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Managerial Judging and Substantive Law

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INTRODUCTION

Since Professor Judith Resnik coined the term "managerial judging" thirty years ago to describe the expanded role of federal district judges under the Federal Rules of Civil Procedure, two distinct lines of scholarly analysis have emerged to discuss judicial management and innovation in complex civil cases. The first, which predates Resnik and is associated most closely with a seminal article by Professor Abe Chayes, focuses attention on the substantive content of constitutional and statutory norms and the role of the judge following adjudication of the merits in using the remedial powers of the court to carry those norms into effect. The second, which has come to occupy a central role in more recent debates over the judicial function, concerns the earlier phases of the litigation process in complex cases, when strong direction from the judge and decisions about scheduling, discovery, joinder, and communication with attorneys can channel settlement negotiations and shape outcomes. In both discussions, the figure of the proactive jurist, involved in case management from the outset of the litigation and attentive throughout the proceedings to the impact of her decisions on settlement dynamics—a managerial judge—has displaced the passive umpire as the dominant paradigm in the federal district courts.[1]

This bifurcation into two lines of analysis—one concerned with judicially supervised post-adjudication remedies in public law disputes and hence implicitly "substantive," the other focused on pretrial proceedings in complex litigation and hence implicitly "procedural"—has obscured the dynamic nature of the relationship that frequently exists between the mechanisms of litigation and the underlying substantive law. It is true that the business of judging implicates distinctive institutional and procedural norms that are worthy of study in their own right. But it is

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∗ Professor of Law, University of Pennsylvania Law School. The Institute for Law and Economic Policy has my thanks for including me in the distinguished conference that gave rise to this article. Conversations with Steve Burbank, Sam Issacharoff, Arthur Miller, Judith Resnik, David Shapiro, and Linda Silberman all served to enrich and sharpen my thinking on the matters I explore here.

1. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

also true that the institutional and procedural norms of the judiciary interface with controlling liability and regulatory policies in defining the parameters of litigation. When a federal judge engages in heavy-handed case management or makes decisions about the proper bounds of a complex proceeding, it is not just the norms of judging but also the applicable liability policies that must guide her in that endeavor. *Erie Railroad v. Tompkins*[2] and the Rules Enabling Act,[3] properly understood, both require such an approach. Professor Robert Cover made this observation almost forty years ago in a tribute to James Moore, one of the fathers of the Federal Rules, in terms that the Academy has largely let slip from its collective memory.

> We have become so transfixed by the achievement of James Wm. Moore and his colleagues in creating, nurturing, expounding and annotating a great trans-substantive code of procedure that we often miss the persistent and inevitable tension between procedure generalized across substantive lines and procedure applied to implement a particular substantive end. There are, indeed, trans-substantive values which may be expressed, and to some extent served, by a code of procedure. But there are also demands of particular substantive objectives which cannot be served except through the purposeful shaping, indeed, the manipulation, of process to a case or to an area of law.[4]

In some cases, controlling liability policies may provide a basis for arguing that restraint is required in shaping a complex proceeding. Such was the holding of the Supreme Court in the portion of its *Wal-Mart Stores, Inc. v. Dukes*[5] decision that found the class certified in that case to violate the requirement of commonality under Rule 23. Although portions of the Court's analysis may shape the construction of Rule 23(a) to some extent in other types of dispute, the commonality holding in *Dukes* is at base a statement of Title VII policy. In contrast, the portion of the Court's opinion that rejected the use of Rule 23(b)(2) to certify a class of workers seeking backpay for sex discrimination is primarily about the scope and

2. 304 U.S. 64 (1938).

3. 28 U.S.C. § 2072 (2012).

4. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975). In an accidental commentary on the Academy's failure to retain Cover's insights here, the Westlaw electronic copy of the publication renders the late scholar's name as "Robert M. Covert." The wisdom in this essay has indeed become a covert presence in discourse about the judicial function. *See id.*, *available at* http://www.westlaw.com.

5. 131 S. Ct. 2541 (2011).

operation of Rule 23(b)(2) itself—a trans-substantive procedural ruling. But even that portion of the opinion implicates questions of Title VII policy in ways that commentary on the opinion has not yet appreciated. The Court's fleeting answers to those Title VII questions contributed to its conclusion that class certification was improper. A more careful focus on the relationship between Title VII policy and the operation of Rule 23 serves to clarify the *Dukes* decision and highlights possible grounds for critiquing and distinguishing the Court's ruling.

In other cases, the substantive law may affirmatively support judicial management and procedural innovation. The claims of first responders injured by the toxic conditions at the site of the September 11, 2001 World Trade Center disaster offer a prominent example. In a series of targeted enactments, Congress created a comprehensive scheme for the resolution of those first-responder claims, specifying a liability rule, preempting alternative remedies, imposing a collective damages cap, and enacting an exclusive grant of jurisdiction to the federal court in the Southern District of New York that resulted in the consolidation of more than 10,000 individual cases before Judge Alvin Hellerstein. In confronting the task of adjudicating these claims, Judge Hellerstein concluded that the proceeding before him required that he enforce a standard of fairness and adequacy in assessing the relief available to claimants, rather than simply treating the action before him as a standard-issue claims-processing mechanism for unconnected individuals, and he aggressively managed the litigation in order to supervise the proposed compensation.[6]

As the Judge has been frank to admit, some of his actions were unprecedented. Most notable among these was his rejection of an initial aggregate settlement in a non-class case, requiring the defendants to produce more funds and the plaintiffs' attorneys to give up some of their fees before he would approve the agreement, even though all the claimants had signed individual retainer agreements with their attorneys.[7] The proceedings, which are on appeal to the Second Circuit at the time of this writing, have been the subject of sharp criticism. That criticism has been misplaced. Judge Hellerstein acted within the proper scope of his authority

6. Judge Hellerstein and his special masters, Professors Henderson and Twerski, provide their account of the history of that proceeding and the nature of the problems they confronted in Alvin K. Hellerstein, James A. Henderson, Jr., & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127 (2012), *available at* http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Hellerstein-et-al-final.pdf.

7. *See id.* at 157–72 (describing the district court's rejection of the initial settlement and offering an account of the court's reasons for believing that such managerial control of the proceeding was justified).

in employing such forceful tactics with the litigants before him. His authority was not that of a generic "managerial judge." It was the authority to use case management and procedural innovation as tools for carrying into effect the distinctive liability policies enacted by Congress in the comprehensive statutory scheme that defined and limited the relief available to first responders.

The interplay between procedural mechanisms and underlying liability policies is evident in more prosaic cases as well. Judges are regularly called upon to exercise their discretion to shape the boundaries of litigation within the open-textured provisions of the Federal Rules. Liability policy can and should guide the judge's hand in that endeavor. An emerging issue in the federal district courts concerning *ex parte* discovery and the operation of joinder under Rule 20 in online copyright infringement suits illustrates this common dynamic.

In this Article, I examine the interface between substantive law and managerial judging. My aim is not to criticize the dominant strain of current scholarship, with its focus on endogenous values in the practice of judging. That work has posed important questions that have properly captured the attention of Academy, Bar and Bench. It is rather to ground that ongoing discussion in a richer account of the role that substantive legal policy can and should play in defining the role of the judge, constraining judicial options in some cases, and legitimizing judicial initiative in others.

I. SUBSTANCE AND PROCEDURE IN THE BUSINESS OF JUDGING

Commentators on the importance of procedure in substantive law reform frequently advert to a noted passage from Karl Llewellyn's *The Bramble Bush*: "You must read each substantive course, so to speak, through the spectacles of the procedure. For what substantive law says should be means nothing except in terms of what procedure says that you can make real."[8] Less frequently remarked upon is the procedural context in which Llewellyn was writing. The essays that make up *The Bramble Bush* were written between 1929 and 1930,[9] prior to the enactment of the Rules Enabling Act of 1934 and during a pocket of time when efforts at federal procedural reform appeared moribund.[10] The Conformity Act still

8. KARL N. LLEWELLYN, THE BRAMBLE BUSH 11 (2008).
9. *See id*. at xxiii.
10. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1089–94 (1982).

governed, requiring a federal court presiding over an action at law to conform its procedures in most respects to those employed by the courts of the state where it was located. Those procedures, in turn, ranged from the traditional forms of action still utilized in some states, where the boundaries of the lawsuit as defined through joinder and pleadings derived from the inherent nature of the rights being prosecuted (and also were hampered by vestigial and inefficient anomalies), to variations on the Field Code, which aimed to codify procedure into an internally coherent system but produced unsatisfying and uneven results. Indeed, New York, where the Field Code originated and where Llewellyn taught, was notorious as one of the most troubled among the Code states, with its early reform efforts having metastasized to become "'an overgrown mass of detail.'"[11] The unpredictable and variable nature of civil practice in the United States during this period was acute. As a realist commentary upon the role of procedure, Llewellyn's remark was concerned more with the sheer ability of claimants to survive the litigation process than with the relationship between regulatory policy and judicial process.[12]

The procedural reform movement that produced the Enabling Act and the Federal Rules sought to create uniformity in place of this disorder and an adjudicatory system that would facilitate rather than frustrate substantive legal policies. Professor Robert Bone, describing the late nineteenth-century conceptual traditions out of which this reform movement arose, explains the emerging view that "procedure was related instrumentally to substance. An ideal procedural system had one objective: to facilitate the crafting of a remedy ideally suited to redress the infringement of right and thus to restore the social ideal to a condition of equilibrium."[13] This conceptual tradition only benefited from the transition in the early twentieth-century from a natural law account of rights and remedies to a positive account of law and policy. In the wake of that transition, Bone asserts, "[m]odern legal discourse is so deeply linked to a

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11. *See id.* at 1042, 1045–46 (quoting *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 34 A.B.A. REP. 578, 596 (1909)).

12. Professor Llewellyn conveys some of that procedural atmosphere in text preceding his famous maxim:

> The lawyer's slip in etiquette is the client's ruin. From this angle I say procedural regulations are the door, and the only door, to make real what is laid down by substantive law. Procedural regulations enter into and condition all substantive law's becoming actual when there is a dispute.

Llewellyn, *supra* note 8, at 11.

13. Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 17 (1989).

vision of procedure as instrumental to a distinct body of substantive law that it is often difficult to imagine other possibilities."[14] The Rules Enabling Act provides doctrinal grounding for this proposition when it formalizes the subordinate status of practice and procedure to "substantive rights" in defining the scope of the rulemakers' authority.[15]

A countervailing trend has also emerged, however, one that is captured by the contemporary emphasis on the trans-substantive nature of federal procedure. In its most basic application, the term "trans-substantive" simply describes a fact about the Federal Rules, reiterated recently by Professor Resnik, that "[u]nlike workers' compensation, the [1937] New York banking law [at issue in the *Mullane* case], and the FLSA, the 1930s Federal Rules crafted a trans-substantive set of procedures to be applied regardless of the kind of lawsuit (contract, tort, patent, federal statutory right) or the form of relief (damages or injunction)."[16] In discussions of procedural reform, the principle of trans-substantivity has also performed a political function, serving at times to deflect targeted efforts to accomplish social ends through the mechanism of procedure. Thus Professor Paul Carrington, recapitulating some of the history described above, recounts the tenor of his experience in 1985 while serving as Reporter to the Advisory Committee on Federal Rules, when the committee reluctantly embraced greater transparency and public participation in the rulemaking process, a reform accomplished largely as a consequence of the scholarly critiques of Professor Stephen Burbank. Carrington writes:

> The structure of the rulemaking process was designed to encourage the making of transsubtantive rules. . . . Those who designed and enacted the 1934 Rules Enabling Act did not suppose that a procedure equally suited to all kinds of cases could be devised, but if special rules for a substantive category of cases were needed, their creation would be a task for Congress. Meanwhile, until such a special need should appear, a politically unaccountable group should work to serve the broad aims . . . stated in [Federal Rule of Civil Procedure 1]. Or so it was thought.
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> But after assessing the situation on the ground in 1985, it seemed to the Advisory Committee unlikely that continued resistance to open meetings would succeed. Procedural rules have substantive

14. *Id*.
15. 28 U.S.C. § 2072(a) & (b) (2012).
16. Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 140–41 (2011).

> consequences, and the 1985 Advisory Committee felt that those affected by a change in the rules should be heard.[17]

Professor Carrington captures two related dynamics in this account of the 1985 reform debate. First, the Rules process has long been informed by the belief that the rulemakers should not craft procedures specifically designed for particular causes of action. This first proposition tends to reinforce the mindset that the underlying substantive law should not inform the operation of the Federal Rules—a distinct issue, and one that does not follow from the principle of trans-substantivity, but the two have evolved to convergence nonetheless.[18] Second, trans-substantivity focuses attention upon the practices and procedures of judging as matters with "substantive consequences" that are nonetheless separate and distinct from any substantive legal regime—a proposition that reflects a core of truth but that once again reinforces an artificial separation between procedure and substantive policy and has the capacity to hobble effective analysis.

Professor Llewellyn's enduring maxim has thus accommodated a range of meanings. When first issued, his words in *The Bramble Bush* served as a commentary on the desperate need for unifying and simplifying procedural reforms. Since then, his admonition has been used to emphasize the independent norms of judicial management to the exclusion of careful attention to the underlying substantive law. In the analysis that follows, I suggest an alternative.

II. LIABILITY POLICY AS A PROCEDURAL CONSTRAINT: *WAL-MART V. DUKES*

I begin by exploring the role that the underlying substantive law can play in constraining a judge's managerial options in a complex

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17. Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 617–18 (2010).

18. The separation-of-powers questions surrounding this aspect of the Rules Enabling Act will not be my focus in this Article, but it bears noting that this account of the Act's limitations—that "if special rules for a substantive category of cases were needed, their creation would be a task for Congress," *id.*—is in tension with the Supersession Clause and its seeming grant of authority to the rulemakers to supplant congressionally enacted procedures, including those targeted to particular substantive categories of cases. Professor Burbank wrote in a similar vein when commenting on Professor Carrington's approach to the Enabling Act shortly after the reforms described above, explaining: "I believe that, under the original Enabling Act, the restrictions on court rulemaking should have been read to effect the purpose of allocating federal lawmaking power of the legislative type, not just to protect existing law, and certainly not just to protect state law." Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1019.

proceeding, using *Wal-Mart v. Dukes*[19] as an illustrative case. *Dukes* has been received as a watershed, with academic commentators treating the Court's holdings on commonality and on Rule 23(b)(2) as paradigm-shifting statements of class-action policy. There is no question that *Dukes* is a consequential case. But the academy has been too quick to assign the opinion broad trans-substantive meaning. The Court's discussion of the commonality issue in *Dukes* is grounded in Title VII policy and speaks primarily to the federal common law of disparate impact remedies under the Civil Rights Act of 1964. The handful of statements on Rule 23 and commonality play only an equivocal role in the analysis. The Court's treatment of Rule 23(b)(2), in contrast, does speak to core questions of class-action policy. Even so, the substantive policies underlying the dispute played a major role in the Court's determination that a (b)(2) action was unavailable, albeit a role that the Court itself left largely unexplored. The constraints that *Dukes* imposes upon class-action practice are inextricably tied to a series of express and implied holdings under Title VII and should be approached with that substantive focus in mind.

Wal-Mart v. Dukes presented the Court with the largest proposed class action ever attempted under Title VII. Wal-Mart, the Nation's largest private employer, stood accused of utilizing a nationwide management policy that consistently imposed a disparate impact upon female workers. The policy reposed broad discretion in store-level managers to employ their own "subjective criteria" in matters of hiring, advancement and termination of employees, and the plaintiffs claimed that such discretion produced a male-dominated workplace hostile to female employees. Plaintiffs sought to represent a class of current and former female employees who had been subject to these policies, numbering about one and a half million in total, claiming injunctive and declaratory relief, backpay, and punitive damages on behalf of the class. The district court certified the class and the *en banc* Ninth Circuit affirmed, finding that the requirements of Rule 23(a) were satisfied and that the action could proceed under Rule 23(b)(2) as a class seeking "final injunctive relief or corresponding declaratory relief . . . respecting the class as whole," with the request for backpay characterized as incidental to the non-monetary relief.[20]

The Supreme Court reversed in an opinion that divided 5–4 in one part and was unanimous in another. The Court divided on whether the

19. 131 S. Ct. 2541 (2011).
20. *Id.* at 2547–50.

plaintiffs' action satisfied the requirement of commonality under Rule 23(a), with the majority finding that Wal-Mart's policy of reposing discretion in store-level managers did not create a sufficiently common issue for class certification. Speaking unanimously, the Court found that Rule 23(b)(2) was not an appropriate vehicle for certifying a class that sought individual backpay awards or individualized injunctions to reinstate particular employees. Commentators and lower federal courts have given the decision active attention in the year since it was rendered.[21] It is thus important to have a clear understanding of the elements of the Court's ruling and the sources of authority from which they spring.

Turning first to the divided portion of the opinion that speaks to Rule 23(a), there are at least two components of the Court's commonality analysis that can properly be termed pure questions of Rule 23 policy. First, in describing how cohesive a common issue must be among class members—and how dispositive the resolution of that issue must be to their claims—the Court adopts a formulation from Professor Richard Nagareda that focuses on the presence of "dissimilarities" within the suit and emphasizes "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation" rather than merely raising common questions.[22] Second, in discussing the evidentiary burden borne by the party seeking certification, the Court offers a strong statement of the plaintiff's obligation to show affirmatively that Rule 23 is satisfied through the introduction of evidence that "convincingly establishes" its requirements.[23] Both aspects of the Court's holding have trans-substantive procedural impact. The one offers a formulation of commonality that may tighten certification analysis in future cases regardless of the substantive legal regime involved; the other sets a generally applicable evidentiary condition at the threshold of class certification. But the primary significance of the Court's commonality analysis in *Dukes* relates to Title VII.

Commonality analysis requires a court to examine the nature of the putative class claims asserted by the plaintiffs and the elements of proof

21. A Westlaw KeyCite request on the opinion performed on June 27, 2012 returned over 500 reported court decisions citing to *Dukes* and well over 1,000 secondary sources.

22. *Dukes*, 131 S. Ct. at 2550–51 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009) (italics in original)). As Justice Ginsburg correctly notes in her partial dissent, the quoted material is taken from a portion of Professor Nagareda's article in which he has referenced, and appears still to be discussing, the requirement of predominance under Rule 23(b)(3). *Id.* at 2565–66 (Ginsburg, J., concurring in part and dissenting in part).

23. *Id.* at 2551–52, 2554.

necessary to establish those claims. Questions of Rule 23 policy—in *Dukes*, whether a court should require only common questions or instead examine "the capacity of a proceeding to generate common answers apt to drive the resolution of the litigation"—must be coupled with questions of liability policy—what type of showing will establish liability in a Title VII disparate impact case, and what type of evidence is competent to make that showing?

After its recitation of the Rule 23 standard, the *Dukes* Court offers an answer to those questions that sounds entirely in Title VII policy. The core of the class proceeding in *Dukes* was a company-wide policy, implemented by Wal-Mart in all of its stores, that reposed discretion on matters of hiring and promotion in store-level managers. Plaintiffs argued that the policy imposed a disparate impact upon women in its overall effect upon company personnel, whether by reinforcing unconscious bias among managers, masking acts of intentional discrimination, or making advancement within the workplace dependent upon social dynamics that disadvantaged women. The common question, and it was undeniably "common," was the nature and extent of the effects imposed by that company-wide policy and whether those effects constituted actionable harms. The "capacity of [the] proceeding to generate common answers apt to drive the resolution of the litigation" depended upon the operative significance, under the controlling liability regime, of the features of the policy that were common to the entire company.

The Court framed its commonality analysis with these principles, flagging the precise nature of the claimed harm under Title VII as its starting point:

> Title VII . . . can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity

> will resolve an issue that is central to the validity of each one of the claims in one stroke.[24]

After reviewing the record from the certification hearing, the Court concluded that the evidence did not support the existence of a policy that was potentially actionable under Title VII and common to the entire class.

> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's ''policy'' of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said ''should itself raise no inference of discriminatory conduct."
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> To be sure, we have recognized that, ''in appropriate cases,'' giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since ''an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.'' But the recognition that this type of Title VII claim ''can'' exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title

24. *Id.* at 2551.

> VII claims will in fact depend on the answers to common questions.[25]

The Court's confidence about what most companies and managers would surely do if left to their own devices may provoke skepticism, and the merits of its Title VII analysis may be subject to debate. What is important for present purposes is to recognize that it is in fact Title VII policy that drives the Court's analysis. If Wal-Mart had an express policy that encouraged stores to prioritize men over women in hiring and promotion, that policy would itself violate Title VII and be subject to a common, classwide injunctive remedy. This is true even if, "left to their own devices," many managers would disregard the policy's encouragement and make decisions based purely on merit. Such a policy would embody intentional discrimination in defining the opportunities available to prospective employees, and that suffices to make out a Title VII claim on a common basis.[26] Just so, if the company had a policy that favored workers with greater height and upper-body strength in positions where those characteristics have no occupational justification, the policy would be subject to a common, classwide injunctive remedy for its unjustified disparate impact, even if many managers would disregard the policy and instead "select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all." Once again, the express policy produces a disparate impact sufficient to warrant injunctive intervention under Title VII.[27]

Thus, the Court's holding does not speak primarily to the content of Rule 23(a)'s commonality requirement. Rather, that holding sounds in the liability policies of Title VII. If the Court had found that a company-wide policy of reposing discretion in store-level managers could support a Title VII injunction because of its capacity to impose a disparate impact upon women, regardless of how that policy plays out in particular stores—just as the express preference and height-and-weight examples described above could violate Title VII for their intentional discrimination and disparate

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25. *Id.* at 2554 (citations omitted).

26. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) ("[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.").

