Fordham Law Review

Volume 78 | Issue 3 Article 5

2009

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THE PUBLIC VALUE OF SETTLEMENT

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Americans love strongly held positions. We marvel at the debates over whether Certs is a candy mint or a breath mint. We delight in the roaring battles over whether the true virtue of Miller Lite is that it is less filling or tastes great. And, while enjoying the rhetorical jousting, we are always in on the bottom line. At the end of the day, the truth is somewhere in between or, as in the case of our dueling commercial antipodes, the dichotomy proves to be false. The war of absolutes yields an invitation to the appreciation of nuance and complexity. Certs turns out to be both a breath mint and a candy mint. And, at least in the mind of its devotees, Miller Lite both tastes great and it is less filling.

And so it is with Owen Fiss's provocative claim to be against settlement.[1] At first blush, Fiss cannot really be against settlement, can he? Two motorists have a fender-bender. There are costs; there may be wealth differentials; there are institutional pressures to get it resolved. But no one wants to see the fact of an accident consume the poor motorists in a lifetime of litigation. Unless of course Fiss is serious that settlement should be viewed "as a highly problematic technique for streamlining dockets."[2] Could he really want us to believe that civil settlements are like plea bargains, asserting that in both contexts "[c]onsent is often coerced"?[3] But there it is. Certainly terms like "coercion" do indicate that this is part of a general pattern whereby the haves come out ahead through systemic failures of the legal system.[4]

But even here, surely this is just one side of the Miller Lite debate, setting up some tradeoff between the public values of the "important cases" and the quotidian concern of dispute resolution for the minor annoyances of everyday life. To be fair to Fiss, he invites that exact demarcation. His

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1. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).
2. *Id.*
3. *Id.*
4. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 123–24 (1974).

concern is with the cases that should claim the public eye and require the articulation of important societal values, a process he entrusts—perhaps disproportionately—to the courts. And if the courts have to get on with the tough business of summoning our better angels, then cases—lots of cases—provide the indispensable grist for the mills of justice.

What's more, settlement forces the smaller litigants who, in Fiss's view, can least afford it, to shy away from justice. Thus, the concern is not settlement in traditional bipolar cases, but settlement in class actions and other aggregate cases that raise "deeper and more intractable problem[s]" because the parties "are not individuals but rather organizations or groups" without designated spokespersons.[5] For Fiss, such settlements are problematic for a variety of reasons:

> (1) plaintiffs' relative lack of power compared to that of defendants;[6]
>
> (2) the inability of individuals in aggregate cases to consent to settlement;[7]
>
> (3) the incapability of settlement to ensure ongoing court involvement;[8] and
>
> (4) the failure of settlement to achieve justice.[9]

The list may not exhaust the indictment of settlement, but it gives the core of the argument. It is interesting to note the mix of empirical claims and claims of first order principle on the proper working of the judicial administration of justice. Whether plaintiffs really do have less bargaining power is a question of fact, then as now. Whether justice requires ongoing court involvement and whether private consent can yield justice are claims of principle that turn fundamentally on the role of courts and the legal system.

Fiss's arguments are characteristically bold and thought provoking, and they take on the conventional wisdom that settlement is favored and should be encouraged.[10] And to the extent that our participation in this symposium

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5. Fiss, *supra* note 1, at 1078.
6. *Id.* at 1076–78.
7. *Id.* at 1078–82.
8. *Id.* at 1082–85.
9. *Id.* at 1085–87.
10. *See, e.g.*, *In re* Syncor ERISA Litig., 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." (citing Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992))); Hensley v. Alcon Labs., Inc., 277 F.3d 535, 540 (4th Cir. 2002) (recognizing the value settlements generally bring by "providing an orderly and peaceful resolution of controversies"); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371, 1388 (8th Cir. 1990) ("A strong public policy favors agreements, and courts should approach them with a presumption in their favor."); Birbalas v. Cuneo Printing Indus., Inc., 140 F.2d 826, 828 (7th Cir. 1944) ("[I]t has long been public policy to favor settlement of controversies, as conducive to termination of litigation." (citing Chi., Milwaukee & St. Paul Ry. Co. v. Clark, 178 U.S. 353 (1900); Bofinger v. Tuyes, 120 U.S. 198 (1887); Jackson v. Horton, 21 N.E. 490 (Ill. 1888))).

requires that we assume either the "tastes great" or the "less filling" side of the debate, we want to throw our marker in on the side of settlement. Our claim is twofold. First, we want to argue that the empirical side of the equation is at least contestable, if not simply wrong. Second, we want to argue that the ability of a legal system to resolve the repeat harms associated with mass society is itself an important justice value, one that brings recompense to the many, deters untoward behavior, and provides a critical private lever to prevent state regulatory monopoly.

As for the first, in some ways the world has moved greatly in the quarter century since *Against Settlement* was written, and in some ways it has moved little. If one looks at the work of the courts, particularly the federal courts, the case dockets and the pace of settlement are not greatly changed. If one looks at the institutional mechanisms for the practice of law, particularly the emergence of powerhouse plaintiffs' law firms, the world looks entirely different—indeed, the market responded much more powerfully than the courts in redressing the world that Fiss and Marc Galanter identified as providing the small player with no redress.

With regard to the second, the biggest development and largest controversies in civil litigation in the last quarter century turn precisely on the ability of or challenge to the legal system in dealing with the mass repetitive harm. The world of settlement administered through class actions, bankruptcy courts, and private aggregations of cases is by leaps and bounds much more developed than twenty-five years ago. In Part III, we make a normative argument that the capacity to resolve mass harms is a critical development in providing justice under law, even as the pitfalls in the system continue to claim our concern.

I. THE EMPIRICS OF SETTLEMENT

Twenty-five years is a long time for an article to hold up. One would expect the empirical assumptions of an article to be the most vulnerable to change, and indeed this appears to be the case with *Against Settlement*. It is interesting after many years of seeing complaints about extortionary settlements by rapacious plaintiffs[11] to revisit an article that is so thoroughly convinced that settlements are of necessity a capitulation by the weak to the powerful, specifically by plaintiffs to defendants.

Indeed, Fiss is utterly persuaded that settlement must reflect the lack of a level playing field for plaintiffs: "settlement is . . . a function of the resources available to each party to finance the litigation, and those

11. The most famous argument against "settlement blackmail" comes from Judge Richard Posner in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (arguing that class certification creates insurmountable pressure on defendants to settle by forcing them "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability"). For a rejoinder, see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

resources are frequently distributed unequally."[12] In his view, "an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is less than the ordinary present value of the judgment."[13] In addition, "the poorer party might be forced to settle because he does not have the resources to finance the litigation."[14]

A. *Do Plaintiffs Lose in Settlement?*

This is a complicated empirical claim in service of a normative view of the courts. Yet it is possible to disentangle the two; one can inquire whether Fiss's concerns about "imbalances of power"[15] were valid twenty-five years ago when Fiss wrote his article, but have subsequently yielded to historic developments. So in assessing the arguments made twenty-five years ago, we must confront the world of today to ask whether the market for legal services has responded in ways that *Against Settlement* did not anticipate. Put another way, in the world described by Fiss and Galanter, it would be difficult to even bring a claim—let alone find a lawyer working on a contingency to undertake litigation—in the face of institutional defendants who, as repeat players, would have every incentive to lord it over a hapless individual claimant.

Understood in this light, one of the key arguments in *Against Settlement* is that courts should not further this market imbalance of resources. But the assumption is that there was no internal mechanism of repair through the market for legal services. And in the intervening period, the market for legal services has indeed responded through efficient mechanisms for referrals and consolidation of similar claims in the hands of repeat-actor plaintiffs' firms—a development greatly facilitated by the eased means of communication and the liberalized rules on lawyer advertising and referrals.

We are hardly the first commentators to note the rise in strong, financially successful plaintiff law firms with the capacity to prosecute and fund expensive and protracted litigation.[16] These firms are capable of litigating against the largest, most powerful defense law firms in the

12. Fiss, *supra* note 1, at 1076.

13. *Id.*

14. *Id.*

15. *Id.* at 1077.

