INDIVIDUALS WITHIN THE AGGREGATE: RELATIONSHIPS, REPRESENTATION, AND FEES*

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Over the past decades, aggregate litigation has become more common; through various statutory, rule-based, and informal means, judges and lawyers consolidate large groups of individual litigants and claims. The paradigm of a class action, however, continues to dominate the literature, and with it, the assumption that a single set of lead lawyers represent all of the plaintiffs in the assembled group.

This article addresses the problems raised when, in contrast to that paradigm, aggregation brings together mass tort plaintiffs, some of whom come with individually-retained plaintiffs' attorneys (IRPAs), who perform tasks in addition to those done by a court-appointed plaintiffs' steering committee (PSC). Our central questions are about the roles of the many lawyers within the aggregate and the potential for policymakers to use procedural tools and the law of attorneys' fees to structure incentives to enhance the experience of individual litigants within the aggregate. Animating our interest is the view that, in addition to effectuating outcomes, litigation is also a means by which to express political and social relationships. What occurs within an aggregate formed for adjudicatory purposes is of moment for the polity.

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* All rights reserved. This article was prepared for the conference on Class Actions and Complex Litigation, New York University School of Law, April 1995. Like many who write on these issues, we have participated, singly or jointly, as academics, expert consultants, and lawyers, in some of the activities that form the basis for this discussion. We have learned a good deal about the challenges of large-scale litigation from those with whom we have worked—Richard Bieder, John Langbein, Francis McGovern, Harvey Nachman, Mark Peterson, George Priest, and Stephen Wizner. Our thanks for help on an earlier draft to Jennifer Arlen, John Frank, Greg Keating, Nancy Marder, Ed McCaffery, Deborah Rhode, Eric Talley, Mary Twitchell, Chuck Weisselberg, and participants in conferences and workshops at New York University School of Law, University of Southern California Law School, and Yale Law School, and to Kelley Poleynard, Gregory Porter, Linda Thomas, Steven Vaughan, and Dan Brown for wonderful research assistance.

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THE PREVALENCE AND POPULARITY OF AGGREGATION

Individualism pervades the traditional conception of civil litigation within the United States; the dominant image is that individual plaintiffs retain specific lawyers to provide services, that those lawyers in turn file cases, which are then processed individually by the courts. Some commentators applaud this tradition, while others believe its mythic qualities are belied by empirical reality.[1]

Whatever its values and utility, that system has been altered in significant respects; for some parts of the civil docket, it simply no longer exists. Group processing is now the norm whenever lawyers or judges perceive that a series of cases involving similar claims have been or are soon to be filed.[2] Within these aggregations (whether they are called class actions, multidistrict litigation, bankruptcy, consolidated cases, or something else), groups of lawyers, litigants, judges, special masters, or other ad hoc court appointees all work together to reach closure. Novel formats have been devised for group-based discovery, for settlement negotiations, for the occasional mass trial, for

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[1] Compare Roger H. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. Ill. L. Rev. 69 with Deborah R. Hensler, Resolving Mass Toxic Torts: Myths and Realities, 1989 U. Ill. L. Rev. 89 [hereinafter Hensler, Myths and Realities].

[2] Judith Resnik, From "Cases" to "Litigation," Law & Contemp. Probs., Summer 1991, at 5, 22 [hereinafter Resnik, From "Cases" to "Litigation"]. As of 1993, the 37,002 cases subjected to multidistrict litigation treatment represented 16.6% of the federal docket. Judith Resnik, Aggregation, Settlement, and Dismay, 80 Cornell L. Rev. 918, 928 n.39 (1995) [hereinafter Resnik, Aggregation, Settlement, and Dismay] (citing to data from the Administrative Office of the United States Courts).

The popular press also focuses on such cases. See Joseph Nocera, Fatal Litigation (pt. 1), Fortune, Oct. 16, 1995, at 60 [hereinafter Nocera, Fatal Litigation I]; Joseph Nocera, Fatal Litigation: Dow Corning Succumbs (pt. 2), Fortune, Oct. 30, 1995, at 137 [hereinafter Nocera, Fatal Litigation II] (focusing on the litigation involving Silicone Breast Implants). Relatively little empirical research explores this phenomenon; as the authors of the most recent effort put it, their study of 417 cases involving class claims in four federal district courts provides "separate snapshots" of recent aggregate case activity, and while it augments the ability to describe such litigation, it cannot test "relationships among variables." Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 84 (1996) [hereinafter Willging et al., Empirical Analysis of Rule 23].

distributing large sums of money, and for other remedies.[3] An increasingly common feature of settlements is the creation of a "claims facility" (analogous in many respects to a mini-agency[4]), which provides process and/or payments to claimants within the aggregate.