27. *See* Dothard v. Rawlinson, 433 U.S. 321, 329–30 (1977) (holding that height and weight restrictions that disproportionately exclude female employees "establish a *prima facie* case for discrimination" if "the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern" and disavowing any "requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants").

effects, even in the face of store-level idiosyncrasy and variation—then the fact of the discretionary policy would itself have constituted a common issue, as "all the employees' Title VII claims [would] in fact depend on the answers to common questions."[28] The Court's holding that such a claim could not be certified against Wal-Mart on a company-wide basis constituted a pronouncement on the content of Title VII's liability rule—the circumstances in which a discretionary policy will or will not support a finding of disparate impact—and spoke to the commonality requirement of Rule 23 in only a derivative fashion.

The Court's analysis of Rule 23(b)(2) and individually tailored remedies, in contrast, sounds primarily in the policies of Rule 23 itself. It is a trans-substantive procedural ruling. Even so, substantive liability policy does play an indirect role in the Court's analysis. But the Court leaves that role largely unexplicated.

In the part of its opinion that speaks unanimously, the Court rejects Rule 23(b)(2) as a vehicle for certifying claims for backpay under Title VII. Disapproving the more expansive uses to which some lower federal courts have put that provision, the *Dukes* Court limits the reach of Rule 23(b)(2) to cases in which "a single injunction or declaratory judgment would provide relief to each member of the class" and holds it to be unavailable "when each individual class member would be entitled to a *different* injunction or declaratory judgment" or "would be entitled to an individualized award of monetary damages."[29] The Court leaves open the question whether (b)(2) could be used in cases where claims for injunctive or declaratory relief "predominated" over paired claims for monetary damages, though it indicates strong disapproval of such hybrid actions and makes clear that their ambit would be narrow in any event.[30]

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28. *Dukes*, 131 S. Ct. at 2554.

29. *Id.* at 2557 (italics in original).

30. *Id.* at 2559–61. Unfortunately, the Court also repeats the *Shutts* fallacy, citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), for the proposition that "[i]n the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process." *Id.* at 2559. *Shutts* decided no such thing. The Court's 1985 ruling answered a question about state adjudicatory power: whether a state court may entertain a nationwide class action involving absent class members with no prior connection to the forum. The Court answered in the affirmative on the strength of the individual notice and opt-out opportunities required by state law, concluding that class members who declined to opt out had manifested sufficient consent to be bound by the forum. In a suit where the adjudicatory reach of the court is not in question, this holding has no direct application, and the Court has held in another seminal opinion, *Mullane v. Central Hanover Bank*, that individual damages claims can sometimes be compromised in a representative proceeding with no individualized notice or opt-out opportunity. 339 U.S. 306 (1950). I explore these issues at length in Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2076–80 (2008).

In contrast to its discussion of commonality, the Court's analysis in this section of its opinion is concerned almost entirely with Rule 23 itself. The Court discusses the history and origins of Rule 23 as a lens through which to scrutinize the proper function of subsection (b)(2).[31] It explains that the text and procedural policies bound up in subsection (b)(2) would be frustrated by allowing its use for the certification of individual damages claims, as it refers to "injunctive relief" that is "appropriate respecting the class as a whole."[32] And it points to the coordinate features of a 23(b)(3) class action that are designed to safeguard the interests of class members when individual damages claims are in play, concluding that the integrity of the Rule would be subverted if subsection (b)(2) could be pressed into service to certify claims for individualized monetary damages without the operation of those safeguards.[33]

These pronouncements upon Rule 23(b)(2) do not depend upon the particularities of the claims sought to be certified. They speak in a trans-substantive fashion to the structure, purpose and operation of the Rule and the process values of notice, litigant autonomy, and opportunity to be heard that are addressed in the Rule's respective provisions. There should be no doubt about the lasting significance of that part of the Court's holding to class action litigation across different substantive legal contexts.[34]

Nonetheless, there is one portion of the Court's holding that does depend upon an assessment of liability policy under Title VII. The Court correctly links this part of its Rule 23 analysis to the Rules Enabling Act, but it fails to provide an adequate account of the underlying substantive law.

Having concluded that Rule 23(b)(2) is only available in cases involving requests for relief that can readily be crafted on behalf of the class as a whole, rather than relief that must be individually tailored to each class member, the Court holds that requests for backpay under Title VII do not satisfy that requirement. Under the statute's remedial provisions, the Court explains, "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay"—specifically, the opportunity to show as to each employee "that it took an adverse

31. *Dukes*, 131 S. Ct. at 2557–58.

32. *Id.* at 2557.

33. *Id.* at 2558–59.

34. Professor Jack Coffee emphasized the relative importance of the Court's 23(b)(2) holding in an early response to the decision. *See* John C. Coffee, Jr., *The Future (if Any) of Class Litigation After 'Wal-Mart,'* NAT'L L.J., Sept. 12, 2011.

employment action against [the] employee for any reason other than discrimination."[35] The Ninth Circuit had approved the use of a sample-based approach to resolve these defenses, under which "[t]he percentage of claims determined to be valid would . . . be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery" without the need for individualized determinations in each case.[36] Rejecting this form of "Trial by Formula," the Court found that a district court was not empowered to administer Title VII claims in a manner that altered the defendant's ability to litigate statutory defenses employee by employee, even in cases involving huge numbers of claims where so many individual hearings would be impractical. Treating the question as one of procedure versus substance, the Court proclaimed: "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[37]

The Court is correct to say that the Rules Enabling Act would forbid a court from relying upon Rule 23 as the source of its authority in crafting a class proceeding that would substantially modify the rights that the parties would enjoy in a purely individual case. But the Court is incorrect in concluding that the holding in *Dukes* necessarily flows from that premise. There is another source of authority that could take into account the larger litigation context—a huge number of claimants, and the impracticality of providing relief without some form of aggregate proceeding—in determining whether it is appropriate to structure a class action in which the defendant's ability to assert individual defenses as to each claimant is altered: the underlying substantive law itself.

Professor Burbank and I addressed a related issue in our analysis of *Shady Grove Orthopedic Associates v. Allstate Insurance*,[38] a diversity case in which the Court found Rule 23 to preempt a New York statute, CPLR § 901(b), that forbade class actions for causes of action affording statutory or penalty damages unless the statute creating the cause of action specifically authorized classwide relief. Justice Scalia's lead opinion is highly formalistic, relying upon the unconvincing proposition that class certification has only an "incidental" effect on the dynamics of litigation

35. *Dukes*, 131 S. Ct. at 2560–61.
36. *Id.* at 2561.
37. *Id.* (citations omitted).
38. 130 S. Ct. 1431 (2010).

and settlement as the basis for its conclusion that Rule 23 presents no problems under the Enabling Act so long as the formal elements of the underlying cause of action remain unchanged in a class action.[39] As we explained in that earlier article, it seems likely that "the majority simply could not see a way to uphold the facial validity of Rule 23 while at the same time acknowledging the industry-changing impact of class action practice."[40] But it is not necessary to retreat to a land of fancy to preserve Rule 23 within the Enabling Act structure.

> The solution to the seeming dilemma caused by Rule 23's dramatic impact upon substantive liability and regulatory regimes is that Rule 23 is not the source of the aggregate-liability policies that generate that impact, and it never has been. Rather, courts must look to the substantive liability and regulatory regimes of state and federal law in determining whether aggregate relief is appropriate and consistent with the goals of that underlying law. Rule 23 is merely the mechanism for carrying an aggregate proceeding into effect when the underlying law supports that result. It is an important mechanism, and one that makes its own controlling policy choices for the federal courts about such matters as notice, opportunity to opt out, and immediate appeal of certification. But Rule 23 does not set policy on the propriety of aggregate remedies as a means of accomplishing regulatory goals—and it could not possibly do so.[41]

In *Shady Grove*, the plurality argued that a Federal Rule could preempt any state liability or regulatory policy that was enforced through a mechanism that utilized "procedural" language. The majority comprising Justice Stevens and the four Ginsburg dissenters, however, recognized that liability policies are sometimes bound up with mechanisms that look procedural in form. The result in the case hinged upon Justice Stevens's conclusion that CPLR § 901(b) was not such a provision.[42]

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39. *Id.* at 1443 (Scalia, J., for himself and Roberts, C.J., Thomas, J., and Sotomayor, J.).

40. Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 65 (2010).

41. *Id.* at 21.

42. It is unfortunately the case that the Ginsburg/Stevens majority discussed these issues exclusively in terms of state substantive policies, perpetuating the fallacy that the limitations of the Rules Enabling Act are particularly directed to state law and federalism values, rather than applying equally to federal question cases and primarily implicating separation-of-powers concerns, *see Shady Grove*, 130 S. Ct. at 1449–50 ("It is important to observe that the balance Congress has struck turns, in part, on the nature of the state law that is being displaced by a federal rule.") (Stevens, J., concurring in part and concurring in the judgment), though Justice Ginsburg was more careful to specify that this way of framing the issue obtains only in diversity cases, *see id.* at 1460–64. For a discussion of these

In *Dukes*, the Rule 23(b)(2) question presents an analytical mirror-image of the question presented in *Shady Grove*. Rule 23 is a procedural mechanism constrained by the Enabling Act. Title VII embodies a set of regulatory and liability policies regarding discrimination in the workplace. Having concluded that plaintiffs seeking certification cannot proceed under section (b)(2) when each class member's claim would require an individualized remedy, the Court correctly turns to Title VII to determine whether the liability policies embodied in the statute could accommodate that requirement. Thereafter, however, the Court's opinion suffers from inadequate analysis.

The Court concludes that it would be inconsistent with the liability policies reflected in Title VII to permit the resolution of backpay claims without giving Wal-Mart an opportunity to raise individualized defenses to the claims of each absentee. It relies for that conclusion upon two sources of authority. First, the Court points to the statute itself, which creates an affirmative defense for employers who can demonstrate a non-discriminatory reason for taking adverse employment action. The statutory text, however, does not specify the form or method of that defense. The provision is directed only to the permissible scope of a court's order:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.[43]

The Court then points to its own statements in *International Brotherhood of Teamsters v. United States*[44] (which in turn rely upon *McDonnell*

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matters, including an account of the differing roles that federal courts play as expositors of common law in difficult Rules Enabling Act cases when proceeding in diversity versus federal question jurisdiction, *see* Burbank & Wolff, *supra* note 40, at 48–51.

The *Dukes* decision offers an implicit corrective to this misframing of the Enabling Act when it invokes the Act as a limitation on the range of interpretations that are permissible for Rule 23(b)(2) in that case, since *Dukes* is a federal statutory dispute in which only federal substantive rights are threatened with abridgment or modification. *See supra* text accompanying notes 30–32. The Court does not flag the issue for particular attention, but the invocation of the Enabling Act is significant nonetheless as a counterweight to the frequent occasions on which the Court has implied that the Act is primarily aimed at safeguarding federalism values. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965).

43. The Civil Rights Act of 1964, Title VII, Section 706(g), 42 U.S.C. § 2000e-5(g)(2)(A).

44. 431 U.S. 324 (1977).

Douglas Corp. v. Green[45] and *Franks*[46]) to describe the "procedure[s] for trying pattern-or-practice cases that give[] effect to these statutory requirements," procedures that provide an opportunity for the defendant to "raise any individual affirmative defenses it may have"[47] against each claimant for separate adjudication.