16. *See, e.g.*, Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 123, 123 (2001) (arguing that defendants no longer enjoy an advantage over plaintiffs in mass tort litigation because, among other reasons, "the financial resources of the elite plaintiffs' bar have reached a point where plaintiffs' lawyers can fund large-scale litigation at the highest level"); Deborah R. Hensler, *Has the Fat Lady Sung?: The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 923–24 (2007) (noting a large increase in the number of plaintiffs' law firms involved in mass tort cases between the early 1990s and 2007); Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 232 (2001) (discussing plaintiffs' firms that "are in the game for the long term and have the resources to sustain cases that, until recently, would have bankrupted virtually any lawyer or plaintiffs' law firm").

country. They have the resources to mount fierce offensive discovery and litigate a defendant's refusal to produce discovery. Such firms can afford to hire the country's best expert witnesses and are equipped with the most sophisticated state-of-the-art equipment.[17] They have the resources to comb through millions of documents produced by a defendant in search of a "smoking gun." Many of these firms are nationally known for their skill and success.[18] Some of those firms not only represent plaintiffs on a contingent-fee basis, but also represent corporate defendants in commercial cases on an hourly basis.[19] This dual client base provides a financial cushion for contingent-fee work. With the emergence of these powerhouse firms, the days are gone when large corporate law firms could routinely wear down plaintiffs in factually strong cases through aggressive discovery and dilatory litigation tactics.

Moreover, these powerful plaintiff law firms no longer work in isolation. Plaintiffs' lawyers are now more likely than ever to share manpower and

17. *See, e.g.*, Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 199 (2001).

18. Among many examples, Lieff, Cabraser, Heimann & Bernstein has more than fifty attorneys in three offices. Its website states that its attorneys have served as lead or co-counsel in forty-two separate cases involving verdicts or settlements of more than $100 million, including eleven cases in excess of $1 billion. Lieff, Cabraser, Heimann & Bernstein, http://www.lieffcabraser.com/ (last visited Nov. 6, 2009). The Cochran Firm has 139 attorneys in twenty-seven offices. According to the firm's website, its partners have won ten verdicts of more than $100 million each and obtained over $45 billion in verdicts, settlements, and judgments. Cochran Firm, http://www.cochranfirm.com/ (last visited Nov. 6, 2009). Bernstein Litowitz, which has over fifty lawyers in three offices, has recovered almost $13 billion for securities plaintiffs. Bernstein Litowitz, http://www.blbglaw.com/index (last visited Nov. 6, 2009). Baron & Budd, with over fifty attorneys in four offices, has recovered billions of dollars in toxic tort cases. Baron & Bud, http://baronandbudd.com/ (last visited Nov. 6, 2009). Cotchett, Pitre & McCarthy, with twenty-four lawyers in four offices, has recovered hundreds of millions of dollars for plaintiffs, primarily in antitrust and other complex business cases. Cotchett, Pitre & McCarthy, http://www.cpmlegal.com/ (last visited Nov. 6, 2009). Coughlin Stoia, with 190 lawyers in eight offices, has recovered billions of dollars for plaintiffs in securities lawsuits, including $7.2 billion in the Enron controversy. Coughlin Stoia, http://www.csgrr.com/ (last visited Nov. 6, 2009). Grant & Eisenhofer has forty-two attorneys in three offices. It specializes in securities litigation and recently brokered a $2.975 billion settlement in a suit against Tyco International. Grant & Eisenhofer, http://www.gelaw.com/ (last visited Nov. 6, 2009). Grant & Eisenhofer represented "the largest cash payment ever made by a corporate defendant in the history of securities litigation" and "the third largest securities class action recovery in history, behind only *Enron* and *WorldCom*." *In re* Tyco Int'l Ltd. Multidistrict Litig., 535 F. Supp 2d 249, 256–57 (D.N.H. 2007). The New York law firm of Seeger Weiss has thirty-six lawyers. Seeger Weiss, http://www.seegerweiss.com/ (last visited Nov. 6, 2009). It played a major role in the $4.85 billion settlement in the *Vioxx* litigation. *See* Peter Page, *Persistence Pays in Vioxx Litigation*, NAT'L L.J., Oct. 6, 2008, at 3. Cohen, Milstein, Sellers & Toll has more than fifty lawyers in four offices. It has been involved in some of the nation's largest class actions, including antitrust, securities fraud, employment discrimination, and human rights cases. Cohen, Milstein, Sellers & Toll, http://www.cmht.com/home.php (last visited Nov. 6, 2009).

19. *See* Kritzer, *supra* note 16, at 232 (citing firms that do both plaintiff contingent-fee litigation and traditional commercial litigation on an hourly basis, including Boies, Schiller, & Flexner and Susman Godfrey).

resources and to work together in planning their strategy.[20] Such coordination allows plaintiff law firms to spread risk, focus on particular areas of expertise, coordinate nationwide litigation, and handle demanding discovery requests made by defendants. This coordination "eliminates the disadvantage [the plaintiffs' bar] faces against the coherent strategy of a single defendant."[21] It also means that "losing is something these [plaintiff] firms can now afford."[22]

As a result of these changes on the plaintiffs' side, one can argue that today, in many cases, the plaintiffs' bar, not the defense bar, has the advantage:

> While in the past, one might have started with the assumption that the defendant had the resources to swamp the plaintiff, these [plaintiff] firms have accumulated sufficient capital through major victories in cases such as asbestos, tobacco, Dalkon Shield, etc., so that it may well be the plaintiff that is in the stronger resource position.[23]

Indeed, the greatest change in the past quarter century may well be the rise of successful mass tort litigation, a mainstay of the litigation landscape today that was only beginning to emerge when *Against Settlement* was being written.[24] Numerous recent aggregate settlements underscore the power of the plaintiffs' bar. Consider the following:

- In 1997–1998, the tobacco industry settled lawsuits by state attorneys general from around the country for more than $240

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20. *See, e.g.*, Erichson, *supra* note 16, at 131.

21. *Id*; *accord, e.g.*, Ingrid L. Dietsch Field, Comment, *No* Ifs, Ands, *or* Butts*: Big Tobacco Is Fighting for Its Life Against a New Breed of Plaintiffs Armed with Mounting Evidence*, 27 U. BALT. L. REV. 99, 115 (1997).

22. Kritzer, *supra* note 16, at 232.

23. *Id*; *accord, e.g.*, Erichson, *supra* note 16, at 129. One example of this shift of advantage to the plaintiffs, as noted above, *see supra* note 11 and accompanying text, was widely noted in the mid 1990s, when some courts and commentators began expressing concern that *defendants* were being coerced to settle major class action cases because of the possibility, after class certification, of a crippling or even bankrupting judgment. *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995). Federal Rule of Civil Procedure 23(f), which became effective on December 1, 1998, authorizes federal appellate courts, in their discretion, to grant review of "an order of a district court granting or denying class action certification." FED. R. CIV. P. 23(f). One of the principal reasons for the rule's adoption was that "a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999). In particular, "[m]any corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere." *Id.* For additional authority discussing Rule 23(f)'s attempt to protect defendants against coerced settlements see, for example, *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000).

24. For an overview of the powerful regulatory role played by the reorganized plaintiffs' bar, see John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261 (2007).

billion.[25] Numerous private plaintiff law firms assisted the attorneys general in those lawsuits. Also in 1997, the industry settled a class action lawsuit by flight attendants for secondhand smoke at a price tag of $349 million. Prior to these settlements, the tobacco industry had been able to claim, despite hundreds of lawsuits beginning in the 1950s, that it had never paid out a single penny in response to any litigation involving alleged tobacco-related injuries.

- The *fen-phen* litigation against Wyeth (formerly known as American Home Products), involving allegations that the company's prescription diet drugs caused certain heart conditions, settled for more than $5 billion. The suits began in 1997; the settlement was finalized in 2008.[26]
- The *Vioxx* litigation against Merck & Co., involving allegations that its pain medication increased the risk of heart attack and stroke, settled in 2008, after four years of litigation, for $4.85 billion.[27]
- Various lawsuits, filed by the recipients of hip and knee replacements after the products were recalled in 2000 and 2001 by manufacturer Sulzer Orthopedics, settled in 2003 for $1.045 billion.[28]
- After nearly a decade of litigation, an antitrust class action against Visa and MasterCard resulted in a $3.05 billion settlement.[29]
- The Enron securities class action litigation resulted in a settlement of $7.2 billion.[30]
- The *WorldCom* securities class action litigation resulted in a settlement of $6.133 billion.[31]

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25. For discussions of the tobacco industry's settlements and its prior record of paying out no judgments see, for example, PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE (1998); Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999); Erichson, *supra* note 16, at 127. The authors admit to having played a role in some of the cases discussed here. Indeed, we first met when we were on opposite sides in tobacco litigation.

