

# Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*<sup>†</sup>

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Deborah Hensler has provided us with new understanding of contemporary procedural innovations. In her thoughtful essay,<sup>1</sup> Dr. Hensler offers an overview of both the history of mass torts and the current methodologies of decisionmaking. She then provides a sustained critique that these methods have not been focused on “enhanc[ing] the parties’ control over litigation outcomes or process.”<sup>2</sup> In making her argument, Dr. Hensler narrows the definition of alternative dispute resolution (“ADR”). She rejects the common usage of the phrase as an umbrella that expansively embraces procedures ranging from judicial settlement efforts to court-annexed arbitration and summary jury trials.<sup>3</sup> In contrast, Dr. Hensler defines ADR to be only those procedures that, “compared to the traditional litigation process of adversarial negotiation and trial, enhance parties’ control over litigation outcome and process.”<sup>4</sup> After a comprehensive review of the innovations in contemporary mass tort litigation, Dr. Hensler concludes that a good deal of the innovation should not be

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1. Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995) [hereinafter Hensler, *ADR in Mass Personal Injury Litigation*].

2. *Id.* at 1594.

3. *Id.* at 1590-91 (describing the growth of ADR in the 1980s).

4. *Id.* at 1594. This narrow definition focuses discussion, but excludes a good deal of innovation that others have claimed properly falls within the ADR rubric. See generally Robert J. MacCoun, E. Allan Lind & Tom R. Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts*, in HANDBOOK OF PSYCHOLOGY AND LAW (D.K. Kagehiro & W.S. Laufer eds., 1992); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) [hereinafter Resnik, *ADR and Adjudication*].

classified as “ADR,” and that, in general, procedures in mass torts have not succeeded in “bring[ing] plaintiffs into the dialogue on mass personal injury litigation.”<sup>5</sup>

I share many of Dr. Hensler’s concerns. Thus, my commentary will not focus on areas of disagreement but on the broader lessons to be drawn from her discussion of ADR in mass torts. Below, I consider the changing roles of judges, the interaction between roles taken in large-scale cases and so-called “ordinary” litigation, and the effects of methods of paying plaintiffs’ attorneys in large-scale cases on, in Hensler’s words, “bring[ing] plaintiffs into the dialogue on mass personal injury litigation.”<sup>6</sup>

First, as other papers in this Symposium illustrate, many commentators use the language of game theory to consider the incentives of the “players” in mass torts.<sup>7</sup> Francis McGovern has correctly identified judges as key players and described the strategic role that members of the judiciary take.<sup>8</sup> It is critical to emphasize that, although judges are “players,” judges are not ordinary players, to be equated with defendants, their lawyers, insurance companies, their lawyers, plaintiffs, or their lawyers. Judges “come to the table” with the force of society. Because judges embody legitimacy before they act, they have different “chips.”

Judges thus have a central role to play in legitimating—or delegitimizing—certain forms of decisionmaking.<sup>9</sup> While idiosyncratic

5. Hensler, *ADR in Mass Personal Injury Litigation*, *supra* note 1, at 1626.

6. *Id.*

7. *E.g.*, Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995). This form of analysis has become common in the procedural literature. *See, e.g.*, Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 528-57 (1991) (analyzing the incentives of litigants in securities class actions); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) (considering the role of judges’ preferences in fashioning procedural rules).

8. McGovern, *supra* note 7, at 1839.

9. Illustrating this point is the controversy over the propriety of judicial acquiescence to litigant demands that, as part of a settlement, judges vacate decisions of judges or juries that are not challenged as legally or factually defective. *Compare* *Neary v. Regents of Univ. of Cal.*, 834 P.2d 119, 121, 123 (Cal. 1992) (explaining that “parties are the persons (or entities) most affected by a judgment, which is the ultimate product of their sustained effort and expense,” and holding that, “absent a showing of extraordinary circumstances,” parties should be permitted to vacate lower court judgments as a part of a settlement) *with In re Memorial Hosp., Inc.*, 862 F.2d 1299, 1300, 1302 (7th Cir. 1988) (holding that judgments are “public act[s] of government” rather than “the parties’ property,” and that courts should not vacate precedents because parties have requested such action as a condition of settlement). In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), the Supreme Court was asked by a party, after settlement had been reached and after the Court had granted certiorari, to vacate a lower court decision as moot. The Court declined to do so because “mootness by reason of settlement does not justify vacatur of a judgment under review,” but the Court left open the possibility that “exceptional circumstances” could justify such action. *Id.* at 393. *See generally* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994) (analyzing the import of the debate about “vacatur on consent”).

behaviors of particular lawyers or parties may be dismissed as the actions of possible outliers in the story, not so the acts of judges. If judges agree to the calculation of compensation by using a grid system,<sup>10</sup> to "auction" claims,<sup>11</sup> or to group cases in which judges try representative claims, thereafter extrapolating damage verdicts to other cases,<sup>12</sup> judges legitimate those procedures. Moreover, as we have seen over time, while appellate courts may reject a given "innovation" by a trial judge, appellate courts can be convinced, when trial judges engage in related and similar procedures over a period of time, of the need for and legitimacy of innovations.<sup>13</sup>

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10. See, for example, *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. Civ. A. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sep. 1, 1994), in which the court approved a \$4.2 billion class settlement containing a Schedule of Benefits for class members suffering conditions specified in an accompanying Disease Schedule. Additionally, the settlement provided for two opt-out rights for plaintiffs: an initial right and a "second opt-out right" that could be exercised if the \$1.2 billion Current Disease Compensation Program portion of the settlement was depleted. *Id.* at \*7. Further, the decision permits defendants to exercise an option to withdraw from the settlement, making the final denouement of the case unclear as of this writing. See *id.* at \*6 (noting that, when 5% of the putative class members initially opted out, those 14,300 persons comprised a "substantial" number, raising "the specter that one or more defendants may elect to withdraw from the settlement"). As of May 1995, the filing of bankruptcy by one of the defendants, Dow Corning, raised questions about the longevity of the settlement. See Milo Geyelin & Timothy D. Schellhardt, *Dow Corning Seeks Chapter 11 Shield, Clouding Status of Breast-Implant Pact*, WALL ST. J., May 16, 1995, at A3, A6. The trial court's decision in April of 1995 to include Dow Chemical as a defendant may also affect the settlement. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1995 WL 309465 (N.D. Ala. Apr. 25, 1995).

11. See, e.g., *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 690 (N.D. Cal. 1990) (requiring that "the selection of class counsel and determination of counsel's compensation be made by competitive bidding"); see also 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, 105 (1991) (suggesting "an auction approach to large-scale, small-claim class and derivative suits").