Teamsters, *McDonnell Douglas*, and *Franks*—and now *Dukes*—are federal common-law rulings. In each case, the Court has taken portions of a regulatory statute that do not specify the methods of evaluating proof or administering remedies and set forth a body of judge-made law designed to carry into effect the express provisions of the statute and the policies underlying them. At the very least, the rulings are robust interstitial federal common law, filling in gaps in the statute that Congress must have contemplated the courts would go on to specify. But they also constitute affirmative statements of policy by the federal courts, making substantive decisions within the framework Congress set forth about the balance between reasonable opportunities for plaintiff recovery, on the one hand, and protection of defendants from unwarranted liability or settlement pressure, on the other. And the Court has been attentive to the impact of Rule 23 upon those competing priorities when setting federal policy for Title VII class actions.

In *Franks*, for example, the Court broadened the forms of class-wide relief available to employees seeking vested status in a seniority system as part of the remedy required to make them whole for past acts of racial discrimination. Citing portions of a Conference Committee report attending the 1972 amendments to Title VII, the Court noted the report's enjoinder that courts "'fashion the most complete relief possible'" and found in it "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial

45. 411 U.S. 792 (1973). *McDonnell Douglas* introduced the burden-shifting framework by which a Title VII claimant can make out a prima facie case of discrimination and then shift the burden to the employer to identify a neutral reason for the adverse employment action. *Id.* at 802–04. It also validated the use of "statistics as to [a company's] employment policy and practice" as a means of determining whether a refusal to hire a particular job applicant "conformed to a general pattern of discrimination against blacks," though the Court cautioned that, in an action brought by an individual claimant, "general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." *Id.* at 804–05 & n.19.

46. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

47. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

discrimination in hiring."[48] The Court responded to the charge that classwide seniority relief could result in unfair burdens upon innocent employees whose seniority would thereby be lessened by emphasizing that "[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies."[49] Validating the propriety of "class-based seniority relief for identifiable victims of illegal hiring discrimination," the Court reserved the possibility that "[c]ircumstances peculiar to the individual case may, of course, justify the modification or withholding of seniority relief," but only when such exceptions were recognized "for reasons that would not if applied generally undermine the purposes of Title VII."[50]

Franks speaks not only to the availability of a particular remedy under Title VII (inclusion in a seniority system) but the administration of that remedy on a class-wide basis and the resulting impact upon the purposes underlying Title VII. In a similar fashion, lower federal courts have grappled with the question whether an individual non-class plaintiff in a workplace discrimination case can proceed on a *Teamsters* pattern-or-practice theory, in which the plaintiff can establish a *prima facie* case by showing "that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers."[51] Some courts have found that this method of proof is available to private litigants only on a class-wide basis,[52] while others permit individual plaintiffs to rely upon pattern-or-practice statistical methods provided that they are sufficiently probative of the reasons underlying the adverse employment action.[53] In both cases, one sees what Professor Burbank and I have described as "the application of Rule 23 [serving as] the occasion for the Court to implement class action policies in federal common law that it was

48. *Franks*, 424 U.S. at 763–64 (quoting SECTION-BY-SECTION ANALYSIS OF H.R. 1746, ACCOMPANYING THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 CONFERENCE REPORT, 118 CONG. REC. 7166, 7168 (1972)).

49. *Id.* at 777–78 (citations and quotations omitted).

50. *Id.* at 779–80.

51. *Teamsters*, 431 U.S. at 360.

52. *See, e.g.*, Semsroth v. City of Wichita, 304 Fed. Appx. 707, 716–17 (10th Cir. 2008) (holding that "the pattern-or-practice method should be reserved for government actions or plaintiffs in class actions to establish the presence of a discriminatory policy, rather than an individual claim"); Lowery v. Circuit City, 158 F.3d 742, 759–64 (4th Cir. 1998) (rejecting pattern-or-practice method in individual Title VII case).

53. *See, e.g.*, Bruno v. W.B. Saunders Co., 882 F.2d 760, 766–67 (3d Cir. 1989) (permitting use of pattern-or-practice style statistical evidence and explaining that "in individual disparate treatment cases such as this, statistical evidence . . . need not be so finely tuned" because the claim does not depend upon demonstrating "systemic employment practices") (citation omitted).

otherwise authorized to make"[54]—whether the federal court is implementing the substantive federal policies mobilized by a statute like Title VII, or utilizing their authority as independent tribunals to articulate rules on such matters as the tolling of a limitations period as in *American Pipe*[55] or a rule of preclusion as in *Cooper*.[56]

In *Dukes*, the Court fails to address the significance of the aggregate litigation context in assessing the content and operation of these federal common-law policies. *Wal-Mart v. Dukes* presented claims of nationwide scope brought against the country's largest private employer, alleging a pattern of substantial harm to female employees as a consequence of the employer's decision to eschew objective standards for hiring and promotion across the company. It is possible that the purposes underlying Title VII could only be faithfully carried into effect in such a case through a nationwide class proceeding that was comprehensive in scope. Insofar as Title VII aims to provide relief to workers who have suffered harm as a result of discriminatory practices, and also to force employers to internalize the actual harm caused by past wrongs, a nationwide proceeding might provide the only practical and economically viable path in response to a pervasive but inchoate policy in a massive national company. And insofar as Title VII aims to eliminate discriminatory practices prospectively, a proceeding that scrutinizes that policy and crafts relief on a company-wide basis may be a necessary tool. At least, so the plaintiffs argued, and those arguments cannot be dismissed out of hand.

If clear statutory text requires individualized assessments that would make a nationwide class action impossible to certify, then a federal common law response is foreclosed. Section 706(g)'s references to the "reinstatement of an individual" and an affirmative defense if adverse action toward "such individual" was non-discriminatory might require individual hearings and foreclose a (b)(2) class action. But there is room for disagreement about just how clear a mandate is imposed by the text alone. If, instead, prior rulings about the requirement for individualized hearings are the product of federal common law building upon indeterminate statutory language, then a case like *Wal-Mart v. Dukes* provides an occasion for revisiting those federal common law rulings

54. Burbank & Wolff, *supra* note 40, at 50.

55. American Pipe & Constr. v. Utah, 414 U.S. 538 (1974) (establishing tolling rule for putative class members in actions filed under Rule 23).

56. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867 (1984) (setting preclusion rule for individual claimants in Title VII discrimination case following unsuccessful prosecution of a pattern or practice claim on a classwide basis).

rather than merely applying them to deny relief. The balance struck in prior cases between reasonable opportunities for recovery by plaintiffs and protection of defendants from unwarranted liability have proceeded from a set of assumptions about litigation dynamics and industry conditions. If those assumptions do not obtain in a new commercial context, then the same authority that gave rise to the *Teamsters* framework in the first place could require reexamination.[57]

In such a case, the aggregate litigation context would matter to some aspects of the parties' claims and remedies. This is not because Rule 23 mandates a reexamination of Title VII policy—it does not, and cannot under the Enabling Act—but rather because the underlying liability policies themselves call for that reexamination. As Professor Kaplan explained when addressing an analogous analytical question relating to subject-matter jurisdiction in class actions, "[l]ike other innovations from time to time introduced into the Civil Rules, those as to class actions change the total situation on which the statutes and theories regarding subject matter jurisdiction are brought to bear."[58] Both circumstances evince what Professor Burbank and I have called the "tension between the limits of the Enabling Act and the power of the Federal Rules to shape or catalyze developments in the underlying law."[59]

I do not argue here that such alterations to the federal common law of remedies under Title VII were warranted in *Dukes*, or that the Court's ultimate holding regarding the availability of certification under Rule 23(b)(2) was incorrect. A proper treatment of those questions exceeds the scope of this Article. But it is these questions that the Court should have addressed in the second half of its analysis. The constraints on class action practice that *Dukes* imposes are defined by the interplay between Rule 23 and the Civil Rights Act of 1964. Whether those constraints represent good policy or bad under that landmark statute, they are largely substance-specific and should be recognized as such.

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57. Professor Sherry makes a similar observation in her discussion of *Dukes*, expressing skepticism at the plaintiffs' underlying substantive goals. *See* Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 26–27 ("I suggest that . . . [the plaintiffs'] decision to proceed as a class action in *Wal-Mart* can be explained as a desire to change the substantive law of employment discrimination. The allegation of a culture of discrimination was essentially an attempt to write into Title VII the concepts of structural discrimination and implicit bias. . . . But such a theory distorts Title VII beyond recognition.").

58. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 399–400 (1967).

59. Burbank & Wolff, *supra* note 40, at 56.

III. LIABILITY POLICY AS AFFIRMATIVE AUTHORITY FOR MANAGERIAL JUDGING: THE 9/11 FIRST-RESPONDERS LITIGATION

The underlying substantive law need not operate only as a constraint upon procedural options in a complex case. The liability policies governing a dispute can sometimes authorize, or even demand, a managerial role on the part of the trial court. This is true in class litigation, where the underlying substantive law can take account of the importance of aggregate relief in defining the rights of parties if authoritative policy-makers so decide, as in the scenario involving Title VII and Rule 23(b)(2) described above. And it is also true in non-class litigation, including the increasingly important phenomenon of mass-tort aggregation.

The current generation of scholarship on aggregate litigation typically draws a sharp distinction between class actions and non-class aggregate proceedings. Particularly with respect to review of proposed settlements for adequacy or fairness, the governing assumption, reflected in the American Law Institute's *Principles on Complex Litigation*, is that the Rule 23 mandate requiring judicial approval of settlements marks class actions as a qualitatively different type of proceeding, conferring authority upon judges that is unavailable in non-class cases.[60] This analytical mindset overstates both the power and the singularity of Rule 23. Rule 23 is a muscular provision that places important tools in the hands of district judges, but those tools can only be employed when they are consistent with the liability policies of the governing substantive law. By the same token, the Federal Rules are not the only source of authority that a judge

60. *See* THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). The ALI Principles begin with the assumption that judicial approval of settlements is only required in class action proceedings, *see id.* § 3.01(a)–(b), emphasize that "[s]ignificant differences between class and non-class cases require that these two types of cases be treated differently for purposes of settlement," *id.* § 3.15, and then set forth a set of conditions that should be met for an aggregate settlement to be enforceable but assign "[r]esponsibility for compliance with the prerequisites for the enforceability of [such] an agreement" to "the claimants' lawyer." *Id.* § 3.17(f). It is of course true that there are differences between these types of proceedings that require close attention, but the ALI's sharply categorical treatment of these distinctions is noteworthy. *See also* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011) (developing argument that individual party consent must be the touchstone for the types of judicial management and supervision that characterizes class litigation).

Professor Robert Bone is one important exception to this scholarly trend. Bone recently penned a critique of the sharp doctrinal demarcations often attributed to the divide between class and non-class proceedings, though his main focus was preclusion doctrine and the analytical foundations of his critique were quite different from those I explore here. *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577 (2011).

can draw upon when called to carry into effect the liability policies underlying a complex dispute.