26. *See, e.g.*, *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 553 F. Supp. 2d 442, 449–56 (E.D. Pa. 2008) (summarizing allegations and proceedings leading up to settlement).

27. Associated Press, *Vioxx Settlement on Track as 44,000 Sign Up*, N.Y. TIMES, Mar. 4, 2008, at C11; Page, *supra* note 18.

28. *In re* Sulzer Hip Prosthesis and Knee Prosthesis Liab. Litig., 268 F. Supp. 2d 907, 910–13, 918–19 (N.D. Ohio 2003).

29. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 103 (2d Cir. 2005).

30. *In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 586 F. Supp. 2d 732, 796 (S.D. Tex. 2008).

31. *In re* WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319, 322 (S.D.N.Y. 2005).

In sum, the plaintiffs' bar is stronger and more cohesive than ever, and this strength is reflected in the large number of high-dollar aggregate settlements.

B. *Consent and the Individual Plaintiff*

In our view, Fiss is on much stronger ground not on the empirics of plaintiffs losing out on the value of their claims in settlement, but on the difficult issue of consent and individual autonomy in mass actions. Here again, however, Fiss blends the normative concern about lack of accountability of agents with an empirical assertion that may prove problematic. For Fiss, even identifiable groups of claimants in aggregate cases "may have an identity or existence that transcends the lawsuit, but they do not have any formal organizational structure and therefore lack any procedures for generating authoritative consent."[32] Instead, settlement is simply thrust upon them. Although Fiss is correct that individual autonomy is inevitably compromised in aggregate litigation, especially in class actions, his particular concern about settlement turns in part on an undervaluation of the structural protections available in most mass litigation and an overvaluation of the curative powers of judges. In all events, it is by no means clear that Fiss's concerns for individual autonomy are advanced by eschewing settlement and forcing a case to trial.

To begin with, many large aggregate cases are not class actions at all. Instead, they may consist of inventories of cases held by a particular plaintiff firm, and such cases may settle without a single lawsuit even having been filed. In these cases, as in cases involving only a single plaintiff, the claimants still have the ability to play a major role in the decision whether to litigate or settle. There are of course many problems with this relationship, but there is both a benefit and a cost to the individual claimant. The benefit is that without such aggregation many cases could not credibly be pursued for the reasons that Fiss and Galanter identified. The cost is that mass representation necessarily introduces distance in the attorney-client relationship and gives plaintiffs' counsel incentives to view the entire portfolio of cases strategically, deciding which case to push in which forum for maximum returns across all the common caseload.

Even so, it is not as if there are no significant protections of individual autonomy within the mass setting. These large cases are subject to the aggregate settlement rule, which enables each claimant in a multiclaimant case to review and veto the settlement before it becomes binding on the claimant.[33] Every state has a version of the aggregate settlement rule.[34]

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32. Fiss, *supra* note 1, at 1079.

33. *See, e.g.*, Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892, 894 (10th Cir. 1975); Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 519–20 (N.J. 2006); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 3.16, 3.17 (Proposed Official Draft 2009); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-438 (2006) [hereinafter ABA Formal Op.]; MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2002); MODEL CODE OF PROF'L

Model Rule of Professional Conduct 1.8(g) is representative. It provides, "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client."[35] Under Rule 1.8(g), the disclosure by counsel "shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement."[36] Thus, under the aggregate settlement rule, individual claimants in nonclass cases retain their right to review a proposed settlement before being bound.

Indeed, if anything, the problem with large nonclass cases may well be not the perceived lack of control by individual claimants, but just the opposite: the ability of holdout claimants to block resolution of the entire case. As Professors Charles Silver and Lynn Baker note, the requirement of individual consent under the aggregate settlement rule

> enables a single plaintiff to block an all-encompassing group deal unless he or she receives a disproportionately large share of the available funds. A strategic plaintiff with little at stake in a lawsuit, such as a person who was exposed to asbestos but has no disease, can therefore make a credible threat to veto a desirable group deal unless paid a disproportionately large amount.[37]

Consistent with the concerns raised by Silver and Baker, the authors, as Reporters for the American Law Institute's (ALI) project, *Principles of the Law of Aggregate Litigation*,[38] have concluded in the now-approved ALI *Principles* that the current laws give individual claimants *too* much control: by having veto power, individual claimants can assert unfair control and demand premiums in exchange for approval.[39] The ALI draft proposes that claimants should be allowed to agree in advance, after appropriate disclosures, to permit a supermajority of claimants to bind the entire group.[40]

But what if we were to reject all these efforts to promote settlement? What if all claimants in mass cases could be forced to go to trial? The

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RESPONSIBILITY DR 5-106 (1980); Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 151 (1999).

34. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 cmt. a (Proposed Official Draft 2009).

35. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2002).

36. *Id.*; *see also* ABA Formal Op., *supra* note 33 (interpreting aggregate settlement role).

37. Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 767 (1997).

38. Professor Charles Silver is also one of the Reporters on the American Law Institute (ALI) Project, *Principles of the Law of Aggregate Litigation.*

39. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 cmt. a (Proposed Official Draft 2009).

40. *Id.* § 3.17. Under the ALI Draft, a claimant who gives an ex ante waiver to permit a supermajority to settle his or her claim may challenge the settlement if (i) the claimant did not receive the proper disclosures prior to waiver, or (ii) the claimant believes that his or her share of the settlement is unfair. *See id.* § 3.18(a).

result would be bewildering. The costs to the legal system and all parties would skyrocket. The efficiencies that created a viable mass plaintiffs' bar would collapse. And what would be the public value of forcing every individual plaintiff to the uncertainty of individual judgments, which necessarily overvalue the claims of some and undervalue the claims of others? To begin with, there must be some value in the comparable treatment of the similarly situated in a mature legal system. More critically, Fiss disregards the important lessons on the efficiencies of a legal system dealing with mature claims, as expressed in the Priest-Klein hypothesis[41] and the literature on "bargaining in the shadow of the law,"[42] both of which were developing at the same time that Fiss was writing.

But even in class actions, which, by definition, are *representative* actions, the agency problems are both overstated and not clearly cured by trial. Fiss's primary argument is that "[w]e do not know who is entitled to speak for these entities."[43] At a formal level, the very concept of a class action is that designated class counsel and class members will take the lead on behalf of the entire class. That model does not mean, however, that class members never have a say in whether to participate in a classwide settlement. Clearly a class certified under Federal Rule of Civil Procedure 23(b)(3) requires individual notice of a claim, a chance to opt out, and the chance to object to any settlement. In the case of most consumer claims, there is little incentive for any affected individual to even investigate a harm whose cost of prosecution does not justify any potential recovery, even if the wrong is likely to yield a judgment. For such negative-value suits, the most important element in ensuring justice is making sure that some agent—dare we say, any agent—will rise to the occasion to take up the case.

Here, however, we may be ships passing in the night. Our concern is primarily with the sorts of economic harms that make up the bulk of our society's use of the courts, and that generate an increasing share of class actions. We believe that Fiss is primarily concerned, not with the class action as a mechanism for the recovery of collectively borne economic harms, but rather those that involve claims for structural reform of an institutional actor.

In the economic cases, class members are entitled to an opportunity to opt out after receiving notice of class certification.[44] In a so-called "settlement class"—in which the case is certified as a class and a settlement is reached at the same time—the class members can review the precise terms of the settlement before deciding whether to opt out. This means that a class member who dislikes the terms of the settlement can choose not to

41. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 3–6 (1984) (explaining that cases that go to trial are likely the product of uncertainty about controlling law and offering empirical support for the proposition that well-developed law promotes settlement).

42. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

43. Fiss, *supra* note 1, at 1078.

44. *See* FED. R. CIV. P. 23(b)(3), (c)(2)(B).

participate and instead retain his or her right to bring a separate lawsuit. Although this right to make an opt-out decision only after reviewing the terms of the settlement does not apply when the opt-out window closes before settlement (for example, when a class is certified before a settlement is reached), a 2003 amendment to Rule 23 permits courts, at their discretion, to grant a second opt out, so that class members can review the terms of the settlement and choose to opt out after seeing precisely what they would recover.[45]

In all such class actions, there are of course procedural protections. First, the class must have "adequate" representatives.[46] Courts have on occasion struck down class settlements on adequacy grounds based on structural conflicts[47] and on other adequacy concerns.[48] As a related matter, the class representatives must have "claims or defenses" that "are typical of the claims or defenses of the class."[49] The typicality requirement ensures that class representatives do not assert unique claims or defenses that undermine the claims of the class as a whole.[50] Second, all class settlements must be approved by the court after a review on fairness grounds.[51] At the fairness hearing, class members are entitled—on their own or through counsel—to appear and raise objections. And any class member who objects at the trial level is allowed to appeal the court's decision approving the settlement.[52]

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45. FED. R. CIV. P. 23(e)(4).