12. See, e.g., *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 666-67 (E.D. Tex. 1990) (permitting findings with respect to "sample members" of a class to be applied to other class members), *appeal filed*, No. 93-4452 (5th Cir. May 3, 1993); see also Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993) (analyzing concerns about, and benefits of, sampling, and advocating a case-by-case approach); Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN L. REV. 815, 851 (1992) (arguing that aggregation and sampling may "achieve a level of justice that simply is not possible in traditional individual trials").

13. Initial efforts to treat the Dalkon Shield litigation as a class action were met with disapproval by the appellate court. See, e.g., *Abed v. A.H. Robins Co. (In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.)*, 693 F.2d 847 (9th Cir. 1982) (vacating the certification of a statewide liability class because of a lack of "typicality" and an inadequate showing that the class action was superior to other modes of adjudication, and vacating a national punitive damages class because of a failure to prove the existence of a limited fund and to meet the commonality, typicality, and adequacy of representation requirements), *cert. denied*, 459 U.S. 1171 (1983). For a discussion by the trial judge whose order was vacated, see Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone*, 98 F.R.D. 323, 325 (1983) (arguing that "for a small, but inevitable number of cases involving hundreds or thousands of persons injured in similar ways by a single nationally marketed product, or in some types of mass catastrophe, the class action device holds the most promise as an effective tool to

We would do well to pause and pay attention to the language, and specifically to the increasingly comfortable use of the game theory metaphor. The image of the judge coming to the table is itself noteworthy. This is no longer the "imperial" or the "umpireal"<sup>14</sup> judge on the bench, but a judge now down in the trenches,<sup>15</sup> as a participant in the negotiation, as a "dealmaker."<sup>16</sup> Hensler's paper implies what I want to make explicit: the judiciary (joined by a group of increasingly powerful mass tort lawyers<sup>17</sup>) plays a key role in delimiting the parameters of acceptable procedures, of what should be called ADR, of what kinds of resolutions are acceptable, of what kinds of negotiations the courts should sanction, enter into, or decline.

Judges and lawyers should be self-conscious about the implications of their strategies and decisions. When judges decide to come to the negotiation, to embrace the roles of player and dealmaker rather than umpire, judges are not simply acquiescing in the evolution of the judicial role. As one considers the changes in the judicial role over the past half century, one can map a major transformation in the debate about judging. Judges have moved from adjudicators and umpires to managers and now players, urging settlement and resolution, and crafting new alternative procedures and formulas to distribute large amounts of money to many individuals and classes. No longer should a debate about judging be framed as about the

accommodate competing interests"). Seven years later, the Fourth Circuit affirmed a class certification of Dalkon Shield claimants who had sued the insurance company for the manufacturer of the shield. The settlement of that action, which was also approved, was conditioned on certification of the class. *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.) (noting that "the 'trend' is once again to give Rule 23 a liberal rather than a restrictive construction"), cert. denied 493 U.S. 959 (1989).

Similarly, appellate courts rejected early efforts by trial judges in the asbestos litigation to use issue preclusion, e.g., *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 343-47 (5th Cir. 1982) (discussing the conflicting trial court decisions on the issues and the unfairness to defendants who lacked notice of the magnitude of subsequent claims at the time of the first suit), and to rely on judicial notice, e.g., *id.* at 347-48 ("The proposition that asbestos causes cancer . . . is not at present so self-evident a proposition as to be subject to judicial notice."). In 1991, the Judicial Panel on Multidistrict Litigation—after rejecting consolidation on five occasions since 1977—revised its earlier decisions and consolidated virtually all of the then pending 26,000 federal asbestos cases for pretrial proceedings before a single district judge. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415-17 (J.P.M.L. 1991); see also *Cimino*, 751 F. Supp. at 666-67 (using aggregated methods for trying asbestos cases are necessary and explaining the legality of such methods).

14. See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

15. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386-414 (1982).

16. Donald Payant, Remarks at the National Conference on Mass Torts (Nov. 10, 1994) (tapes on file with the *Texas Law Review*).

17. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 964, 1025-26 (1993) (discussing the role of plaintiffs in mass tort litigation in the 1980s). The availability of lawyers and financing of litigation affect legal rules and rights-seeking in an array of areas. See Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423 (1993) (examining the role of corporate lawyers as legal entrepreneurs, developing concepts that become a part of law).

“active” as compared to the “passive” judge, but rather as about the propriety and utility of the deployment of judges as adjudicators, as compared to their use as negotiators and dealmakers, and about the effects of simultaneously assuming a multitude of roles at once.<sup>18</sup>

Many commentators currently celebrate this reframing of the judicial role and explain it as essential<sup>19</sup>—particularly in cases that form the subject matter of this Symposium, mass torts.<sup>20</sup> That brings me to my second point: Whatever judges and lawyers do in mass torts is unlikely to be confined to mass torts. How the “mass tort litigation game” is reframed will also shape other forms of litigation. No one should think that they have the power to confine the reforms. If changes are understood as effective (however measured) in the context of mass torts, reforms are likely to be adopted in very different contexts.

A quick review of the past five decades illustrates how procedures crafted for the “big case” have migrated to the “small case.” In the 1940s, federal judges became concerned that antitrust cases were “protracted”—and had to be handled in a manner different from other cases.<sup>21</sup> The proposed judicial response was to take “control.”<sup>22</sup> In the 1960s and 1970s, civil rights and securities cases formed the centerpieces of group litigation. Once again, judicial control emerged as a central tenet. New procedures (remember the “fluid class”<sup>23</sup>) and remedial mechanisms (such as structural injunctions, busing, and special masters) came to the fore.<sup>24</sup>

18. For a discussion of the structural changes that prompted this evolution in the judicial role, see WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* 125-58 (1990); Resnik, *Managerial Judges*, *supra* note 15, at 391-402.

19. E.g., Robert M. Parker & Leslie J. Hagin, “ADR” *Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905, 1913 (1993); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 255-60 (1985).

20. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 539 (1994) [hereinafter Weinstein, *Ethical Dilemmas*]; Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 281-302.

21. In 1949, Chief Justice Vinson appointed the Committee to Study Procedure in Antitrust and Other Protracted Cases, which reported, in 1953, that reforms were needed because the protracted case “might threaten the judicial process itself.” See Committee to Study Procedure in Anti-Trust and Other Protracted Cases, *Procedure in Anti-Trust and Other Protracted Cases*, reprinted in 13 F.R.D. 62, 64 (1953).

22. *Id.*; see also Resolutions Adopted at the Seminar on Protracted Cases, 23 F.R.D. 614, 614-15 (1958) (“The judge assigned should at the earliest moment take *actual control* of the case and rigorously exercise such *control* throughout the proceedings in such case.” (emphasis in original)).

23. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 166 (1974).