The consolidated proceedings overseen by Judge Alvin Hellerstein in the 9/11 first-responders litigation dramatically illustrate the role of the substantive law in authorizing management and innovation by a district judge beyond that expressly contemplated by the Federal Rules. It is possible that the singular nature of the statutory framework governing the proceedings before Judge Hellerstein will limit the immediate precedential impact of his rulings. Even if so, the distinctive features of that statutory framework provide a rich opportunity for challenging the artificial lines of separation typically drawn between the role of the judge in a class action and in non-class proceedings.

The first-responders litigation arose as part of the federal government's multi-stage response to the death and injury wrought by the terrorist attacks of September 11, 2001. The use of hijacked commercial airliners as weapons of mass destruction posed an existential threat to the U.S. airline industry, which faced the prospect of incalculable liability for the harm done by the attacks themselves and a crisis in public confidence in the safety and viability of air travel. Congress responded by enacting a statutory scheme, the Air Transportation Safety and System Stabilization Act,[61] or ATSSSA, to protect the airline industry from bankruptcy and to provide compensation to the injured survivors of the attacks and the families of deceased victims.

The most well known component of ATSSSA, the Victim Compensation Fund or VCF, set up a no-fault system overseen by special master Kenneth Feinberg that enabled eligible beneficiaries to receive compensation for their harm in return for agreeing to waive the right to sue in tort.[62] As originally structured, the VCF covered individuals who were killed or physically injured in the attacks or in their "immediate aftermath," a designation that extended no more than 96 hours after the crashes occurred.[63]

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61. Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended 49 U.S.C. § 40101 (2012)).

62. *See id.* § 405(c)(3)(B)(i)–(ii) (providing that individuals who submit a claim under the VCF thereby waive the right to file a civil action in any U.S. court for damages sustained as a result of the air crashes).

63. *See In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357 (S.D.N.Y. 2003); *In re* World Trade Ctr. Disaster Site, 414 F.3d 352 (2d Cir. 2005) (defining scope and operation of VCF and related provisions of ATSSSA).

Ken Feinberg provides an indispensable account of his experience administering the VCF in KENNETH R. FEINBERG, WHO GETS WHAT?: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 41–62 (2012).

Individuals who suffered physical injury as a result of the attacks but who were not present within 96 hours of the crashes, including many rescue and response personnel who began work outside that window of time, were not eligible for participation in the no-fault VCF. Their tort claims posed potentially serious threats to the airline industry, the City of New York, and the owners of the World Trade Center property site where rebuilding would need to occur. ATSSSA thus extended the liability protections it provided those defendants to cover such claims as well, even though the injured parties would not have the opportunity to participate in the no-fault compensation scheme. In lieu of a compensation fund, ATSSSA permitted these claims to proceed in tort, but subject to extensive and coordinated regulation. The first-responders litigation was the resulting proceeding in which these claims were adjudicated.[64]

To govern the first-responder claims, ATSSSA created exclusive remedy provisions, imposed caps on total damages, and established specialized rules for jurisdiction and venue—a set of provisions that were comprehensive in scope and preemptive in effect. Far from being just another mass tort multidistrict litigation that happened to arise in a singular factual context, the first-responders litigation was the product of a targeted statute containing substantive aggregate liability policies. Those policies must be considered as a whole to appreciate their full import:

Exclusive Federal Cause of Action: ATSSSA created a federal cause of action that preempted all other state and federal provisions as "the exclusive remedy for damages arising out of the hijacking and subsequent crashes of [the 9/11] flights."[65] This federal cause of action incorporated state law by reference as a standard in defining the liability rule, but it did so with the caveat that any such law not be "inconsistent with or preempted by Federal law."[66]

Caps on Liability: Under ATSSSA's exclusive federal remedy, the total damages available for all claimants against airlines and airports, aircraft manufacturers, or persons with a property interest in the World Trade Center were capped at "the limits of liability insurance coverage maintained by" those entities;[67] and the total damages for all claimants against the City of New York were capped at three hundred and fifty

64. *See* Hellerstein et al., *supra* note 6, at 132–42 (describing the series of decisions by which the district court came to define the scope of the proceeding it would hear, the terms of eligibility for participating in that proceeding, and the jurisdiction of the district court to proceed).

65. ATSSSA § 408(b)(1).

66. *Id.* § 408(b)(2).

67. *Id.* § 408(a)(1).

million dollars (or the city's insurance coverage, if that number was greater).[68] Any damages claimed against the specified defendants that exceed these levels were extinguished.

Mandatory Jurisdiction and Venue: Having created a limited fund from which all claimants seeking an adjudicatory remedy must pursue their claims, the statute required that every claim be heard before a single court, ensuring that the entirety of the first-responders litigation would be heard as a comprehensive consolidated action: "The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim . . . resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001."[69] Although the statute did not specify that all claims must be heard before the same judge, that eventuality was easy to predict in light of established MDL practice, which favors the consolidation of related complex claims before a single transferee judge.[70] In this connection, one should note the different treatment that choice of law and jurisdiction receive under ATSSSA. Although the statute permits different state laws to apply as the point of reference for liability in each first-responder case, selecting the law that the state of each respective crash site would apply (subject to preemption or inconsistency with federal law), it mandates that all claims be heard in the Southern District of New York, emphasizing the importance that ATSSSA attached to coordination. The statute contains a targeted directive for a consolidated proceeding for all September 11 claims.

This comprehensive set of statutory provisions necessarily called for an approach to the management and adjudication of the first-responder claims that prioritized the overall fairness of recovery and the allocation of benefits among claimants as a controlling principle in the litigation. ATSSSA forged a substantive legal relationship among the first responders. The ability of any one claimant to recover was dependent upon the amount obtained by others from the limited fund, and a lack of

68. *Id.* § 408(a)(3).

69. *Id.* § 408(b)(3). The "resulting from or relating to" language is broad, apparently intending to extend to the fullest extent possible under Article III in sweeping claims relating to the September 11 attacks into the Southern District of New York.

70. While the MDL statute speaks of transfer to "a judge or judges," ordinary practice since the statute's inception has been to transfer cases to a single transferee judge. 28 U.S.C. § 1407(b); *see, e.g.*, Hon. Andrew A. Caffrey, *The Role of the Transferee Judge in Multidistrict Litigation*, 69 F.R.D. 289 (1976) (remarks of Chief Judge Caffrey at a meeting of transferee judges, referring *passim* to individual transferee judges as the recipients of MDL cases). I have conducted recent conversations with members of the MDL panel that have been to the same effect.

coordination in the award and timing of individual recoveries or settlements could have compromised the ability of some responders to recover at all if the limited fund was exhausted prematurely. Such circumstances have long been recognized as justifying the type of judicial supervision mandated in the class-action setting by Rule 23(b)(1)(B) and its correlative provisions. In this case, ATSSSA created those circumstances as a matter of targeted liability policy, not simply the application of a general liability rule to an unusual factual scenario.

The first-responder claims were not a class proceeding. They were not governed by Rule 23. But Rule 23 does not embody some *expressio unius* principle that forecloses a district court from employing its managerial tools outside the context of a class action, particularly when the substantive law calls for such judicial supervision. To suggest that the specification of certain managerial tools under Rule 23 forecloses a district judge from employing similar tools in non-class cases is to misunderstand the structure and operation of Rule 23.

In a Rule 23(b)(1)(B) class action, the requirements for judicial assessment and approval of any proposed settlement serve a dual function. They safeguard the interests of absentees who have no voice in the litigation, a distinct requirement of class litigation. But they also serve to ensure that the consolidation of claims effectuated by a class proceeding will not operate to the collective detriment of plaintiffs claiming against a limited fund. A case involving massive coordination of individual claims subject to a collective damages cap squarely implicates this second purpose, even if it does not raise formal concerns about the interests of absentees. Rule 23 does not purport to occupy the field of judicial management in consolidated actions when concerns arise over the impact of consolidation on the rights of claimants in non-class proceedings.

Judge Hellerstein's federal common law powers provided him with sufficient authority to take actions aimed at ensuring that the policies underlying ATSSSA would be given effect through the consolidated proceeding before him. Those underlying liability policies demanded compensation that was fairly allocated and adequate in amount for the first responders claiming under the limited fund. The imperative for fairly allocated compensation proceeds from ATSSSA's imposition of a damages cap and its consolidation of all claims before a single court, which made the claimants' ability to recover wholly interdependent and necessarily called for an allocative approach. And the imperative for compensation that was adequate in amount reflects the trade-off that ATSSSA imposed when it capped the damages available to first responders and extinguished their claims under state law in order to secure

the widely distributed public benefit of a financially solvent airline industry, a healthy New York City, and property owners who were willing and able to proceed with the reconstruction of the World Trade Center site.

The approach I suggest here—analyzing the managerial powers of a court in light of the substantive law that governs the dispute before it—finds ample antecedent in the caselaw. Consider the noted opinion of Judge Lord in *United States v. Reserve Mining Co.* concerning requests for intervention by private and governmental entities in an abatement proceeding brought by the federal government against a mining company under the Federal Water Pollution Control Act.[71] The governing statute required that the court take into account a wide variety of materials encompassing "such . . . evidence, including that related to the alleged violation of the [pollution] standards, as it deems necessary" to the complete resolution of the dispute.[72] Given that substantive mandate, Judge Lord found:

> The role of a court [hearing such an abatement suit], because of the nature of the proceedings and considerations which must be reviewed and undertaken pursuant to the statute, transcends ordinary civil litigation and makes a reviewing court more of an administrative tribunal than a court in an ordinary adversary civil case.[73]

Using this principle as his guide, Judge Lord concluded that Rule 24's requirement that intervenors-as-of-right show an "interest relating to the property or transaction which is the subject of the action"[74] must be read "as an inclusionary rather than exclusionary device" in a Federal Water Pollution Control Act abatement action.[75] Judge Lord's opinion is cited in the literature as an example of intervention analysis that properly takes into account the public-law context of the inquiry.[76] In the first-responders

71. United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972); *see also* The Federal Water Pollution Control Act, 33 U.S.C. § 1160 et seq. (repealed 1972). I thank Steve Burbank for suggesting a discussion of Judge Lord's opinion.

72. 33 U.S.C. § 1160(c)(5) (repealed 1972).

73. *Reserve Mining*, 56 F.R.D. at 413.

74. FED. R. CIV. P. 24(a)(2). The 2007 restyling of the Rules changed "which" to "that" in the quoted text.

75. *Reserve Mining*, 56 F.R.D. at 413.

76. *See, e.g.*, Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 328 n.339 (1989). Judge Lord also had distinguished antecedents in this approach to intervention. In his classic article on the subject, Professor Shapiro emphasized that the "interest" requirement in Rule 24(a) does not impose a uniform and rigid test but rather must be read in light of the substantive legal setting and the impact of a proposed intervener on the litigation.

litigation, the necessity of a substance-specific approach to the district court's managerial decisions under ATSSSA was patent.