46. FED. R. CIV. P. 23(a)(4) (providing that "the representative parties [must] fairly and adequately protect the interests of the class").

47. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (striking down the class settlement because, among other reasons, class representatives with an existing injury could not adequately represent class members whose injuries had not yet manifested themselves); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (same).

48. *See, e.g.*, Wein v. Master Collectors, Inc., No. 1:94-CV-2694-JOF, 1995 WL 550475, at *3–4 (N.D. Ga. Aug. 16, 1995) (finding the class representative inadequate because of failure to understand her claim and her lack of interest in the case); Beck v. Status Game Corp., No. 89 Civ. 2923, 1995 WL 422067, at *4–7 (S.D.N.Y. July 14, 1995) (finding the class representative inadequate because of chronic failure to communicate with class counsel and lack of knowledge about basic elements of the case); Greenspan v. Brassler, 78 F.R.D. 130, 134 (S.D.N.Y. 1978) (finding that "Plaintiffs' limited personal knowledge of the facts underlying this suit, as well as their apparently superfluous role in this litigation to date, indicate their inadequacy as class representatives" (footnote omitted)); *In re* Goldchip Funding Co., 61 F.R.D. 592, 594–95 (M.D. Pa. 1974) (holding that proposed class representatives had not shown themselves to be adequate, and noting that "[t]he class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives").

49. FED. R. CIV. P. 23(a)(3).

50. *See, e.g.*, Wiener v. Dannon Co., 255 F.R.D. 658, 666–67 (C.D. Cal. 2009) (finding proposed class representative failed typicality requirement because she had purchased only one of the products at issue in the litigation); McIntyre v. Household Bank, No. 02 C 1537, 2004 WL 2958690, at *6–7 (N.D. Ill. Dec. 21, 2004) (finding class representative failed typicality requirement because of argument by defendant that representative's claim was time barred); Landry v. Price Waterhouse Chartered Accountants, 123 F.R.D. 474, 475–77 (S.D.N.Y. 1989) (finding representative in securities fraud suit atypical because of claim that representative did not rely on defendant or on integrity of market).

51. *See* FED. R. CIV. P. 23(e).

52. Although class members may not have an absolute right to testify orally at a given fairness hearing, there is no doubt that they have the right to present the grounds for their

Numerous courts have found settlements deficient on fairness or other grounds.[53] Third, courts can appoint special masters, court experts, or other adjuncts to help with the settlement process and provide an additional layer of protection for the class. Examples of the use of such devices are legion.[54]

To be sure, class action settlement procedures are far from perfect and are often inadequate. For instance, the second opt-out provision has rarely been utilized since its adoption in 2003.[55] The factors that courts utilize in

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objection to the court. *See* FED. R. CIV. P. 23(e)(4)(A) (providing that "[a]ny class member may object" to a proposed class settlement); Devlin v. Scardelletti, 536 U.S. 1, 8 (2002) (observing that "nonnamed parties have been consistently allowed" to object to settlements at fairness hearings under the Federal Rules of Civil Procedure).

53. *See, e.g.*, Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 654 (7th Cir. 2006) (overturning a settlement approved by the district court because the proposed recovery by class members was akin to coupons and provided inadequate compensation); Staton v. Boeing Co., 327 F.3d 938, 972 (9th Cir. 2003) (reversing the approval of a settlement because of concern about attorneys' fees); Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003) (reversing the approval of a class settlement because of insufficient notice, lack of opportunity for opt out, and unfairness of settlement terms); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279 (7th Cir. 2002) (Posner, J.) (reversing the district court's approval of a class settlement because of concern that class counsel, "in derogation of their professional and fiduciary obligations, place[d] their pecuniary self-interest ahead of that of the class"); Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292, 1301–04, 1311, 1317, 1328 (S.D. Fla. 2007) (rejecting proposed coupon settlement based on an "onslaught of opposition" from objectors, academics, and Attorneys General of thirty-five states); Grosso v. Fid. Nat'l Title Ins. Co., 983 So. 2d 1165, 1174 (Fla. Dist. Ct. App. 2008) (reversing the approval of a settlement under Florida's version of Rule 23 in part because of meager proposed payments to unnamed class members in the face of materially higher payments to the lead plaintiff and very large attorneys' fees).

54. *See, e.g.*, *In re* Holocaust Victim Assets Litig., 424 F.3d 132 (2d Cir. 2005) (affirming the distribution of settlement proceeds through the use of a special master); *In re* Asbestos Litig., 90 F.3d 963, 972 (5th Cir. 1996) (noting that a law professor was appointed as guardian *ad litem* to review the fairness of settlement to the class), *vacated and remanded on other grounds sub nom.* Flanagan v. Ahearn, 521 U.S. 1114 (1997), *aff'd on remand sub nom. In re* Abestos Litig. 134 F.3d 668 (5th Cir. 1998), *rev'd on other grounds sub nom.* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Officers for Justice v. Civil Serv. Comm'n, 473 F. Supp. 801, 818 (N.D. Cal. 1979) (appointing a special master to oversee distribution of damages); Miller v. Mackey Int'l, Inc., 70 F.R.D. 533, 535 (S.D. Fla. 1976) (upholding the prior decision to appoint a guardian *ad litem* to protect class members after parties negotiated a class settlement); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.644 (2004); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403 (2003); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25 (2002); Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 422 (1999); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1448–52 (2006).

55. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.11 cmt. a (Proposed Official Draft 2009). There are several representative cases denying a second opt out. *See, e.g.*, Hainey v. Parrott, 617 F. Supp. 2d 668, 679 (S.D. Ohio 2007) (rejecting a second opt out because "class members had enough information at [the earlier time] to make a reasoned decision whether or not to opt out of the settlement" and because a second opt-out period "would result in additional administrative costs, which in turn reduces the amount available for distribution"); Hicks v. Stanley, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *6 (S.D.N.Y. 2005) (denying a second opt out because not enough was at stake for individual

evaluating settlements are complicated and confusing.[56] Objections are, in many instances, lodged not to raise legitimate concerns but to extract fees.[57] In some settlements, such as "coupon" settlements (for example, a settlement that gives each class member a coupon good for $500 off the purchase price of a vehicle manufactured by the defendant), class counsel receive large fees while class members receive little or nothing of actual value.[58] And current practice, which typically does not award fees to objectors when a settlement is rejected in its entirety,[59] provides little

action); Denney v. Jenkens & Gilchrist, 230 F.R.D. 317, 345 (S.D.N.Y. 2005) (noting that a second opt out must "be applied sparingly"), *aff'd in relevant part sub nom.* Denney v. Deutsche Bank AG, 443 F.3d 253, 271 (2d Cir. 2006) ("Requiring a second opt-out period as a blanket rule would disrupt settlement proceedings because no certification would be final until after the final settlement terms had been reached."); *In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 518 n.18 (E.D.N.Y. 2003) (denying a second opt out because of an "infinitesimal number of objections"), *aff'd sub nom.* Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96 (2d Cir. 2005).

56. For examples of the wide variety of approaches to settlement, see *Visa U.S.A. Inc.*, 396 F.3d at 117 (addressing the nine "*Grinnell* factors," articulated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)); *In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534–35 (3d Cir. 2004) (addressing the nine factors); Ngwanyia v. Gonzales, 376 F. Supp. 2d 923, 928 (D. Minn. 2005) (addressing the four factors described in *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988)); *In re* Am. Bank Note Holographics, Inc., 127 F. Supp. 2d 418, 426–28 (S.D.N.Y. 2001) (examining, inter alia, the difficulty of proving claims and damages, "litigation risks," the possible bankruptcy of one of the defendants, the threat of protracted litigation, the "arm's length" nature of negotiations between "skilled attorneys," the extent of discovery completed, and giving "great weight" to the views of counsel); *In re* Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 174–78 (S.D.N.Y. 2000) (examining, among other things, plaintiffs' "difficulty in establishing damages at a trial," the "arm's length" nature of negotiations, whether defendants could withstand a greater judgment, and the small number of objections); *see also* Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167 (2009) (discussing various approaches of the federal appellate courts to class settlements and proposing simplified standards for review).

57. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.08, cmt. a (Proposed Official Draft 2009); Brunet, *supra* note 54, at 409 (discussing the possibility that "[o]bjectors and their attorneys may be engaged in a form of extortion, seeking to hold up court approval of a settlement in exchange for a piece of a limited settlement pot"); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 375 (2003) (describing "professional objectors" as "a term used colloquially to describe plaintiffs' law firms that threaten objections largely as a means to obtain side payments for themselves in exchange for their agreement either to drop the objections or not to raise them in the first place").

58. *See, e.g.*, Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1698–1705 (2006) (discussing the regulation of coupon settlements under § 1712 of the Class Action Fairness Act, 28 U.S.C. § 1712); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 994 (2002) (arguing that "[c]oupon-based settlements illustrate how defendants have structured class action settlements to maximize the gains for the corporate defendant while minimizing any compensation to the class").

59. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.08 (Proposed Official Draft 2009).

incentive to objecting lawyers to invalidate a settlement—as opposed to simply forcing the parties to modify its terms to some degree.[60]

But most critically, these protections do not address Fiss's core concern of just and fair results for the individual claimants. Here it may be that more is required to protect litigants in the institutional reform cases that are the deeper source of his concern. Nor is Fiss alone here. Derrick Bell famously decried the conflicted posture of the institutional civil rights bar in representing local civil rights concerns as the inherent problem of "serving two masters."[61] But if we look at the bulk of class action practice at present, there must be some recognition of the protections that the law has developed for the resolution of claims through class actions.

II. WHAT HAPPENS AT TRIAL?

Let us pause to express a point of shared concern with the general tenor of *Against Settlement.* We believe that settlement is a reality of all legal systems and that settlement is normal and healthy. That is different from procedural developments that are aimed at either barring the courthouse door to classes of litigants or attempting to coerce settlements. These practices, and the vanishing trial rates,[62] have led Judith Resnik to characterize appropriately the view of much of the judiciary that a trial is a "pathological event" that should be resisted at all costs.[63] While we applaud the ability of the legal system to realize efficient and just settlements of civil disputes, we too worry over the equity of settlements achieved under a hammer.

At the same time, we are skeptical that trials offer the curative powers that Fiss attaches to them. For him, "[t]here is a conceptual and normative distance between what the representatives do and say [in a settlement] and what the court eventually decides [in a trial], because the judge [in a trial] tests those statements and actions against independent procedural and substantive standards."[64] In a settlement, the court is required to test the settlement's terms—and the negotiations leading to the settlement—against a variety of "independent procedural standards."[65]

Even accepting Fiss's concern that class members do not have a real voice in the settlement context, an approach that favors trial over settlement

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60. *See id.*

61. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482–93, 505–15 (1976) (discussing the conflict of institutional civil rights lawyers committed to school integration in dealing with the aspirations of the local communities they represented in obtaining better local schools).

62. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 524 (2004); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73–75 (2006).

63. Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 261 (1995).

64. Fiss, *supra* note 1, at 1080.

65. *Id.*

would not solve the underlying agency problem, or that of the class members' lack of voice. A class action trial, like a class action settlement, is handled in a representative capacity. In the relatively few class action cases that have gone to trial, unnamed class members have played little or no role in the crucial classwide aspects of the case, which determine whether the suit will succeed or fail.[66] The heavy lifting is done by class counsel, with some support from the class representatives.[67] Thus, unnamed class members typically have no role in deciding which claims are brought to trial, which witnesses are called, what arguments are made, what evidence is offered, or any of the other myriad strategic decisions that must be made in the course of a trial. The court, in conducting the trial, will have only a vague sense as to whether particular strategic decisions will benefit some class members at the expense of others or are otherwise not in the best interests of the class as a whole. And, while Federal Rule of Civil Procedure 23(e) requires a court to find that a settlement is fair to the class, there is no similar requirement (apart from a general finding of adequacy of representation) that a court scrutinize the individual strategic considerations of class counsel and the class representatives at trial to ensure that they are "fair" to the class as a whole. Nor is there a process by which unnamed class members can object at trial to plaintiff counsel's litigation strategy decisions.

Indeed, in a class action of any substantial size, permitting active participation by unnamed class members in the classwide phases would be entirely unworkable. This point is underscored by the requirement that "the class [be] so numerous that joinder of all members is impracticable."[68]

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66. For a critical account of the lack of client involvement in class litigation, see Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 211 (2008) (chronicling passivity of named class representatives, even in securities cases); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064 (1995).

67. For example, in one of the largest class action cases to go to trial, involving an estimated 700,000 class members, the unnamed class members played little, if any, role in the case. The case was tried in phases: (1) an initial trial on liability and entitlement to punitive damages and (2) a trial of compensatory damages for three class representatives and a lump sum determination of punitive damages to the class. Liggett Group Inc. v. Engle, 853 So. 2d 434, 441–42 (Fla. Dist. Ct. App. 2003). The history of this case is ongoing and complex, dating back to a class action first filed in 1994. *See generally* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996). After a lengthy trial, the Florida intermediate court decertified the class and reversed the compensatory and punitive damages awards. *Id.* at 42. The Florida Supreme Court affirmed the decertification of the class, but found that certain findings from the first phase could be retained. *See* Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1269 (Fla. 2006), *cert. denied*, 128 S. Ct. 96 (2007). Subsequently, thousands of former class members brought individual suits in state and federal court, and the defendants removed the cases to federal district court in Florida. The district court held that the jury findings from the decertified class action were neither claim preclusive nor issue preclusive in the individual cases. *See generally* Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328 (M.D. Fla. 2008). That matter is currently on appeal, and Professor Issacharoff represents the appellants. In the meantime, individual trials are going forward against the backdrop of the former class adjudication.

68. FED. R. CIV. P. 23(a)(1).

There is simply no reasonable or practical way that potentially thousands of class members could take an active role in the day-to-day management and trial of a class action. Such a trial would defeat the very purpose of the class device, which is that some members are designated to represent the class as a whole. Thus, Fiss is forced to concede—grudgingly—that "[g]oing to judgment does not altogether eliminate the risk of unauthorized action."[69]

But again, we think that the core disagreement may turn on the types of cases we have in mind. For our purposes, we increasingly direct our scrutiny to the mass harm cases that form classic personal injury or economic harm claims across a mass of victims. Fiss, by contrast, has in mind cases that fit into the classic model of *Brown v. Board of Education*,[70] ones in which the fundamental values of the society are put before hopefully courageous judges. In cases such as *Brown*, the actual litigants and even their lawyers are actors in a broad societal struggle, and their status as being the nominal litigants gives them no particular claim to resolve or "settle" social values free from the transparency and appellate scrutiny that follows a full trial. It is unclear to us whether Fiss really wants to apply the same considerations to mass harm cases in which the modern challenge is to bring mechanisms of efficient dispute resolution to basic contract or tort cases whose substantive dimensions are rather familiar.

Given that Fiss appears to be primarily concerned with the structural injunctive cases, it follows that he would want to provide for ongoing judicial supervision of the institutions under attack. We will confess up front to not being as enamored of judicial supervision as Fiss—indeed, few are. But even so, there is a serious claim that, although a court adjudicating a trial can "continue [its involvement] almost indefinitely. . . . settlement cannot provide an adequate basis for . . . necessary continuing involvement, and thus is no substitute for judgment."[71] Fiss notes that, because settlement is "contractual," it "does not contain the kind of enforcement commitment already embodied in a degree that is the product of a trial and the judgment of a court."[72]

Even here, the world of litigation has moved in the past quarter century. Even as *Against Settlement* was going to press, the era of the big structural injunction was drawing to a close—and not because of settlement pressures. Judicial supervision of school desegregation had proved largely unworkable and an exhausted judiciary watched the fruits of its efforts ablaze in violence in Boston.[73] Reforms to doctrines of standing, ripeness, and comity had made the federal courthouse less a beacon for social activists disinclined to enter the political arena. And, perhaps most centrally, the

69. Fiss, *supra* note 1, at 1080.
70. 347 U.S. 483 (1954).
71. Fiss, *supra* note 1, at 1082.
72. *Id.* at 1085.
73. *See, e.g.*, J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES 222–23, 244–45 (1985).