24. See Curtis J. Berger, *Away From the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978) (discussing his role as a special master attempting to negotiate an agreed-upon remedy in a case involving segregated schools and housing); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1289-1304 (1976) (arguing that a bipolar model of adjudication did not reflect proceedings in public law cases, in which the issuance of a decree was but a step in the litigation and courts relied on a range of individuals to design and then

In the 1980s and 1990s, mass torts have become the source of parallel innovation and debate, about the shape of the litigation, its scope, and the remedial options.<sup>25</sup> In each iteration, judges have been at the forefront of naming the problems and of offering responses. However, while many of those responses are designed for the large-scale case, innovations in large cases affect what happens in small, so-called "ordinary" cases.

Let me give an example. The possibility of a pretrial conference has been a fixture of the Federal Rules of Civil Procedure since 1938, when Rule 16 was drafted.<sup>26</sup> Initially, judicial use of pretrials for management of cases was erratic and occasional. But, as mentioned above, in what were then called "protracted cases" (primarily anti-trust litigation), federal judges urged their colleagues to take charge and to use the pretrial conference as the point at which to assert authority over the litigation and the parties.<sup>27</sup>

Judges did, liked the results, and began to use pretrial conferences and management in an array of cases. Stephen Yeazell has recently chronicled the development of the expanded authority of district judges that resulted.<sup>28</sup> The end result is familiar: in 1983, Rule 16 was revised to require mandatory pretrial scheduling in most cases.<sup>29</sup> In 1990, by enacting the Civil Justice Reform Act,<sup>30</sup> Congress endorsed judicial

monitor "complex forms of ongoing relief"); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 465-67 (1980) (discussing judicial involvement in multi-party remedies in cases predating the public law litigation of the 1960s and 1970s); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 27-28 (1979) (describing the remedial activities in structural litigation).

25. See, e.g., David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 902-08 (1984) (arguing that, given the resources of defendants in mass tort cases, individual litigation, financed by contingent fee contracts, is insufficient and that aggregate procedures, such as class actions, are necessary in mass torts); Roger H. Trasgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985) (objecting to some aspects of the trend to aggregate mass torts and arguing for the vitality, as modified, of more individualized processing); Weinstein, *Ethical Dilemmas*, *supra* note 20, at 476-81 (surveying the administrative and procedural concerns raised by mass tort litigation).

26. Rule 16 originally provided:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider . . . [t]he simplification of the issues; . . . [amending] the pleadings; . . . obtaining admissions of fact[;] . . . limit[ing] . . . expert witnesses; . . . [t]he advisability of a preliminary reference of issues to a master for findings . . . ; [s]uch other matters as may aid in the disposition of the action.

Fed. R. Civ. P. 16, 308 U.S. 684 (1938).

27. See, e.g., Resolutions Adopted at the Seminar on Protracted Cases, *supra* note 22, at 614-15.

28. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 646-66.

29. Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 207 (1983). District courts were given authority to exempt by local rule designated categories of cases; specifically mentioned as possibilities were social security claims and prisoners' cases. *Id.*

30. Pub. L. No. 101-605, tit. I, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (Supp. V 1993)).

management of the pretrial phase. In 1993, federal rulemakers again amended Rule 16 to elaborate what could transpire within the pretrial phase.<sup>31</sup>

In this description lie both general truths about procedural rulemaking and a specific warning. The promulgation of formal, authorizing rules often *follows* practices that have already been in place for some time. Moreover, the migration of procedures works in a variety of directions. Why do many commentators and participants perceive it acceptable in mass torts to provide, as a remedy, a grid, on which to map injuries and by which to allocate funds?<sup>32</sup> Grids are a familiar mechanism because administrative law judges work from such schedules—created either by statute or implementing regulations—in cases ranging from workers' compensation to disability benefits. Thus, some of the "innovation" in mass torts is *replication* and *importation*, from agencies to courts, of the procedures found in administrative adjudication schemes.<sup>33</sup>

Further, the willingness to pull together a series of tort cases—whether as a class action, a consolidated proceeding, or a multi-district litigation—is itself a part of a societal movement away from individual adjudication. Mass torts are but one example of a general trend within the federal courts

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31. The 1993 amendments further detail the judicial role in managing the pretrial process, controlling discovery, structuring trials, and helping parties to settle cases. Judges were also authorized to require parties or their representatives to attend pretrial conferences or be available by phone "to consider possible settlement of the dispute." Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 427-31 (1993) [hereinafter 1993 Amendments].

Moreover, the 1993 amendments revised the description of ADR. In 1983, Rule 16 referred to ADR by the term "extrajudicial procedures." Fed. R. Civ. P. 16(c)(7) (1983). After the 1993 amendments, Rule 16 referred to ADR as "special procedures to assist in resolving the dispute when authorized by statute or local rule." 1993 Amendments, *supra*, at 429. The 1993 amendments acknowledge that ADR had moved inside the courts. The Advisory Committee explained that the revision "describe[s] more accurately" procedures aside from "traditional settlement conferences" that "may be helpful in settling litigation." *Id.* at 600.

32. See, e.g., Elizabeth Rolph, *Framing the Compensation Inquiry*, 13 CARDOZO L. REV. 2011 (1992) (discussing the issues and criteria that all compensation systems must address, including "eligibility screens" and rules for processing claims and awarding sums of money). Several litigations have relied on grids, including the Dalkon Shield case and the breast implant proposed settlement. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. Civ. A. CV94-P-11558-S, 1994 WL 578353, at \*24 (N.D. Ala. Sept. 1, 1994) (describing the Schedule of Benefits); Dalkon Shield Claimants Trust, Dalkon Shield Packet (1990) (on file with the *Texas Law Review*) (describing four claim options and disease schedule); Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found?)*, 61 FORDHAM L. REV. 617, 641, 628-51 (1992) (describing the "highly structured, rules-based process" used to evaluate Dalkon Shield claims). One commentator has advocated the legislative establishment of an administrative compensation scheme to allocate funds to claimants alleging injuries from asbestos. Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1821-28 (1992).