Nonetheless, the academic and critical commentary of Judge Hellerstein's management of the first-responders litigation has been remarkably inattentive to the statutory framework within which the Judge was operating. One extensive treatment of the issue in a Seton Hall Law Review article is illustrative.[77] The author, Jeremy Grabill, approaches judicial review of mass non-class settlements from a libertarian perspective, identifying litigant autonomy as the value of primary importance in safeguarding the interests of mass-tort non-absentee claimants. According to Grabill, individual consent should be the only basis for a judge to exercise review and approval authority of a settlement in such a case.[78] I disagree with Grabill's approach, but his analysis is thoughtful and careful. In crafting his arguments about non-class litigation, Grabill focuses particular attention on three case studies: the two pharmaceutical litigations that arose out of alleged injuries from Baycol and Vioxx, and the 9/11 first-responders litigation. As a point of contrast to these cases, Grabill provides an overview of federal statutory regimes that expressly require or authorize judicial review of non-class settlements, including the compromise of claims in federal bankruptcy, environmental remediation actions under CERCLA, and employment claims under the federal Fair Labor Standards Act.[79] Throughout his discussion of litigation practice under these statutory schemes, Grabill focuses attention on the specific liability policies that require or justify aggressive judicial management, including approval of settlements.

In his discussion of Baycol, Vioxx, and the first responders, however, such attention to underlying liability policies is absent. In discussing these cases, Grabill focuses attention on the absence of the factors that he believes justify active judicial management in bankruptcy and other

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> [T]he reference in Rule 24 and in some statutes to an "interest" suggests that the test is a simple one, but that notion quickly fades when one struggles with the cases. . . . Whether a sufficient interest exists to make intervention appropriate calls for considerable and careful judgment, and perhaps a little faith as well, with attention to such factors as the legal and practical availability of other remedies, the contribution that the prospective intervener can make to the litigation, the immediacy and degree of the harm threatened, and the advantages of avoiding multiplicity of actions.

David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 740 (1968).

77. Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123 (2012).

78. *Id.* at 127, 163–64.

79. *Id.* at 130–38.

proceedings. But when offering an affirmative account of the policies at stake in his case studies, in particular the first-responders case, Grabill employs what Judge Posner might call Esperanto liability law[80]—a homogenized description of mass-tort liability policy with no attention to the singular liability-shaping features of ATSSSA:

> Though it is a creature of ATSSSA, the *World Trade Center Disaster Site* litigation can be thought of as an MDL proceeding, or perhaps five related mini-MDLs all before the same judge. And just as in the Baycol and Vioxx litigations, the plaintiffs' claims in the *World Trade Center Disaster Site* litigation were not certified as class actions, leaving thousands of related cases to proceed individually.[81]

Grabill goes on to describe the proposed settlement in the first-responders litigation as "much like the Vioxx Settlement Agreement" because it required settling parties to opt in and would take effect only upon achieving a certain threshold of participation.[82] He pays no attention to the liability framework created by ATSSSA, which preempted alternative remedies, capped the aggregate liability available to all claimants, and imposed a caveat that federal interests not be undermined when incorporating state tort law as a rule of decision.

Whatever merit one attaches to off-the-rack arguments about the autonomy that litigants retain in an MDL proceeding in which claimants are pursuing their individual claims free from any formal constraints on recovery—and there is good reason to approach those arguments skeptically, given the limited nature of the attorney-client relationship in many mass cases, the pressure on claimants to accept prefabricated settlements, and the power of attorneys in a management committee to shape the course of the proceedings—such arguments carry much less force when the autonomy of litigants has been altered by a liability regime that formally transforms the resolution of their claims into an exercise in allocation.

The same principles call for some critical attention to Judge Jack Weinstein's opinion in the Zyprexa pharmaceutical litigation, which

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80. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300–01 (7th Cir. 1995).

81. Grabill, *supra* note 77, at 147. See also Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 321–22 (2011) (describing the consolidated first-responders' litigation as a mere Rule 42 proceeding and disregarding the jurisdiction and venue provisions of ATSSSA).

82. Grabill, *supra* note 77, at 149–50.

contains one of the leading judicial statements of a quasi-class theory in justifying court supervision of mass aggregate litigation.[83] The *Zyprexa* dispute involved claims that a drug used to treat schizophrenia produced weight gain and elevated blood-sugar levels as side effects, increasing the risk of diabetes. A large number of individual cases were consolidated before Judge Weinstein by the Judicial Panel on Multidistrict Litigation, whereupon the Judge appointed five special masters, one tasked with overseeing discovery and four (one of whom was Kenneth Feinberg) with facilitating settlement. After a little over a year, the efforts of this team produced a settlement consisting of a three-track claims-administration structure that covered about 8,000 plaintiffs. On the matter of fees and expenses, the Judge instructed the settlement special masters to "consult with each other and the parties and recommend to the court a fee schedule providing for allocation of expenses and a reasonable attorney's fee," using as the measure of reasonableness "the lesser of the maximum reasonable general fee schedule" recommended by the special masters themselves, "the fee agreed upon between the client and the attorney in an individual case, and the maximum amount permitted under the applicable local state rules and statutes."[84] Upon receiving the recommendation of the special masters, the Judge made a slight alteration that reduced the percentage cap on contingency fees and gave the special masters discretion to make further adjustments up or down in individual cases.[85]

On the issue of attorney's fees, there is authority supporting the power of judges to engage in supervisory review to ensure that the attorneys who appear before them do not use the processes of the court in an unethical manner to extract excessive or coercive fees from the parties they represent. Judge Weinstein discusses those authorities in his order reducing the negotiated fees, and his account of the fee negotiations—which saw some attorneys seeking forty percent contingencies from their clients—suggests that supervision on that issue may indeed have been warranted.[86] But rather than rely solely upon that more limited species of

83. *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488 (E.D.N.Y. 2006) [hereinafter *Zyprexa II*].

84. *In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122, 122 (E.D.N.Y. 2006) [hereinafter *Zyprexa I*].

85. *Zyprexa II*, 424 F. Supp. 2d at 490–491.

86. Professor Ratner raises legitimate questions concerning the applicability of the authorities cited in *Zyprexa* to an MDL proceeding. *See* Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59 (2013). As Ratner points out, the authorities upon which Judge Weinstein and several of his MDL colleagues have relied in supervising contingency awards generally "involved highly-contextualized and case-specific court supervision of attorneys' fees, where

power, the Judge begins his analysis with a broader theory of the supervisory role of courts in non-class aggregate cases:

> While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of the court. The large number of plaintiffs subject to the same settlement matrix approved by the court; the utilization of special masters appointed by the court to control discovery and to assist in reaching and administering a settlement; the court's order for a huge escrow fund; and other interventions by the court, reflect a degree of court control supporting its imposition of fiduciary standards to ensure fair treatment to all parties and counsel regarding fees and expenses.
>
> No one except the trial judge, assisted by special masters, can exercise this ethical control of fees effectively. Many of the individual plaintiffs are both mentally and physically ill and are largely without power or knowledge to negotiate fair fees; plaintiffs' counsel have a built-in conflict of interest; and the defendant is buying peace and is generally disinterested in how the fund is divided so long as it does not jeopardize the settlement.[87]

This strong statement of the quasi-class theory could equally be used to justify judicial supervision and approval of all the terms of a mass action settlement, not merely the details of attorney compensation, as leading commentators were quick to recognize.[88]

Judge Weinstein's articulation of the quasi-class theory in *Zyprexa* is a statement of judicial authority in a purely "procedural" mode, in several respects. First, Judge Weinstein makes no reference to the liability policies underlying the dispute, instead relying upon features of the suit—a large number of claimants with limited ability to participate or negotiate with

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the plaintiffs were legally incompetent . . . or where court intervention in fee issues was attendant to either the award of statutory fees . . . or to the creation of a common fund as part of a class action settlement." *Id.* at 76. At the very least, Ratner argues, a more fully realized justification is required to extend these precedents to MDL proceedings. This critique is well taken, but for present purposes, it suffices to observe that such debates still center on the status of MDL parties and the ethical responsibilities of the court, rather than the more far-reaching theory of the quasi-class that Judge Weinstein chose to rely upon in *Zyprexa*.

87. *Id.* at 491–92. *See also Zyprexa I*, 233 F.R.D. at 122–23.

88. *See, e.g.*, Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2009 SUP. CT. REV. 183, 214–15.

counsel and the imperfect alignment of incentives—to which he ascribes trans-substantive significance. Second, the Judge points to his own earlier managerial decisions, creating a "degree of court control" in the proceeding, as a justification for his Rule 23-style supervision of proposed settlements, an argument that might be vulnerable to a charge of analytical bootstrapping, although the federal policies underlying the MDL statute itself might go some way toward answering those criticisms. The Judge's lack of attention to underlying liability policies in this broad statement of principle is worthy of particular note in light of his discussion of attorney's fees, where he looks to state and federal authorities as sources of underlying policy guidance.[89]

My purpose here is not to argue that a trans-substantive account of the judicial function is inadequate to support the type of managerial power that Judge Weinstein exercised in *Zyprexa*. Some scholars have made that case,[90] although I am more convinced by the work of others who have examined the dynamics of mass adjudication in the courtroom, in attorney-client relations, and in the economics of litigation and concluded that such proceedings raise serious questions about the absence of judicial supervision and the need to protect vulnerable claimants, even if the trans-substantive authority of judges to address these needs remains contested.[91] My purpose here is more limited: to juxtapose *Zyprexa* with the World Trade Center first-responders litigation and invite a comparison with the more specific grounding that the underlying liability policies provided to Judge Hellerstein's rulings.

Judge Weinstein relies upon a set of general observations about the practical dynamics of mass consolidation to justify the use of tools like the MDL statute and Federal Rules of Civil Procedure 16, 26, 42 and 53 to shape policy outcomes. These are indeed powerful tools, and the MDL statute in particular has received inadequate attention as a source of federal law on important matters of litigation policy. But these sources of authority say nothing about the policies that should govern the actual outcomes produced by a managerial process. Rather, it is the liability

89. *Zyprexa II*, 424 F. Supp. 2d at 492–96.

90. *See, e.g.*, Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005) (discussing controls on aggregate settlement in terms of individual consent and the ethical rules of lawyer-client relations and conflicts of interest, rather than judicial supervision).

91. *See, e.g.*, Deborah R. Hensler, *Bringing* Shutts *into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 U.M.K.C. L. REV. 585 (2006) (arguing that the paradigm of individual client relations, notice, and litigant autonomy is inadequate to protect the interests of claimants in non-class mass aggregate proceedings).

policies underlying a mass dispute that must dictate outcomes.[92] As Professor Burbank and I have explained in discussing the role of a judge overseeing a complex proceeding in federal diversity court:

> Sometimes, federal common law will be required to implement federal interests reflected in valid federal law, including the Rules themselves. Where this is so, state law will be displaced. Sometimes, however, the federal common law analysis will fail to unearth interests that are demonstrably rooted in existing federal law. In the latter class of cases, the limitations on federal common law in diversity litigation will often require that state law control the analysis because no valid federal interests requiring protection exist to displace it.[93]

Just as Rule 23 has sometimes served as "the occasion for the Court to implement class action policies in federal common law that it was otherwise authorized to make,"[94] governing such matters as the tolling of statutes of limitation or the preclusive effect of a judgment, so can the rules governing mass consolidations in federal court serve as the occasion for implementing managerial litigation policies that fall within a federal court's independent common-law authority: promoting the reliability and factual accuracy of the proceedings and ensuring that the interests of claimants are not compromised through neglect, faithless behavior, or iatrogenic effects created by the very initiation of a consolidated action. But when it comes to determining the adequacy of a global settlement or the propriety of trade-offs reflected in the allocation of damages among claimants, the judge must look to the underlying law, be it state or federal, for guidance.[95] In such a case, the underlying liability policies define the

92. Professors Silver and Miller set forth an alternative approach to the quasi-class model that seeks to improve the incentive structures of lawyers and the court itself to produce good outcomes for claimants. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010). The authors point to the Private Securities Litigation Reform Act as a model for their approach, although they do not offer a fully elaborated justification for the importation of the PSLRA's approach into disputes governed by different substantive legal regimes (that is, outside the securities law context).