civil rights revolution succeeded in creating a vibrant class of minority legislators (and, indeed, now a black President) for whom courts were as often as not obstacles to seeking social advancement through the political process.[74]

At the same time, numerous class action settlements can be cited in which courts have maintained substantial continuing involvement in the litigation. Such settlements belie the contention that continuing judicial involvement in settlements is inevitably weak or nonexistent. Of course, some courts will want to wash their hands of all involvement after a settlement is approved. But other courts remain much more proactive, especially when the settlement itself calls for a continuing judicial role:

- In the *Agent Orange* litigation,[75] filed by Vietnam veterans and their families, the parties reached a historic settlement.[76] Judge Jack Weinstein exercised significant direct and indirect continuing control: he appointed a claims administrator for the payment program, appointed a special master for appeals from denials of payment program benefits,[77] and established a "Class Assistance Program," which operated under the court's supervision to distribute services to class members.[78] Distribution of the settlement took place for a ten-year period from 1988 to 1997, during which time $196.5 million in cash payments were given to approximately 52,000 class members.[79]
- In numerous recent employment discrimination class actions, courts have maintained substantial supervision and control after settlement through the use of judicial surrogates, such as special

74. *See* Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 44–45 (2003). The increased judicial skepticism regarding structural injunctions is evident in *Horne v. Flores*, 129 S. Ct. 2579 (2009), where the Court found error in the lower courts' refusal to modify or vacate a court decree. The Court emphasized that judges "must take a flexible approach" to considering postjudgment challenges to institutional reform decrees, so as "to ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant." *Id.* at 2594–95 (citation and internal quotation marks omitted); *see also* Rahman v. Chertoff, 530 F.3d 622, 626 (7th Cir. 2008) (Easterbrook, C.J.) (describing a 1977 U.S. Court of Appeals for the Seventh Circuit case as "a relic of a time when the federal judiciary thought that structural injunctions taking control of executive functions were sensible" and declaring "[t]hat time is past"); *cf.* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2510, 2516 (2009) (stating that, while "exceptional conditions" during the civil rights movement of the 1960s justified Congress's passage of the Voting Rights Act, "we are now a very different Nation") (quoting South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966) (internal quotation marks omitted)); ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003).

75. Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001).

76. *Id.* at 251–54 (discussing settlement terms).

77. *In re* "Agent Orange" Prod. Liab. Litig., 689 F. Supp. 1250, 1266–67 (E.D.N.Y. 1988).

78. *Id.* at 1259–60.

79. *Stephenson*, 273 F.3d at 255. For a comprehensive report on the Agent Orange litigation, see PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986).

masters.[80] For instance, in the November 2000 settlement of a class action lawsuit against Coca-Cola by 2200 current and former African-American employees, the settlement consisted not only of a monetary payment of $192.5 million, but also the creation of "an independent, seven-member court-supervised task force that would operate for four years to oversee Coca-Cola's diversity reform efforts and elimination of subjective decision making, investigate complaints, and report back to the court on progress."[81] The task force's recommendations were binding on Coca-Cola unless the company secured relief from the court.[82]

- In the *Holocaust Victim Assets Litigation*,[83] filed against various Swiss banks, the parties reached a monetary settlement of $1.25 billion to benefit groups who were targets of Nazi persecution.[84] As described by the U.S. Court of Appeals for the Second Circuit, the district court and the special master spent "over six years" on the task of "allocating limited funds among the victims of a limitless atrocity."[85]
- In the *fen-phen* litigation,[86] which commenced in 1997, an initial settlement of $3.75 billion was reached in August 2000.[87] As it turned out, however, claims for settlement benefits and new lawsuits by opt-out plaintiffs exceeded the parties' projections, and with the court's ongoing involvement, the defendant paid additional sums of $1.275 billion to pay claims of non-opt-out plaintiffs and $2.3 billion to settle the vast majority of the 60,000 to 70,000 opt-out plaintiff cases.[88]
- The settlement of the attorneys general lawsuits against the tobacco industry resulted in agreed-upon terms that may not have been obtainable in the context of contested litigation. Under the "Master Settlement Agreement," which covers forty-six states, the tobacco companies agreed to pay the states more than $200 billion.[89] They also agreed, among other things, to refrain from targeting youth in cigarette advertising; to refrain from advertising their products on most outdoor and transit advertising; to refrain from producing, distributing, or selling

80. *See* Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367 (2008) (discussing employment discrimination class action suits).

81. *Id.* at 401 (citing Tammy Joyner & Janita Poe, *Coke Settlement Sets New Standard for Corporations*, ATLANTA J.- CONST., Nov. 19, 2000, at 1); *see also* Ingram v. Coca-Cola Co., 200 F.R.D. 685 (N.D. Ga. 2001) (approving settlement).

82. *Ingram*, 200 F.R.D. at 688 (observing that "[t]he Task Force's recommendations are binding on Coca-Cola unless the Company seeks and obtains judicial relief in a proceeding where it bears the burden of proof").

83. 424 F.3d 158 (2d Cir. 2005).

84. *Id.* at 160–62.

85. *Id.* at 169.

86. *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 553 F. Supp. 2d 442 (E.D. Pa. 2008).

87. *Id.* at 469.

88. *Id.* at 454–56; *see also supra* note 26 and accompanying text.

89. Liggett Group, Inc. v. Engle, 853 So. 2d 434, 468 (Fla. Dist. Ct. App. 2003).

> tobacco brand-name products such as caps, jackets, and bags; and to refrain from limiting or suppressing research on the health effects of tobacco.[90] Under the agreement, the attorneys general can enforce the agreement in court and can seek fines, civil contempt, or criminal sanctions.[91]

Consistent with the above settlements, recent commentators have recognized the ability of class action settlements to achieve structural reform through major judicial oversight.[92]

III. THE NORMATIVE VALUES OF JUSTICE IN SETTLEMENTS

Perhaps the biggest indictment of settlements is that they frequently achieve peace but not justice.[93] According to Fiss, settlements frequently "deprive a court of the occasion, and perhaps even the ability, to render an interpretation."[94] In his view, "[p]arties might settle while leaving justice undone."[95]

Fiss is certainly correct that, in most settlements, defendants do not admit liability. And in some cases, such as certain types of civil rights cases cited by Fiss[96]—there may well be no substitute for a formal judgment to articulate the critical underlying social and legal values. But the passage of time allows us to revisit Fiss's assertion[97] and to ask whether the tradeoffs he advocates represent a significant part of what courts actually do. Even in the domain of class actions, the structural injunction is a dying breed. Available statistics suggest that the vast majority of class actions are damages actions under Federal Rule of Civil Procedure 23(b)(3) or a state

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90. *Id.* at 469 n.49.

91. *Id.* (describing Master Settlement Agreement); Master Settlement Agreement 39–42 (1998), *available at* http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf/file_view (describing terms of jurisdiction and enforcement); *id.* at 14–28 (describing relief, including, inter alia, prohibitions on tobacco companies' sponsorship of concerts and athletic events, use of cartoons in advertising, and outdoor advertising). For a relatively critical account of the tobacco settlement's terms and enforcement, see RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 184 (2007) (explaining that the settlement's terms effectively have put courts in an ongoing role of construing and enforcing the various limitations on competitive entry on a going-forward basis, and suggesting that "one might very well question whether state-protected cartelization of the tobacco industry represents a credible public health strategy").

92. *See, e.g.*, Levit, *supra* note 80; Benjamin C. Fishman, Note, *Binding Corporations to Human Rights Norms Through Public Law Settlement*, 81 N.Y.U. L. REV. 1433, 1433 (2006). Although finding shortcomings with prior human rights class action settlements, the latter author notes that "future settlements of human rights cases against corporations can—*perhaps more effectively than fully litigated cases*—better reflect the promise of public law litigation by setting up legally binding systems to monitor corporate conduct" *Id.* (emphasis added).

93. Fiss, *supra* note 1, at 1085.

94. *Id.*

95. *Id.*

96. *Id.* at 1076, 1087.