33. Whether such borrowing will be successful remains a topic of debate. See, e.g., Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 964-82 (1993) (detailing criteria for workable administrative compensation schemes and explaining the misfit between certain forms of toxic torts and administrative compensation).

of life-tenured judges doing less adjudication in individual, relatively small value cases. Such cases are either decided en masse, by Article III judges superintending large-scale litigations, or are delegated—to magistrate and bankruptcy judges within the federal courts, to claims facilities created by the federal courts, or to administrative agencies outside the federal courts.<sup>34</sup> As such rules are crafted and procedures are invented for the large-scale cases, one should be wary of justifying some extraordinary departure from what might otherwise be required on the grounds that it is an idiosyncratic event (*i.e.*, “just this one time, because this is Agent Orange,” or “this is asbestos”). What judges and lawyers perceive to be useful in one arena will *not* remain a procedure only for the “extraordinary.”<sup>35</sup>

My third comment is about other effects of large-scale litigation on the adjudicatory process. The movement over the past decades has continually been in the direction of defining a “case” as a larger and larger unit of decisionmaking. I recently had the occasion to go back and reread some cases from the 1950s about joinder; I was surprised to read judicial debate

34. See Judith Resnik, *Finding the Fact Finders: Shifting Values and Modes of Decisionmaking*, 64 *FORDHAM L. REV.* (forthcoming). For examples of proposals to further delegate cases away from Article III judges, see *FEDERAL COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 55* (1990) (proposing that Social Security claims be heard before an administrative law judge, whose decision would be appealable to “a new Article I Court of Disability Claims, with review in the courts of appeal limited to constitutional claims and to pure issues of law”); *id.* at 58-59 (detailing a proposal by the dissenters from the *Report* that would retain district court review, but interpose review by a new Social Security Benefits Review Board “to provide thorough administrative review of decision by ALJs” and modeled on entities created to review black lung cases); *COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 126* (Mar. 1995) (“[F]ederal court jurisdiction could be curtailed in cases appropriately resolved in Article I tribunals, administrative agencies, or state courts. Examples . . . include social security benefit claims, contract claims, benefit claims under ERISA welfare plans, forfeiture proceedings, and cases primarily involving state law issues . . .”).

35. This migration of procedure from one arena to another is evidence of a preference for trans-substantive procedures. Recall the insight of the drafters of the 1938 Federal Rules of Civil Procedure: that one set of trans-substantive rules could govern different kinds of cases. See generally Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 *YALE L.J.* 718 (1975).

The trans-substantive regime has deteriorated to some extent, as exemplified by 28 U.S.C. §§ 2254-2255 (1988) (setting forth different procedures for post-conviction remedies for state and federal prisoners); *MANUAL FOR COMPLEX LITIGATION (SECOND)* (1986) (providing guidelines for use in large-scale cases); Patricia D. Howard, *A Guide to Multidistrict Litigation*, 124 *F.R.D.* 479, 488-97 (1989) (setting forth procedures for use in multidistrict litigation). Many commentators propose further procedural variations. See Parker & Hagin, *supra* note 19, at 1914 (proposing the assignment of cases to litigation tracks based on the matter’s complexity, the need for discovery, the parties’ financial resources, the public policy concerns, and the novelty of the issues involved).

At the same time, one sees evidence of the pull towards trans-substantive procedure. If it is useful and feasible to put together all the claimants from an air crash, hotel fire, or securities fraud, why not put together all claimants in a mass products liability lawsuit? How about claimants in a toxic tort? If judicial management is good in a large, complex, or protracted case, why not also manage the small?

about whether one could join several plaintiffs, who had been injured in the same car accident, into a single lawsuit or whether each individual plaintiff had his or her "own" case.<sup>36</sup> For much of our procedural history, courts worried about the melding of claims and the need for particularity about individual claimants.<sup>37</sup> That theme is reiterated on occasion but has diminished over time, so that it is only the occasional "dissenter" who argues for individual case treatment.<sup>38</sup>

Once working on the scale—to wit, the very large, very high stakes cases involving millions if not billions of dollars and hundreds if not thousands of individuals<sup>39</sup>—that many of the participants in this Symposium have helped to craft, experienced judges and lawyers may have a difficult time believing that they should be spending a good deal of time on smaller cases, and particularly on the comparatively small-stakes, individual plaintiff-defendant dispute. Having just negotiated a \$300 million dollar settlement for 10,000 people, how does one then turn to the \$80,000 dispute and spend three days trying the case?

But also note that the \$300 million resolution is often a *settlement*, not a trial. Once working at the very large scale, it appears both awesome and unfeasible to try the amalgam created. Size itself makes problematic the activity of adjudication, with its requisite bases of information obtained through evidentiary screens, its aspirations towards specific knowledge of facts, and its attention to detail. Although the disputants may have the resources for trials, that mode of decisionmaking seems too cumbersome, sprawling, and inadequate to the task. In the large-scale litigation, something called ADR (not necessarily what Dr. Hensler would call ADR, but something other than adjudication) seems to make sense to lawyers and

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36. See, e.g., *State ex rel. Rosen v. McLaughlin*, 318 S.W.2d 181, 184 (Mo. 1958) (holding that a trial judge could order consolidation for trial of four actions involving the same car accident and four plaintiffs in the same family).

37. In *Rosen*, the trial court consolidated four separate actions for pretrial purposes but ordered four separate trials, stating that "it would be an undue burden on a trial court to hear all four of the . . . cases at one trial and that the verdict forms, instructions to the jury and other matters would be confusing and burdensome to a jury and a trial judge." *Id.* at 183 (omission in original) (quoting the trial court's order); see also *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 343, 344-45 (5th Cir. 1982) (reversing the trial court's application of offensive collateral estoppel to asbestos defendants on the ground that the earlier judgment was "ultimately ambiguous as to certain key issues," and pointing out distinctions among various asbestos plaintiffs and defendants).

38. See, e.g., Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (criticizing some aggregated proceedings but supporting group discovery).

39. See, e.g., RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 11, 23 (1991) (noting that the Dalkon Shield litigation involved 3.6 million Dalkon Shields that "had been implanted in women all over the world," and that, by 1984, A.H. Robins had paid out \$260 million to settle 7,700 claims); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 45, 164 (1986) (stating that Agent Orange litigation "eventually included 2.4 million Vietnam veterans, as well as their spouses and afflicted children, born and unborn," and settled for \$180 million).

judges.<sup>40</sup> In the smaller cases, ADR also appears to make sense, but for a different reason—that the case is too “small” to merit the investment of resources that a trial would demand.

Fourth, as I watch the proliferation of possible procedures for decisionmaking (all the alternatives sitting under the ADR umbrella and not only those that Hensler’s approach would admit), I see declining enthusiasm for one kind of decisionmaking under the canopy—adjudication itself. I am less sanguine than some about the possibilities of a “multi-door” courtroom, in which equal access exists for all doors. I doubt that, when there are half a dozen decisionmaking forms and a host of different kinds of procedures—ranging from mediation to court-annexed arbitration—that the door marked adjudication will remain wide open.<sup>41</sup> I believe that we are seeing a shift in the forms of procedure, from an adjudicatory model towards a resolution model. During the last few decades ADR has become an *integral* part of the state’s mechanisms for responding to disputes.<sup>42</sup> From one perspective, the two modes are no longer discrete conversants but have begun to be integrated into or melded into each other.<sup>43</sup> From another vantage point, the state’s system is increasingly itself in disarray, and the “private” system is becoming the one of choice, when litigants have the resources and ability to “opt out.”<sup>44</sup>

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40. Other factors affect the impulse toward ADR. See Resnik, *ADR and Adjudication*, *supra* note 4, at 241-52 (analyzing how ADR is perceived in relationship to adjudication and how proponents of ADR argue that its strengths include that it is less expensive, quicker, friendlier, more efficient, and fairer than adjudication). Further, the current criminal caseload within federal courts, mandated by speedy trial legislation that gives docket preferences to criminal cases, also provides reasons for reformatting civil decisionmaking. Mandatory penalties create incentives for criminal defendants not to plea bargain and sentencing guidelines demand fact finding at that stage of the proceedings.