93. Burbank & Wolff, *supra* note 40, at 26–27.

94. *Id.* at 50.

95. This is true even in the case of class actions subject to Rule 23(e)(2)'s requirement that settlements only be approved upon a finding that the result is "fair, reasonable, and adequate." The measure of fairness and adequacy must be taken against the underlying liability policies, and those policies fall outside a federal judge's common law authority in a diversity case. Justice Ginsburg makes the same basic point in her opinion for the Court in *Gasperini* when describing the standard against which a Rule 59 motion for new trial based upon excessive damages must be measured. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 437 n.22 (1996) ("It is indeed 'Hornbook' law

point of reference for claimant outcomes and shape the authority of the judge to manage the proceedings in service of those ends.

IV. LIABILITY POLICY AND THE EXERCISE OF DISCRETION UNDER THE FEDERAL RULES: THE SWARM-DOWNLOAD COPYRIGHT CASES

The underlying substantive law can also influence the more quotidian aspects of a lawsuit. Trial judges have broad discretion in their administration of many of the procedural doctrines that shape civil actions. We typically discuss those doctrines in endogenous terms, with judges seeking to maximize such procedural values as the efficient management of their dockets, the avoidance of unnecessary litigation burdens on parties and witnesses, and the fair, accurate and expedient resolution of claims. This focus is appropriate and indeed required by the rules themselves, most prominently in the case of Federal Rule of Civil Procedure 1, which admonishes that the Federal Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[96] But such endogenous concerns need not be a judge's only point of reference when making discretionary procedural rulings. It is equally appropriate for a judge to consider the potential impact of a ruling on the liability policies bound up in the substantive law when exercising procedural latitude.[97] A series of procedural copyright rulings now percolating up through the federal district courts provides an apt illustration.

The cases giving rise to these rulings involve claims brought by the owners of sexually-explicit movies seeking to prevent online violations of their copyright perpetrated through bit-torrent or swarm downloading. A swarm download is a technique by which a large electronic file is downloaded in pieces from multiple sources in parallel and the pieces then reassembled into a complete whole. The technique will often enable users to download files much more quickly. Picture information on the Internet as water flowing through various rivers, streams, and rivulets. If a user

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that a most usual ground for a Rule 59 motion is that 'the damages are excessive.' Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York.") (citations omitted).

96. FED. R. CIV. P. 1.

97. The leading academic commentary on the exercise of discretion under the Federal Rules remains Judge Friendly's classic article. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982). Judge Friendly offers an indispensable account of judicial process values in discussing the administration of discretionary doctrines, but he leaves unexplored the role of substantive liability policy in shaping judicial discretion.

downloads a file through a single pathway, then the download speed is limited by the smallest rivulet in that pathway. But if the user can download many pieces of the file from multiple different sources, then he can overcome the drag caused by the small rivulets, stacking them together in parallel and enabling much more data to flow in a short period of time. A user who downloads a file using swarm technology can then become a new source for future swarm downloads. In such a case, the file is kept on the user's computer in a manner that makes it accessible as a download source for future swarms.

Swarms have been used aggressively to download sexually-explicit movies, perhaps because the technique enables users to acquire the films anonymously (and, obviously, for free). Owners of these movies seeking to protect their copyright encounter two related challenges. The first involves the identification of the alleged perpetrators. Because the swarm is anonymous, copyright owners are typically able to identify only the IP address of the source that participated in the swarm.[98] The tools of discovery can assist copyright holders by empowering them to subpoena information from Internet Service Providers ("ISPs"), which keep records of the identities of IP address holders, though many ISPs purge that information periodically, limiting the window of time during which alleged perpetrators could be identified. The second problem arises from the sheer number of alleged perpetrators. Swarm downloading is a form of distributed copyright violation. There is not a single, readily suable entity that is responsible for each violation. Rather, hundreds, or thousands, of individual users make up the ad hoc group responsible for the hundreds, or thousands, of violations. These users typically do not know each other and have no relationship other than their anonymously shared file swarms.

In response to these problems, copyright holders have adopted aggressive litigation strategies in seeking to pursue civil remedies. Relying upon Federal Rule of Civil Procedure 20, they have attempted to join alleged violators as anonymous "Doe" defendants in large numbers, sometimes in the thousands and frequently in the hundreds, identifying them only by the IP addresses used in illegal swarm downloads. And relying upon Rule 26(d), they have asked district courts to permit them to take third-party discovery from ISPs prior to the Rule 26(f) conference of the parties, so that they can learn the identities of the IP address holders and serve them individually in the lawsuit. Dozens of district courts

98. An IP or Internet Protocol address is a number that uniquely identifies a location to or from which data is transmitted. Thus, for example, the cable modem or wireless router attached to a typical home computer has an IP address that locates it for the rest of the world.

around the country have rendered opinions in these disputes, and they have varied widely in their responses.

The case for some form of pre-conference discovery is strong in these disputes. The plaintiffs allege facts that, if true, would constitute violations of their copyright, and subpoenaing records from ISPs is the only tool by which they might be able to identify the alleged perpetrators. The tool is not a perfect one. ISP records will only give the identity of the subscriber who has paid for a given Internet account. They will not indicate who was using the account at the time of the swarm download. So, if a teenager uses his parent's Internet account to participate in a swarm, or a college student uses his roommate's account—or, for that matter, if a user participates in a swarm through a publicly-available wireless site—the ISP records will identify someone other than the perpetrator and may wind up giving little useful information. Courts have noted that some copyright holders might send aggressive settlement demands to account holders after obtaining discovery from ISPs, despite the uncertainty around whether a given account holder is the actual perpetrator, pressuring potentially innocent individuals into settling for nuisance value. Courts are right to be concerned about such tactics, which they can address through orders that limit the use that plaintiffs can make of information obtained from ISPs and the circumstances and manner in which they may contact account holders.[99] But some kind of pre-conference discovery appears necessary to enable plaintiffs to identify the defendants they wish to sue.

The more difficult question is what type of action plaintiffs should be permitted to assemble when they seek to enforce their copyright in swarm download cases. Rule 20(a) provides that defendants "may be joined in one action as defendants" if claims are asserted against them "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" that share common questions of law or fact.[100] Trial courts have wide discretion in shaping the boundaries of a civil action in their administration of Rule 20 and Rule 21, which empowers the Court "at any time, on just terms, [to] add or drop a party."[101] Two questions thus present themselves in these cases. First, is joinder possible under Rule 20—do the proposed defendants satisfy the threshold

99. *See, e.g.*, Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 244–45 (S.D.N.Y. 2012) (crafting an order designed to protect account holders from premature disclosure or exploitation of identifying information).

100. FED. R. CIV. P. 20(a).

101. FED. R. CIV. P. 21.

requirements of the rule? Second, is joinder advisable under Rule 20—should the court permit it?[102]

The swarm download cases clearly satisfy the requirement of a common issue of law or fact: the law applicable to the violation of the plaintiff's copyright and many of the factual circumstances surrounding a particular swarm will be common to all defendants. The transaction-or-series-of-transactions requirement is more debatable, and district courts have differed in their analysis. One leading opinion found that

> it is difficult to see how . . . a series of individuals connecting either directly with each other or as part of a chain or 'swarm' of connectivity designed to illegally copy and share the exact same copyrighted file . . . could *not* constitute a "series of transactions or occurrences," for purposes of Rule 20(a),[103]

while others have held that this requirement is defeated by the lack of any relationship among swarm participants and the distribution of swarm activity across time (swarm activity around a given file can sometimes last for months) and digital geography.[104]

Threshold questions about the boundaries of a transaction or occurrence determine whether joinder is available at all. As to that

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102. It bears noting that the decision of the Supreme Court in *Shady Grove* creates the possibility of an alternate construction of Rule 20 by viewing the permissive language of the Rule (parties "may join" or "may be joined") as granting discretion to the parties in deciding how to structure their suits but none to the trial court, which must permit joinder whenever the threshold requirements of the Rule are satisfied. *Shady Grove* relied upon such a reading of Rule 23 to reject the efforts of the lower federal courts in that case to give effect to New York CPLR § 901(b). *See* Shady Grove Orthopedic Ass'n v. Allstate Ins. Co., 130 S. Ct. 1431, 1438 (2010).

> Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court 'to certify a class in each and every case' where the Rule's criteria are met. But that is *exactly* what Rule 23 does: It says that if the prescribed preconditions are satisfied '[a] class action *may be maintained*' (emphasis added)—not '*a class action may be permitted.*' Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes.

Id. This portion of the analysis in *Shady Grove* is probably not sustainable. For present purposes, it suffices to observe that the syntactical differences between Rule 20 and Rule 23, coupled with the control mechanism of Rule 21, should defeat any attempt to apply *Shady Grove*'s rigid interpretation of Rule 23 to the joinder of individual parties.

103. *Digital Sin*, 279 F.R.D. at 244.

104. *See, e.g.*, Third Degree Films, Inc. v. Does 1–131, 280 F.R.D. 493, 498 (D. Ariz. 2012) ("[T]here is no logic to segregating the Arizona based members of the swarm from the non-Arizona based members, except Plaintiff's convenience. The Court finds this is not a basis for allowing permissive joinder."); AF Holdings LLC v. Does 1–97, No. C-11-03067-CW (DMR), 2011 WL 2912909, at *4 (N.D. Cal. July 20, 2011) (finding that the "fundamental constraint" imposed by BitTorrent protocol "on the collaboration between copyright infringers" precludes Rule 20(a)(2)(A) from being satisfied).

question, the district court's analysis in *Digital Sin* seems the most appropriate. As with the doctrine of supplemental jurisdiction, the threshold requirements of permissive joinder set the outer boundaries for the types of civil action that are possible, and permissive joinder is discretionary, meaning that a liberal approach does not impose a *de facto* rule mandating more complicated lawsuits. Thus, Judge Nathan is correct to rely upon the Court's statement in *United Mine Workers of America v. Gibbs*[105] that "the impulse [under the Federal Rules] is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[106] The sentiment is an appropriate one for defining the parameters of Rule 20.