97. *Id.* at 1087.

counterpart.[98] In recent years, civil rights class action lawsuits—which are normally brought under Rule 23(b)(2)—have been declining, both in absolute numbers and as a percentage of class claims.[99]

In suits primarily or exclusively about damages, when a defendant agrees to a large payout but professes innocence on the charges alleged, most people assume—correctly—that the defendant would not have settled had it not believed there was at least some evidentiary basis for the claim.[100] More fundamentally, in most damages actions, the claimants are concerned less about a court finding of wrongdoing than they are about recovering compensation for their injuries. Moreover, there is a strong societal interest in obtaining the deterrent effects that come from compensation in ex post facto settlements.[101] The notion that claimants in suits seeking exclusively or primarily damages are disserved by not obtaining a formal court finding of wrongdoing does not comport with reality in many circumstances.

Consider an asbestos case, for example, where the class members are suffering significant injuries as a result of asbestos exposure. Fiss's premise is that the best outcome for the claimants and for the public is to forgo a settlement and litigate at trial. But with discovery and court delays, it could take many years for a trial, even on common issues. And follow-up proceedings would inevitably be necessary to adjudicate individual causation and damages questions for potentially thousands of claimants. Many of the class members might not even survive long enough to have their cases adjudicated. In this circumstance, most class members would no doubt prefer an early settlement to a long wait for a judicial finding of

98. *See, e.g.*, DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 52 (2000) (noting that "the world of class actions in 1995–1996 was primarily a world of Rule 23(b)(3) damages actions"); THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 8 (1996), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf ("The most frequently certified class was the Rule 23(b)(3) or 'opt-out class,' which occurred in roughly 50% to 85% of the certified classes in the four districts [that were studied].").

99. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5 (2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf (finding 195 civil rights class actions in the period July–December 2001, compared to 162 in January–June 2007, a 17% decrease; also finding, on a percentage basis, that civil rights class actions went from 14.2% of total class action filings and removals in July–December 2001 to only 6.9% in January–June 2007).

100. *See* McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 167 (5th Cir. 1983) (excluding evidence of settlement because "[i]t is reasonable to infer that jurors would view the settlement as an admission of guilt"); Paster v. Pa. R.R., 43 F.2d 908, 911 (2d Cir. 1930) (Hand, J.) (stating that if evidence of a defendant's settlement were admitted, "damage will have been done" to the integrity of the proceedings, "since such a concession of liability *is almost sure to be taken as an admission of fault*" (emphasis added)); *see also* FED. R. EVID. 408 (prohibiting the use of settlement offers and discussions to prove liability).

101. The extensive literature on this point is summarized in Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375 (2007).

wrongdoing. As one prominent plaintiffs' lawyer, Elizabeth Cabraser, noted in discussing an analogous situation—the U.S. Supreme Court's decision in *Amchem Products, Inc. v. Windsor*[102] striking down a class settlement—"the multibillion-dollar settlement, rejected by the Supreme Court, was lost forever, and thousands of claimants who would gladly have traded their pristine due process rights for substantial monetary compensation have been consigned to the endless waiting that characterizes asbestos bankruptcies."[103] As Cabraser recognizes, claimants are frequently interested not in formal judicial pronouncements but in receiving fair and prompt compensation. No one is served when plaintiffs' counsel insist on litigating a case that defendants would settle on financial terms favorable to the class.

To illustrate, consider the sweeping *Vioxx* settlement. There, the parties agreed to the amount of $4.85 billion to settle approximately 50,000 pending claims involving heart problems and ischemic strokes by individuals who used Merck's anti-inflammatory drug.[104] Prior to the settlement, a number of plaintiffs had proceeded to trial with mixed results: twelve wins for the defendant, five wins for plaintiffs, and two mistrials.[105] These results were consistent with the general problem of causation in the case. It was well established that *Vioxx* caused an increased baseline rate for heart attacks and strokes. But the elevated baseline among the millions of *Vioxx* users translated poorly to an individual trial in which a plaintiff would have grave difficulty proving that *Vioxx* use was more likely than not the precipitating cause for a cardiac event.

Under the agreement, a claimant's eligibility for a portion of the settlement, and amount of recovery, is to be determined by a claims administrator based on review of pertinent documents, including medical records.[106] Absent a settlement, each claimant would be forced to endure a potentially lengthy court delay before securing a trial. Moreover, each case would be subject to the vagaries of the jury system, with each claimant—even those with stronger claims—being at risk of a defense verdict. Factors

102. 521 U.S. 591 (1997).

103. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005).

104. Settlement Agreement at 2, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Nov. 9, 2007), *available at* http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf; *see also* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2213–16 (2008) (discussing the *Vioxx* settlement); Alex Berenson, *Analysts See Merck Victory in Vioxx Deal*, N.Y. TIMES, Nov. 10, 2007, at A1.

105. *See* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2334–37 (2008) (article by Judge Eldon E. Fallon, who oversaw the consolidated MDL proceedings leading up to the Vioxx settlement, and two of his former law clerks, discussing six of the *Vioxx* trials, including one verdict for the plaintiff, four for the defendant, and one mistrial); Molly Selvin, *Merck's Vioxx Tactic Pays Off*, L.A. TIMES, Nov. 10, 2007, at C1 (reporting that, "[a]lthough the company has been hit with several multimillion-dollar verdicts, Merck won in 12 of the 17 trials to date and has yet to pay out anything while appealing its losses").

106. Settlement Agreement, *supra* note 104, at 8–22.

that might play a part in the jury's verdict include the geographical location of the case, the precise jury pool that was available, and the existence of pretrial publicity that might influence the case. The verdict might also depend on the skills of the particular trial counsel or the evidentiary rulings of the particular judge assigned to the case. A settlement, however, is more likely to be consistent across the claimants and not dependent on such fortuitous factors. Thus, a settlement enables the claims administrator to view eligibility for the group as a whole, thereby lending consistency to the process and helping to ensure that meritorious claimants are compensated. Significantly, the attorney for the plaintiff in the first *Vioxx* case to go to trial, which resulted in a $253 million verdict for his client, observed that the overall settlement "was simply the right thing to do."[107] Who can say that the trial route, as opposed to the settlement route, is the only "just" way to proceed?

A similar analysis applies even in many cases seeking both damages and structural relief. Consider again the race discrimination suit by African-Americans against Coca-Cola.[108] That lawsuit, involving a class of 2200 present and former African-American employees of Coca-Cola, settled in 2000 for $192.5 million in damages, along with significant structural relief. Among the latter relief was the creation of a seven-member task force that would monitor and oversee Coca-Cola over a four-year period to ensure diversity reform and the absence of subjective decision making.[109] Professor Nancy Levit, after evaluating the settlement and its implementation in detail, concluded that the settlement was a huge success from the standpoint of Coca-Cola's diverse workforce.[110] In her analysis, she noted all of the steps taken by the task force and Coca-Cola to implement best practices for human resources and to ensure compliance with those practices.[111] Indeed, she noted that "[t]he task force oversight and advice worked so well that the defendant, Coca-Cola, voluntarily requested an additional fifth year of court oversight."[112] Statistical

107. *See* Wailin Wong, *Settlement Frees Merck of Vioxx Suits: Deal's 'Reasonable' Cost Means Company's Risky Strategy May Pay Off*, CHI. TRIB., Nov. 10, 2007, § 2, at 1–2 (quoting Texas lawyer Mark Lanier).

108. *See supra* notes 80–81 and accompanying text.

109. Levit, *supra* note 80, at 401.

110. *Id.* at 402 (concluding that "[t]he Coke settlement was 'the real thing'" (footnote omitted)). *But see* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1332 (2003) (conducting statistical and case studies of class action employment discrimination litigation and concluding, inter alia, that "we should not rely on the litigation to eliminate or deter discrimination, but instead should see it in a more limited light as a process of wealth transfers with a substantial public relations dimension that can occasionally lead to significant change, but only to the extent a firm finds that it is in its interests to reform its employment practices").