41. In his influential essay, Professor Frank Sander proposed a model of dispute resolution that was “not simply a court house but a Dispute Resolution Center.” Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 131 (1976). Others have credited Sander with proposing the “multi-doored courthouse.” E.g. SENATE COMM. ON THE JUDICIARY, THE JUDICIAL IMPROVEMENTS ACT OF 1990, S. REP. No. 416, 101st Cong., 2d Sess. 28 n.15 (1990), reprinted in 1990 U.S.C.C.A.N. 6803, 6831 n.15; Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 426 n.17 (1986); Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 824 (1988); Charles Thensted, *Litigation and Less: The Negotiation Alternative*, 59 TUL. L. REV. 76, 93 & n.77 (1984).

42. See, e.g., *Court Arbitration Authorization Act of 1993: Hearings on H.R. 1102 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 16 (1993) [hereinafter *Hearings on H.R. 1102*] (statement of Judge Ann Claire Williams, of the Northern District of Illinois, representing the Judicial Conference of the United States) (reporting that “[j]udicial use of Alternative Dispute Resolution (ADR) programs was firmly grounded in the Federal Courts” even prior to the enactment of the Civil Justice Reform Act in 1990).

43. Resnik, *ADR and Adjudication*, *supra* note 4, at 215 n.13.

44. See Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12B STUD. L. POL. & SOC’Y, 367, 374 (1992) (“[S]ome of the reforms within public courts that have been described as privatization can be seen as part of the competition for an attractive disputing process.” (emphasis in original)); Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 892 (1993) (“The courts face a burgeoning industry

The preference for settlement over trial, for abbreviated procedures over expansive procedures, is pushing procedural reforms toward non-adjudicatory resolutions. Evidence of such preferences can be found in a variety of proposals. Judge William Schwarzer has suggested revision of the federal offer-of-judgment rule.<sup>45</sup> Judge Robert Parker has proposed case tracking plans, under which relatively few cases would qualify for jury adjudication.<sup>46</sup> If current trends continue, an individual's "right" to adjudication, to a decision by a person who bears the title "judge" in a court, will be permitted only upon special justification.

Enthusiasm for ADR, in its many different forms, is one of several factors making it difficult to preserve a vibrant role for adjudication.<sup>47</sup> Opening those other doors labeled "ADR" has required energy and a belief that such innovation is both useful and good. As Hensler's paper documents, proponents of ADR have a myriad of views that support a diversity of programs.<sup>48</sup> For some, ADR is a default position, second best but necessary because adjudication has not made good on its promises. The queue for adjudication is too long, the costs too high.<sup>49</sup> For others, ADR is not second best, it is better than adjudication—for a variety of reasons.<sup>50</sup> For some proponents, ADR is more flexible, more imaginative, and more engaging of parties than is adjudication.<sup>51</sup> For other advocates, certain forms of ADR are more generative of information

in alternative dispute resolution . . . that threatens to siphon off many civil cases, including those of litigants wealthy enough to afford it.").

45. See William W Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992).

46. See Parker & Hagin, *supra* note 19, at 1915-17.

47. See HEYDEBRAND & SERON, *supra* note 18, at 99-123 (exploring technocratic responses altering adjudicatory modes); Garth, *supra* note 44, at 370-76 (describing the effects of competition from private dispute resolution practices on adjudication); Resnik, *ADR and Adjudication*, *supra* note 4, at 244-46 (discussing how that efforts to promote ADR have been focused on comparing it favorably to adjudication and intersect with other factors affecting an appreciation for rights-seeking); Yeazell, *supra* note 28, at 632-39 (analyzing how that the 1938 Federal Rules' creation of a pretrial process altered the processes of litigation and contributed to a decline in the rate of cases going to trial).

48. Hensler, *ADR in Mass Personal Injury Litigation*, *supra* note 1, at 1589-91.

49. See Kenneth R. Feinberg, *Response to Deborah Hensler, A Glass Half Full, a Glass Half Empty*, 73 TEX. L. REV. 1647 (1995) (discussing the volume of mass torts and arguing that alternative procedures are necessary "because of absolute government paralysis in dealing with mass torts"); see also *Panel Discussion*, 59 BROOK. L. REV. 1199, 1207 (1993) (emphasizing courts' lack of resources to try mass tort claims one at a time).

50. See, e.g., *Recent Developments in Alternative Forms of Dispute Resolutions (ADR)*, 100 F.R.D. 512, 514 (1983) (comments of Eric D. Green at the Judicial Conference of the Federal Circuit) ("[E]ven if court calendars were reduced to more manageable levels, the alternatives described [i.e., private mini-trials] . . . permit the parties to arrive at better solutions than a court can impose.").

51. See, e.g., Eric D. Green, *Growth of the Mini-Trial*, LITIGATION, Fall 1982, at 12, 17 (arguing that parties "should at least consider a mini-trial in every case"); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 7-8 (1991) (commenting that ADR may "be better because [it] . . . provide[s] a greater opportunity for party participation and recognition of party goals").

than is adjudication, and, as a consequence, the results are better.<sup>52</sup> Others like ADR because of its frequent reliance on parties' consent, which, rather than a court order, forms the basis of the resolution. The assumption is that parties' tailor-made agreements and remedies are preferable to court-imposed outcomes.<sup>53</sup>

The commentary that accompanies ADR is filled with expressions that the adjudicatory model has not served many well: that its costs, its complexity, indeed its individualization, fail to respond to problems that are now seen as shared rather than individual. Moreover, judges—whom one might have expected to be the prime defenders of adjudication and to praise the system in which they work and with which they are so closely identified—are often in the vanguard of the development of alternatives to adjudication.<sup>54</sup>

Procedural changes within courts are, of course, not driven exclusively by internal phenomena. As the bench, bar, and Congress call for ADR, other developments affect the context in which adjudication is perceived. Over this past two decades, we have seen increased disenchantment with government regulation; many commentators read the 1994 election results and the legislation proposed in its wake as reflective of an anti-regulatory mood.<sup>55</sup> In this larger context, the process of adjudication, which

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52. See *Administrative Dispute Resolution Act: Hearings on H.R. 2497 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 66, 66 (1990) (statement of Marshall J. Breger, Chairman of the Administrative Conference of the U.S.) (praising ADR as faster, cheaper, better, and more imaginative and creative than adjudication).