This approach is also consistent with the treatment of Rule 20 that Professors James, Hazard and Leubsdorf provide in their treatise, which conceptualizes the series-of-transactions requirement as a reflection of underlying liability policies. When "completely independent acts converge to cause an injury, for all or for some part of which the actors have a common liability under substantive law," the cases have generally concluded that the transaction test is satisfied, and James *et al*. embrace that result.[107]

The question whether joinder is advisable in these cases, and hence whether the district court should exercise its discretion to permit it, requires broader thinking about the sources of law that should influence the court's decision. The impact of massive party joinder on the dynamics of litigation is one major consideration. Thus, Judge Teilborg in the District of Arizona denied a plaintiff's request to join 131 individual swarm defendants out of concern for the impact on the litigation, detailing the many ways in which "allowing this case to proceed against 131 Defendants creates more management problems than it promotes

105. 383 U.S. 715 (1966).

106. *Id.* at 724.

107. FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 563–64 (5th ed. 2001). My thanks to Steve Burbank for drawing my attention to this treatment of Rule 20.

The authors go on to question the result in *Insull v. New York World-Telegram Corp*., 172 F. Supp. 615 (N.D. Ill. 1959), a rare and much-noted instance of a court finding the transaction test not satisfied. Plaintiff Insull asserted libel claims against three unrelated defendants for statements they made over a three-year period, and the district court found the claims too separate in time and circumstance to satisfy the transaction or occurrence requirement. While acknowledging that this result is "not wholly untenable," the authors question why "a common liability for the same damage" should permit joinder of multiple defendants "but not a liability for separate but similar damage inflicted on the same plaintiff at the same time," particularly when the latter circumstance "involve[s] great overlapping of proof" and common questions about the proper measure of damages for each. James et al., *supra*, at 564–65.

efficiency."[108] These are concerns arising from Rule 20 itself and clearly require attention. Indeed, taking into account such litigation concerns in a request for massive individual joinder operates as a complement to Rule 23(a)(1), which permits a class action to proceed only when "the class is so numerous that joinder of all members is impracticable."[109] If the impracticality of joining numerous individuals is one requirement for entertaining a representative action, it is obviously a justification for denying excessive joinder in a proposed individual action.

But Professor Cover reminds us that "there are also demands of particular substantive objectives which cannot be served except through the purposeful shaping, indeed, the manipulation, of process to a case or to an area of law."[110] What impact will permitting or denying massive joinder have upon the underlying liability policies in these cases? That question, too, can and should guide a district court's exercise of its discretion under Rule 20, even after it finds that the threshold requirements of the rule are satisfied. In the swarm download cases, at least two countervailing considerations are at work. There is the threat that denying joinder would frustrate the goals of the underlying law. Judge Nathan indicates her awareness of this concern when she notes that denying joinder might "introduce significant obstacles in plaintiffs' efforts to protect their copyrights from illegal file-sharers" in part because "requiring aggrieved parties to file hundreds or even thousands of separate copyright infringement actions" would entail the payment of hundreds or even thousands of individual filing fees at $350 per action.[111] Conversely, massive joinder and pre-conference discovery carry with them the danger of abusive settlement practices and misdirected enforcement. Several courts have noted the danger that copyright holders will "send settlement demands to the individuals whom the ISP identified as the IP subscriber"

108. *Third Degree Films*, 280 F.R.D. at 498.

109. FED. R. CIV. P. 23(a).

110. Cover, *supra* note 4, at 718.

111. Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 244 n.6 (S.D.N.Y. 2012) (quotation and alterations omitted); 28 U.S.C. § 1914 (2012) (requiring "parties instituting any civil action . . . to pay a filing fee of $350"). Judge Howell relies upon a similar concern in permitting broad joinder and pre-conference discovery in a case involving over 5,000 total defendants, writing:

> If the Court were to consider severance at this juncture, plaintiffs would face significant obstacles in their efforts to protect their copyrights from illegal file-sharers and this would only needlessly delay their cases. The plaintiffs would be forced to file 5,583 separate lawsuits, in which they would then move to issue separate subpoenas to ISPs for each defendant's identifying information. Plaintiffs would additionally be forced to pay the Court separate filing fees in each of these cases, which would further limit their ability to protect their legal rights.

Call of the Wild Movie, LLC v. Does 1–1062, 770 F. Supp. 2d 332, 344 (D.D.C. 2011).

despite the possibility that the subscriber may not be the alleged infringer, and indeed that mass joinder combined with pre-conference discovery would particularly lend itself to this practice.[112] "That individual—whether guilty of copyright infringement or not—would then have to decide whether to pay money to retain legal assistance to fight the claim that he or she illegally downloaded sexually explicit materials."[113] Given the discomfort or awkwardness that many people would feel in having their names associated with a sexually-explicit film, the danger of abusive or misdirected enforcement is acute.

These concerns operate at the juncture between procedure and substance, and district courts must attend to both good case-management practice and liability policy in resolving these disputes. Thus, when Judge Nathan permitted the plaintiff in *Digital Sin* to obtain pre-conference discovery against 176 Doe defendants, she crafted an order designed to prevent abusive settlement tactics that required the ISPs to perform an intermediary role, serving the subpoena upon the account holders identified via IP address but preserving their anonymity during a safe harbor period in which they could contest the subpoena or move to proceed anonymously.[114] No less an authority on civil practice than Judge Lee Rosenthal has given her imprimatur to this approach, adopting Judge Nathan's order in a swarm download case before her court.[115]

This way of proceeding imposes costs upon the ISPs, which are required to become active participants in the early stages of the lawsuit with a primary role in administering discovery requests and facilitating challenges brought by subscribers. There is no question that, as a general matter, the provisions for third-party practice encompass the possibility of such costs: Rule 45 admonishes district courts to avoid "undue burden" in issuing subpoenas, contemplating that some burdens might be necessary in third-party discovery practice.[116] But what justifies the imposition of such costs in this class of cases?

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112. SBO Pictures Inc. v. Does 1–3036, No. 11-4220 (SC), 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30, 2011).

113. Hard Drive Prods., Inc. v. Does 1–130, No. C-11-3826 (DMR), 2011 WL 5573960, at *3 (N.D. Cal. Nov. 16, 2011).

114. *Digital Sin*, 279 F.R.D. at 244–45.

115. *See* Hard Drive Prods., Inc. v. Does 1–59, No. H-12-0699, 2012 WL 1096117, at *2 (S.D. Tex. Mar. 30, 2012).

116. *See* FED. R. CIV. P. 45(c)(1), stating that

> A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

The answer follows from the underlying liability policies. ISPs provide a service that has high social utility, offering widespread access to the Internet and permitting users to explore the web anonymously. But ISPs also impose social costs, facilitating the unauthorized copying of protected materials in violation of copyright law.[117] The policies underlying the law of copyright speak to this trade-off. If the distributed and anonymous nature of swarm downloads creates the danger of widespread copyright violations with no remedy, then copyright policy suggests that the businesses selling the service that facilitates those violations should also have to bear the costs associated with facilitating a remedy.

In a different type of dispute—one where the values and activities protected by the underlying law were not threatened in a singular fashion and where the burdened third party was not also a participant in undermining those protected values—this assessment of costs and burdens might well play out differently. The rules on joinder and third-party discovery offer the tools for judges to use in adjudicating such disputes, and they define threshold conditions that must be satisfied for those tools to be available. Trans-substantive procedural values like efficiency, fairness to parties in the processing of their claims, and the manageability of the resulting proceedings all inform the analysis. But, in appropriate cases, the goals of the substantive law must also play a role in assessing the allocation of costs and burdens among the litigants.

This discussion of joinder in swarm-download disputes should sound unremarkable—an assessment of litigation dynamics and policy impacts of a type that courts make all the time. It draws together procedural and substantive values in a manner that is both appropriate and unavoidable when setting the metes and bounds of civil disputes. That same amalgam of procedural and substantive values characterizes large questions like the shape of class action practice under Title VII and extraordinary cases like the 9/11 first-responders proceeding. And yet the role of liability policy in defining and shaping the parameters of litigation in all these settings seldom receives the attention it requires.

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117. For present purposes, I adopt a simplistic description of social costs and copyright: the law of copyright seeks to prevent unauthorized copying of protected material, and anonymous Internet access facilitates that unauthorized copying. I leave unexplored larger questions concerning the level of constraint that is desirable in copyright enforcement; whether the net value added to copyrighted material by the open architecture of the Internet offsets any costs that result from unauthorized copying; and whether copyright itself is a viable paradigm in electronic media. A deeper examination of these factors might influence the discovery analysis.

CONCLUSION

The explosion of interest in the role of judges over the last thirty years has produced valuable insights into the institutional responsibilities and limitations of the judiciary. The increasing demands that litigants have placed upon the civil justice system make such discussions of the judicial function ever more salient, with class actions, mass tort adjudication, and the MDL process bringing important regulatory matters within the compass of private adjudication. But these insights have come at a cost. In focusing so much attention on the craft of judging, we have gotten out of the habit of discussing complex-litigation dynamics—both the prosaic and the extraordinary—in light of the underlying substantive law.

Writing in 1975, near the beginning of what we now identify as the threshold of the modern era of managerial judging and complex litigation, Professor Cover foresaw the danger that the growing power of our uniform and trans-substantive procedural code might crowd out proper consideration of underlying substantive values.

> Professor Moore's great achievement—the continued viability, efficacy and, indeed, excellence of the Federal Rules of Civil Procedure—seems all the more remarkable when one realizes that the river of litigation constantly erodes the architecture of process-oriented codes, leaving us with its case law incidents of application. It is extraordinary that our legal system holds a divided view of procedure: Our norms for minimal process, expressed in the constitutional rubric of procedural due process, are generally conceded to constitute a substance-sensitive calibrated continuum in which the nature of the process due is connected to the nature of the substantive interest to be vindicated; yet our primary set of norms for optimal procedure, the procedure available in our courts of general jurisdiction, is assumed to be largely invariant with substance. It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process. My point is not that the Federal Rules are not workable over such a broad range. But it may be worth asking in

> what sense that codification works well because of its trans-substantive aspiration, and in what sense it works in spite of it.[118]

The decades have proven Cover prescient. The success of the Federal Rules has produced an ever-greater alienation from substantive values in procedural analysis.

The mode of analysis set forth in this Article aims to reverse that trend. Its prescription should be a source of comfort and reassurance to judges. When judges confront litigation problems that are unprecedented and intractable, they can often look to the controlling liability policies set by politically accountable decision makers to ground their rulings and justify the allocation of benefits and burdens that those rulings entail. When judges must determine whether to constrain or authorize expansive and unprecedented forms of litigation in class or mass-tort adjudication, they can use the goals of the underlying substantive law in the disputes before them as guideposts for their decisions. And when judges issue rulings on open-textured procedural provisions that carry the potential for dramatic trans-substantive effect, they can specify the manner in which the underlying law shapes their analysis and issue holdings that are more focused in their reasoning and more modest in their precedential impact. The managerial judge need not feel unguided at sea. Liability policy can provide a compass.

To return to Karl Llewellyn's metaphor and update it for a new era, we must learn to read trans-substantive procedure through the spectacles of the substantive law.

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118. Cover, *supra* note 4, at 732–33.