111. Levit, *supra* note 80, at 400–05.

112. *Id.* at 402; *see also* UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA, INGRAM V. COCA-COLA CO., CASE NO. 1-98-CV-3679(RWS), FIFTH ANNUAL REPORT OF THE TASK FORCE (2006) [hereinafter FIFTH ANNUAL TASK FORCE REPORT], *available at* http://www.thecoca-colacompany.com/ourcompany/task_force_report_2006.pdf.

evidence supports Levit's assessment. Surveys of employees conducted by the task force in 2006 revealed satisfaction levels regarding the company's commitment to diversity that were "the highest they had been since the task force began surveying employees in 2002, and the numbers were substantially higher than the baseline levels measured in the first survey."[113] And during the period between 2000 and 2006, the company "increased [its] diversity considerably" among senior officials and in "pipeline jobs that would later fill senior management positions."[114] Significantly, as Professor Levit noted, in 2007, Coca-Cola ranked fourth in the nation on DiversityInc's "Top 50 Companies for Diversity."[115]

Given this very positive scenario, it is difficult to maintain that the Coca-Cola settlement was "unjust" or that plaintiffs should have insisted on a trial. No doubt, had the case gone to trial, Coca-Cola would have mounted a vigorous defense that could have resulted in a defense verdict. And even if plaintiffs had prevailed, no one could have guaranteed that the damage award would have been as high or that a program as successful as the task-force program would have been implemented. Indeed, the court in *Ingram v. Coca-Cola Co.* noted that the structural relief afforded by the settlement "likely exceed[ed] what this Court could have required the Company to undertake if the class had prevailed at trial."[116] Further, in terms of public visibility, the head of Coca-Cola's internal task force, Deval Patrick, is now governor of Massachusetts.

In short, the trial route has no monopoly on justice. It is possible to have fair and just settlements, just as it is possible to have unfair and unjust verdicts. As Professor Carrie Menkel-Meadow points out, "Negotiated compromises are not lawless, rightless 'give-aways,' as the antisettlement literature too often assumes. . . . [A] settlement process may actually be more 'just' [than a verdict after a trial] . . . ."[117]

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113. Levit, *supra* note 80, at 404 (citing FIFTH ANNUAL TASK FORCE REPORT, *supra* note 112, at 21–23).

114. *Id.* at 403 (citing FIFTH ANNUAL TASK FORCE REPORT, *supra* note 112, at 6).

115. *Id.* at 405 (citing DiversityInc, Top 50 for Diversity Profiles, No. 4: The Coca-Cola Company (May 26, 2007), http://www.diversityinc.com/public/1801.cfm).

116. Ingram v. Coca-Cola Co., 200 F.R.D. 685, 688 (N.D. Ga. 2001). The same point could be made with respect to the Attorney General's settlement in the tobacco litigation. In a relatively short amount of time, the parties reached agreement on a historic payout of more than $200 billion, along with various changes in the tobacco industry's conduct that probably could not have been ordered in a trial. For example, the prohibitions on tobacco companies' sponsorship of concerts and athletic events, use of cartoons in advertising, and outdoor advertising would have raised serious First Amendment concerns if imposed by a court. As the terms of a voluntary agreement, however, they are enforceable just as any other settlement contract. *See* Master Settlement Agreement, *supra* note 91, at 14–28; *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001) ("The First Amendment . . . constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.").

117. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2673–74 (1995).

IV. MASS RESOLUTION AS A PUBLIC VALUE

Against Settlement described settlement as "a highly problematic technique for streamlining dockets" and called settlement "a capitulation to the conditions of mass society."[118] By his own assessment, therefore, Fiss's approach is not limited to a narrow category of cases. Instead, he stated that his concerns applied to a majority of cases on a court's docket.[119] If adopted, therefore, Fiss's approach would have a major impact on our court system by dramatically increasing the number of cases awaiting (and proceeding to) trial. We will conclude by addressing this account of settlement both as a matter of practical reality and conceptually.

To begin with, the court system was clogged when Fiss wrote his piece, thus explaining the rise in ADR that he lamented.[120] But the problem has only gotten worse. Between 2000 and 2007, only 1.3% to 4.1% of civil cases filed in federal district courts reached trial.[121] Indeed, as one court noted, the ten most "productive" trial-holding district courts in 2003 held between thirty-two and forty-two trials during that year, disposing of only about five to ten percent of their cases via trial.[122] The situation is the same in the class action context: "the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements."[123]

Even under the current system, in which few cases reach trial, the courts are clogged. In the federal system, for example, during the twelve-month period ending September 30, 2008 (the most recent period for which numbers are currently available), 267,257 new civil cases were filed in the federal district courts.[124] With 678 authorized judgeships, this averages out

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118. Fiss, *supra* note 1, at 1075.

119. *Id.* at 1087 (noting that the cases subject to his critique "probably dominate the docket of a modern court system").

120. *See, e.g.*, George L. Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163, 163 (1982) (discussing the growing volume of litigation and the institution of ADR procedures in many courts).

121. ADMIN. OFFICE OF THE U.S. COURTS, 2007 JUDICIAL FACTS & FIGURES tbl.4.10, *available at* http://www.uscourts.gov/judicialfactsfigures/2007/Table410.pdf.

122. *In re* Relafen Antitrust Litig., 231 F.R.D. 52, 91 (D. Mass. 2005). Moreover, the *In re Relafen* court noted that the figures counted as a "trial" any "contested proceeding before a court or jury in which evidence [was] introduced." *Id.* (emphasis omitted) (citation omitted). Thus, these figures include not only jury trials, but bench trials, motions to suppress evidence, *Daubert* hearings, etc. The number of full jury trials was clearly much smaller than the numbers suggest.

123. Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) (citing Thomas E. Willging et al., *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 143 (1996)).

124. ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 48, 206 (2009), *available at* http://www.uscourts.gov/judbus2008/JudicialBusinespdfversion.pdf. Moreover, there were 70,896 new criminal cases filed during the same time period, for a combined total of 338,153 cases filed, representing a four percent increase over the combined total for the previous twelve-month period. *Id.* at 11.

to 394 civil cases per judge.[125] The median time interval from filing to disposition of civil cases in federal district courts during the reported time period was 8.1 months.[126] During the same period, 5283 civil trials were completed (2175 of which were before juries).[127] Those trials were generally quite short: over half (2652) were tried in a single day, and only twenty-one took twenty days or longer.[128] But even though the vast majority of cases settle, and most trials that do occur are relatively short, the backlog is considerable. As of September 30, 2008, 21,577 civil cases had been pending in the district court for three years or longer.[129] As these statistics reflect, an infusion of new trials generated by Fiss's approach—especially lengthy trials in large, aggregate litigation—would place an impossible burden on the courts.

An expected rejoinder would be that this simply shows the societal failure to provide sufficient resources to its system of justice. Before ascending the fragile spire of debate over how to use finite public resources (education or courts? cure cancer or expand legal services? etc.), we should step back and ask whether our commitment as a society really extends to the trial of all manner of disputes as they arise. It is noteworthy that Federal Rule of Civil Procedure 1 speaks of the objectives of the procedural system in terms of "secur[ing] the just, speedy, and inexpensive determination of every action."[130] The structure of the Rules makes clear that trial is but one mechanism for the "determination" of an action, though necessarily the background prospect against which all settlements are framed.

But the deeper question is whether developed settlement structures are a "capitulation" to mass society, as Fiss would have it, or the response of a mature mass society to the fact of predictable repetitive harms. It is impossible to return to some bygone era of the Jeffersonian yeoman farmer, or even the integral Kantian individual. Instead, the challenge is how a mature legal system allows for resolution of common claims arising from the fact of mass society.[131] This is a broad subject that requires much more elaboration. For present purposes, let us just say that the ability of a legal system to develop the public and private structures that allow for the

125. *Id.* at 16 (noting an increase from 380 civil filings per authorized judgeship during the previous twelve-month period).

126. *Id.* at 19.

127. *Id.* at 22.

128. *Id.* at 183.

129. *Id.* at 58. This figure represents a significant increase over the 17,003 civil cases that had been pending for three years or more on September 30, 2007. *Id.*

130. FED. R. CIV. P. 1.

131. The historic emergence of private responses to the need for efficient aggregation of mass claims is discussed in Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004). Richard Nagareda provides the most comprehensive account of the development of new institutional and legal responses in NAGAREDA, MASS TORTS, *supra* note 91.

relatively efficient and effective compensation of those harmed in mass society will likely appear to the victims as a virtue rather than a vice.

CONCLUSION

Owen Fiss is an inspirational teacher and a bold and original thinker. His unwavering belief in the prospects of justice, enforced by a wise and nurturing judiciary, have informed decades of major scholarship. In the case of *Against Settlement*, however, the bold strokes may obscure that the argument runs only to a small and diminishing subset of the claims in the legal system. Certainly there are concerns of equity and legitimacy as the legal system channels mass claims into routinized forms of settlement. It is unlikely, however, that resurrecting the heroic trials of the long-departed Warren Court era will provide the footpath forward. Mass society yields mass harms, and all citizens are better off for the prospect of a secure, if imperfect, system of compensation and deterrence. Trials are, and will likely remain, a small part of that balance.