53. See, e.g., Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2239 (1993) (advocating private ADR rather than court-annexed programs, in part because parties in private proceedings can select their arbitrator and the rules to be used); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?* 1993 J. DISP. RESOL. 1, 3 (1991) (arguing that compelled ADR undermines its usefulness). Cf. Menkel-Meadow, *supra* note 51, at 25, 42 (1991) (noting the problem of coercion associated with mandatory ADR, but advocating mandatory, nonbinding ADR methods).

54. Judges, such as the Raymond Broderick (E.D. Pa.), Thomas Lambros (N.D. Ohio), Arthur Spiegel (S.D. Ohio), and Richard Enslin (W.D. Mich.), are particularly enthusiastic about processes such as summary jury trials and court-annexed arbitration, both of which rely on the introduction of non-judge third parties who respond to the development of factual or legal information. See Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217, 218-20 (1989); Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement*, 77 JUDICATURE 6 (1993); S. Arthur Spiegel, *Summary Jury Trials*, 54 U. CINN. L. REV. 829 (1986); Richard A. Enslin, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N.M. L. REV. 1 (1988).

55. See, e.g., Frank Swoboda, *Plan Combines a Revival of Reaganomics, Reins on Regulation*, WASH. POST, Dec. 14, 1994, at A23 (examining proposals in the Republican Contract with America to diminish government regulation). See also the proposed Regulatory Transition Act of 1995, H.R. 450, 104th Cong., 1st Sess. (1995) (imposing a moratorium on regulatory activity and finding that cost/benefit analysis is required to improve government efficiency).

involves the application of law to fact, is recognized as having a regulatory potential that is less appealing than are the possibilities of forming consensual agreements among private parties. Privatization and ADR in the courts are, I believe, related phenomena.<sup>56</sup> Of course, to the extent that preferences between ADR and adjudication are shaped by strategic interests, enthusiasm for one or the other may depend on whether one perceives courts to be hospitable or hostile to claims that expand rights. For example, at the Conference on Mass Torts, concern was expressed that a settlement orientation (in cases such as Agent Orange and in the pending litigation on breast implants) has worked to relax standards of causation and proof of injury.<sup>57</sup> Some of those who had been corporate supporters of ADR may now support a return to the rule of law, because settlement-oriented ADR facilitates a blurriness about rights that a legal regime might not recognize to exist.

In short, the current embrace of alternative dispute resolution entails serious dissatisfaction with, if not dislike of, adjudication.<sup>58</sup> While some forms of ADR, such as those within Dr. Hensler's definition, may be less

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The shift in attitude can also be seen in Supreme Court rulings on "private arbitration" of federal statutory claims. In the 1950s, the Court declined to require arbitration and insisted on the regulatory role of courts. See *Wilko v. Swan*, 346 U.S. 435, 438 (1953) (holding that an arbitration clause violated the Securities Act of 1933 because it involved a surrender of an unwaivable right and was thus void), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). In contrast, in the 1980s, the Supreme Court has revised its doctrine, now reading Congress as approving private arbitration and downplaying the import of the regulatory role of courts. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (stating that arbitration and adjudication were equally able to resolve the important public interest of resolving disputes). Both arbitration and adjudication are reconceived over these decades, and the convergence of features emphasizes the ability of both to resolve disputes more than the regulation of behavior. See also Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437, 472-84 (1989) (discussing the ADR movement's emphasis on disputes as conflicts of discrete interests, as contrasted with adjudication's goals of preserving and enforcing rights).

56. See Garth, *supra* note 44, at 372-76 (discussing the relationship between private and public adjudication services); Robel, *supra* note 44, at 892-93 (observing that supporters of privatization of government activities articulate similar arguments to those used by ADR supporters).

57. E.g., Zoë Baird, Remarks at the National Mass Tort Conference (Nov. 10, 1994) (tapes on file with the *Texas Law Review*).

58. I should add that I am not a romantic about the "good old days of adjudication." Deborah Hensler, among others, has provided a good deal of data on the "myths" of the one-on-one tort system and its failures to provide access to many potential claimants. See Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89 [hereinafter Hensler, *Myths and Realities*]. However, I am also not a romantic about the current set of alternatives, which, as Dr. Hensler demonstrates, also have serious limitations. Hensler, *ADR in Mass Personal Injury Litigation*, *supra* note 1; see also Alexander, *supra* note 7, at 524-67 (conducting an empirical study of a small sample of securities cases in which the cases settled at similar values, suggesting a lack of relationship between the merits of a case and its settlement value); Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 424-32 (1989) (discussing varying levels of success of ADR programs).

in tension with adjudication than others, the settlement-oriented regime linked to many ADR modes is in tension with an adjudicatory model predicated on fact finding and imposition of legal rules.<sup>59</sup> My point here is not to argue for or against the changes but to argue for self-consciousness about contributions to change.

My fifth and final point relates to Dr. Hensler's call for more participation and control by the plaintiffs, as distinct from their attorneys.<sup>60</sup> My question for her is about the relationship between involvement of lawyers and the involvement of litigants. Does Dr. Hensler envision a world of direct engagement—of litigant without lawyer? Or, does she propose participation by litigants with or through individual lawyers?

Mass torts provide an interesting arena in which to think about these questions. In some kinds of class actions, such as securities cases, small groups of lawyers represent a host of individuals who, absent the existence of a class action, would have no counsel and no case at all. Further, securities litigants may not even know that they have suffered any injuries. In contrast, in many mass torts, each plaintiff has knowledge of injury and comes into the aggregate with his or her own contingency fee lawyer.<sup>61</sup>

Not all lawyers are competent, nor do all pay attention to their clients. But if a lawyer is functioning as he or she should, that lawyer provides a bundle of services to a client. The lawyer for a personal injury client is not only engaged in obtaining an outcome—a sum of money. Rather, in quantitative research, tort litigants describe their interest in “telling their side of the story,”<sup>62</sup> in wanting more than outcomes. Litigants have reported seeking vindication, knowledge, and acceptance of

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59. My purpose here is not to provide a fulsome exposition of the goals, values, and purposes of ADR and adjudication, as well as an understanding of the overlaps and tension among them. Others have done so. Marc Galanter & John Lande, *Private Courts and Public Authority*, 12B STUD. L. POL. & SOC'Y 393, 395-407 (1992); Silbey & Sarat, *supra* note 55, at 472-96. See generally STEPHEN B. GOLDBERG, FRANK E.A. SANDER, & NANCY H. ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (2d ed. 1992). In addition, one might, as Deborah Hensler does, attempt to rope off some procedurea as not ADR but as creative judicial management or simply settlement efforts, and preserve an arena for ADR that is closer to adjudicatory models.

60. Hensler, *ADR in Mass Personal Injury Litigation*, *supra* note 1, at 1622.

61. See generally Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals Within the Aggregate: Representation and Fees* (manuscript for the Research Conference on Class Actions and Related Issues in Complex Litigation) 138-55 (Apr. 8, 1995) (unpublished manuscript on file with *Texas Law Review*) [hereinafter Resnik, Curtis, & Hensler, *Individuals Within the Aggregate*] (exploring the respective roles of individually retained plaintiffs' attorneys (“IRPA”), as compared to lawyers appointed to plaintiff steering committees (“PSC”) or as lead counsel, and analyzing how court-structured aggregate litigation can affect roles played by both litigants and lawyers).

62. See Hensler, *Myths & Realities*, *supra* note 58, at 99; E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik, & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990).

responsibility.<sup>63</sup> When lawyers for such clients are doing a good job, those lawyers are in communication with their clients, whose needs include education about the value of a claim and any proposed remedy,<sup>64</sup> assistance in seeking expert evaluation of claims, and information about the legal process. Some of what these lawyers do for their clients is characterized—often negatively—as “handholding.” In the context of most mass torts, the need for consolation may be great, and both the lawyers and the legal system may not be able respondents.<sup>65</sup>

In a large-scale mass tort, the act of consolidating the individual cases into a *junbo* lawsuit risks breaking individual attorney-client relationships. In general, because the litigation is primarily controlled from the plaintiffs’ side by a plaintiffs’ steering committee (PSC) or other lead counsel, individually-retained plaintiffs’ attorneys (IRPAs) have greatly diminished roles.<sup>66</sup> The questions are about the desirability and utility, from a societal or individual point of view, of the *relationship* between litigant and court, and between client and lawyer, as distinct from the transfer of money in payment for injuries.<sup>67</sup>

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63. See, e.g., SANDRA M. GILBERT, *WRONGFUL DEATH: A MEDICAL TRAGEDY* 104-57 (1995) (providing Gilbert’s personal narrative of experiences when her husband died unexpectedly in an operation and she received little information about the cause, and describing the limited responses of her lawyer and the legal system); GERALD M. STERN, *THE BUFFALO CREEK DISASTER* at x (1976) (stating that survivors of the Buffalo Creek disaster sued, in part, to “make the company admit its responsibility . . . and to make sure something like this would never happen again”); SCHUCK, *supra* note 39, at 174-76 (relating the testimony of Vietnam veterans seeking recognition of their harms and admissions of wrongdoing). See also *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 768, 768-69 (E.D.N.Y. 1984) (relating the objections by some class members to the settlement because it contained “no admission of guilt, no assignment of blame” by the chemical companies and because the government failed to participate and admit its role), *aff’d*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

64. See generally Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 16-20 (1993) (explaining that lawyers need to consider how different clients would value a remedy and that valuation might differ across a class). See generally Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1205 (1982) (discussing the complexity of representing classes and the need for lawyers to attempt to communicate with groups of clients); Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709 (1989) (arguing that it is important for lawyers representing groups to rely on client-centered norms and to make an affirmative effort to ascertain the views of class members).

65. See, e.g., KAI T. ERIKSON, *EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD* 156-245 (1976) (detailing trauma to individuals and to community resulting in aftermath of flood); GILBERT, *supra* note 63, at 221 (describing Gilbert’s interview and meetings with her attorney whose voice was “crisp and perfunctory”); *id.* at 242-58 (reporting her discomfort as a plaintiff at a deposition and her lawyer’s unresponsive attitude); *id.* at 269-71 (describing the crudeness of the discussion when settlement was proposed and the absence of explanation).

66. This term does not appear regularly in the literature but is one that was adopted in *In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605 (1st Cir. 1992). I was an appellate counsel in this case, representing IRPAs in a fee dispute.

67. In general, the literature on the effects of lawyers in such cases focuses on their role as “agents” for clients, the limited means by which the client-principles can police their lawyers, and the incentives of lawyers. Often ignored are other aspects of the attorney-client relationship and of the role

Large-scale litigations are entities created or sanctioned by courts. As judges and lawyers craft such amalgams, they should attend to the experiences of litigants within them. Dr. Hensler assumes that it is desirable to enable individual participation in litigation.<sup>68</sup> She relies on a good deal of social science research finding that individuals distinguish process from outcome.<sup>69</sup> Individual litigants in ordinary tort litigation have reported greater satisfaction with procedures such as court-annexed arbitration and trials, about which litigants report that they can participate and have some "control."<sup>70</sup> A good deal of the academic literature on the meaning of due process contains a parallel theme: that process has a value not totally dependent on outcomes, and that its purposes may include dignifying individuals, enabling participation, giving voice to litigants' views, and effectuating outcomes.<sup>71</sup>

What import should both theories of the value of process and empirical understandings of litigants' concerns have in large-scale litigation? Should judges try to create incentives for an individual attorney-client relationship to exist in the large-scale mass tort lawsuit? What roles could and should IRPAs play in a consolidated mass tort? How high on a hierarchy of aspirations should participation and control values be placed? What is the relationship between the role of individual lawyers and perceptions of litigants of their participation and control?

I raise these questions here not to answer them all but to point to the necessity of their consideration.<sup>72</sup> Having process values does not equate

of litigation beyond its production of outcomes. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 896-917 (1987) (discussing plaintiffs' attorneys' incentives to maximize fees); Macey & Miller, *supra* note 11, at 17, 17-27 (considering the problem of "design[ing] incentive structures that reduce the disparity of interest between" attorneys and clients).

68. See Hensler, *ADR in Mass Personal Injury Litigation*, *supra* note 1, at 1624 ("The challenge then is to . . . enhance litigant control and participation . . .").

69. *Id.* at 1593-94; see also JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 6-16 (1975) (describing experimental studies on disputants' perceptions of process and concluding that such perceptions are not dependent solely upon outcomes); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 953 (1990) ("[P]rocedural justice judgments and outcome satisfaction [are] little related to objective outcome.").

70. Lind et al., *supra* note 69, at 982. Note the distinction between individual reports of control and some objective measure of whether control exists. *Id.* at 983-86.

71. See, e.g., Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153; J. Roland Pennock, *Introduction to DUE PROCESS* xv, xvii (J. Roland Pennock & John Chapman eds., 1977); Robert G. Bone, *Rethinking the "Day In Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 279-89 (1992) [hereinafter Bone, *Rethinking the Day in Court*].

72. See Resnik, Curtis, & Hensler, *Individuals Within the Aggregate*, *supra* note 61, for elaboration of these issues.

with having a lawyer or with thinking that lawyers provide good process. Lawyers may be bad agents in terms of process values, just as they have been accused of being inadequate representatives when the focus is on outcomes;<sup>73</sup> lawyers may be disloyal, self-serving, inept, or inattentive.<sup>74</sup> Perhaps other people, such as lay advocates,<sup>75</sup> or litigants themselves, should play greater roles in large-scale litigations,<sup>76</sup> and lawyers' roles should be diminished.

Thus far, judges have ordered fee payments to PSC members, who have highly visible roles in shaping litigation strategy.<sup>77</sup> Should judges have interest in creating monetary incentives for IRPAs to do the unglamorous work of providing ordinary legal services to the group of claimants? Can judges, clients, or others police the provision of services, so as to require fee payments only when services are actually rendered? Should courts focus instead on facilitating client-based groups?<sup>78</sup> Or are the intra-group conflicts among claimants and their physical dispersion obstacles too

73. Coffee, *supra* note 67, at 879, 882-96 (discussing the problems plaintiffs have in monitoring their attorneys).

74. Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 778, 812, 811-28 (1992) (arguing for a change from the "victimization strategy of disability advocacy" which "reproduces images of . . . dependence, incompetence, and deviance . . . [and] inhibits . . . narratives of [ ] autonomy and community"); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2131 (1991) (noting poverty lawyers' reliance on their "own narratives to define the client's story . . . silence[s] and displace[s] client narratives"); Lucie E. White, *Goldberg v. Kelly On the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990) (commenting that advocacy disempowers clients because "advocacy is a practice of speaking for the client,] . . . [and] the advocate . . . inevitably replays the drama of subordination").

75. See generally Edward V. Sparer, Howard Thorkelson, & Jonathan Weiss, *The Lay Advocate*, 43 U. DET. L.J. 493 (1966) (discussing the value of lay advocates).

76. KAREN M. HICKS, *SURVIVING THE DALCON SHIELD IUD: WOMEN V. THE PHARMACEUTICAL INDUSTRY 2*, 50-72, 118-19 (1994) (discussing the Dalkon Shield Information Network (DSIN), a political organization of which Hicks was the "principal founder," which created "an empowering dialogue with Dalkon Shield women" by cracking "the legalistic rhetoric").

77. See Resnik, Curtis, & Hensler, *Individuals Within the Aggregate*, *supra* note 61, at 66; see also *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir.) (citing the "fiduciary duty" of lead counsel not to "overreach" in a class fee application (quoting *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 18 (S.D.N.Y. 1980))), *cert. denied*, 484 U.S. 926 (1987). Some judges have raised concerns about their obligations toward both litigants and the community as a whole. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 89-112 (1995) (discussing ethics of courts).

78. At some points in the Dalkon Shield litigation, claimants' groups worked as consumer networks and functioned to create counterweights to the lawyers. HICKS, *supra* note 76, at 57-72, 96-107 (describing the development of the Dalkon Shield Information Network and its interaction with the courts and attorneys involved in the litigation); see also Elizabeth Newman & Laura Fry, *The Dalkon Shield and Women's Litigation* 14-33 (1990) (unpublished; on file with the *Texas Law Review*). In the 1960s, training lay advocates was the goal of some members of the welfare rights organizations. MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973*, at 28 (1993); see also Sparer et al., *supra* note 75, at 494, 509-15 (describing the "necessary and proper role of . . . lay advocates in securing justice . . .").

great to overcome?<sup>79</sup> Should efforts be made to help networks of lawyers who are not on the PSC to get together, so that they can form a group of significant size, by which to form a counterweight to the power of a PSC and of defendants' lawyers?<sup>80</sup> Or are these propositions misdirected, because of the fear that enabling individuals or subgroups to exercise control and to participate results in "degeneration"<sup>81</sup> that will undermine aggregate solutions? To return to the game theory metaphors with which I began, the fear (as Dr. Hensler notes) is too many "players" will attempt to find places at the table, and with the jostling, the proposed "global peace" settlement will unravel.

Deciding upon one's aspirations is critical; there is no escape from making decisions about questions of participation, control, and individualization. Every time lawyers and judges craft or authorize various ADR processes, fashion or approve resolutions, structure or avoid group trials, propose and approve attorney fee awards, these questions are answered. The structure of a lawsuit, its size, and the roles accorded to lawyers and clients create incentives that enhance or diminish individual participation. Money paid to lawyers is key: what forms of work are contemplated in the ADR programs and what work is paid for by court-ordered awards or permitted to be paid for under contractual agreements will greatly affect the kind of legal services provided.

I hope that the "players" pay increased attention to the issues raised by Deborah Hensler. Procedural innovations, rules, and agreements should specify the respective roles of lawyers and clients and the roles of the different lawyers—those on the inside, sitting at the table, and those who

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79. See generally Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 685 (1941) (discussing potential claimants' lack of information about their injuries, their legal rights, and resources to pursue redress); Peter H. Schuck, *Mass Tort Litigation: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. (forthcoming May 1995) (manuscript at 36, on file with the *Texas Law Review*) (commenting on the "diffuseness and conflicting interests of plaintiffs").

80. Cf. Schuck, *supra* note 79 (manuscript at 31-32) (noting that, in non-mandatory class actions, opt-out rights of plaintiffs give them the ability to dissent from proposed settlements with which they disagree).

81. Ben Kaplan first used this term in 1963, when he explained why mass torts were likely to be unsuitable for class action treatment. As he put it, even if aggregated, many mass torts would "degenerate in practice into multiple lawsuits separately tried." Memorandum from Ben Kaplan, Reporter, Advisory Committee on Civil Rules, to the Advisory Committee on Civil Rules, at EE-27 (Jan. 17, 1963) (summary statement for Topic EE, Modification of Rule 23 on Class Actions), *microformed on* CIS No. CI-6313-087 (Congressional Info. Serv.). He thought that individual questions of liability and of damages, coupled with varying state law on torts, would require a good deal of individualized treatment. *Id.*; see Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 5, 9-14 & n.17 (explaining Kaplan's objections to including mass torts as examples of cases to fit within the class action rule that he, as one of the drafters of the Federal Rules, was proposing); see also Bone, *Rethinking the Day in Court*, *supra* note 71, at 269-70, 279-89 (asserting that claims that litigants have rights to strategic autonomy are overstated).

never appear in court. The rules created in response to today's novel situations, arising in large-scale litigation, will spill over, affecting other kinds of cases. Procedural rules, ethical rules, and fee award allocations need to go hand in hand, and they should feature prominently in the innovative procedures that the participants in this Symposium shape.