Whenever aggregation occurs, a question emerges about which lawyers shall act on behalf of the group. But when the very existence of a lawsuit is itself predicated on the creation of an aggregate (the classic example being the class action), the assumptions are that one set of lawyers represents (or creates) the class, and that without the availability of the class action mechanism itself, no lawyers would represent any individual plaintiffs. Examples of such group litigations range from suits seeking monetary damages (such as securities, antitrust, and consumer fraud litigation), monetary and injunctive remedies (such as employment litigation), or structural relief (such as school desegregation, environmental, and prison litigation). Indeed, one of the primary purposes of class actions is to enable groups otherwise without legal representation to obtain access to courts; the group creates sufficiently large economic or social interests to attract attorney attention and entrepreneurial risk-taking.

Until relatively recently, these kinds of class actions (with a single set of lawyers acting on behalf of a large group of clients) constituted the gamut of classes and dominated the discussion of aggregate cases. Drafters of the federal class action rule had presumptively excluded mass torts from the reach of their rule,[5] and tort cases proceeded, one by one, through the courts. But in 1968, Congress created multidistrict litigation (MDL), by which cases within the federal courts could be aggregated,[6] officially only for pretrial purposes but in practice often for disposition. In the 1970s and 1980s, judges deployed the MDL panel for mass accidents such as fires and plane crashes.[7] During those years, product liability cases also became both more common and wider in scope, including many claims for injuries arising out of the use of a particular product. Judges and lawyers used various

[3] E.g., Deborah R. Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 Tex. L. Rev. 1587 (1995) [hereinafter Hensler, ADR in Mass Personal Injury Litigation]; Judith Resnik, Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 Tex. L. Rev. 1627 (1995) [hereinafter Resnik, Procedural Innovations].

[4] Resnik, From "Cases" to "Litigation," supra note 2, at 38, 63.

[5] Fed. R. Civ. P. 23(b)(3) advisory committee's note; see Resnik, From "Cases" to "Litigation," supra note 2, at 9-16.

[6] 28 U.S.C. § 1407 (1994).

[7] From the creation of the MDL Panel in 1968 through 1985, about one-quarter (106 out of 404) of all transferred MDL litigations were mass accidents. Resnik, Aggregation, Settlement, and Dismay, supra note 2, at 927-30, 928 nn.39-41 (1995).

means to create informal, consolidated processing; such techniques included uniform pretrial orders or the assignment of a single judge to a group of cases.[8] In the 1980s, via the Dalkon Shield and the Johns-Manville bankruptcies,[9] judges and lawyers further accustomed themselves to handling mass torts in a consolidated or coordinated fashion. Judges also began to certify some mass torts as class actions.[10] By the mid-1990s, mass tort class actions had become a part of the landscape of aggregate litigation.[11]

Mass tort cases, however, are not clones of the more familiar examples of class actions. Unlike civil rights, consumer, or securities class actions, in many of the mass tort aggregate cases, plaintiffs retain individual lawyers hired via contingency-fee contracts before cases are aggregated. "Individually-Retained Plaintiffs' Attorneys" (IRPAs) is the name we gave such lawyers,[12] whose roles in group litigation have been overshadowed in legal scholarship and in procedural manuals by court-appointed lead lawyers—a "Plaintiffs' Steering Committee" (PSC) or "Plaintiffs' Management Committee" (PMC), whose titles and acronyms are now commonplace.

Little by way of rules or case law guides courts in sorting out the relationships among clients and the many lawyers within group litigation.[13] While the economic benefits to lawyers of large-scale litigation

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[8] See, e.g., Deborah R. Hensler, William L.F. Felstiner, Molly Selvin & Patricia A. Ebener, Asbestos in the Courts: The Challenge of Mass Toxic Torts 69-70 (RAND No. R-3324-ICJ 1995) [hereinafter Hensler et al., Asbestos in the Courts].

[9] See Richard B. Sobol, Bending the Law: The Story of the Dalkon Shield Bankruptcy 37-48 (1991); Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

[10] Resnik, From "Cases" to "Litigation," supra note 2, at 17-18.

[11] Deborah R. Hensler & Mark A. Peterson, Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis, 59 Brook. L. Rev. 961 (1993). The recent inclusion of torts in the class action framework is reflected in both the expanded discussion of mass torts in the 1995 *Manual for Complex Litigation*, see Manual for Complex Litigation, Third §§ 33.2-.29 (1995) [hereinafter Manual Third], and in the fact that no tort class actions were found in the Federal Judicial Center's recent empirical project reviewing cases disposed of from 1992 to 1994 in four federal district courts, Willging et al., Empirical Analysis of Rule 23, supra note 2, at 81-82. The researchers suggest that mass tort class actions are too recent a phenomenon to have reached disposition in large enough numbers to have been captured in their sample, with its cutoff date of disposition by 1994. Id.

[12] See In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 605 (1st Cir. 1992) [hereinafter *Nineteen Appeals*] (adopting this nomenclature); In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 300 (1st Cir. 1995) [hereinafter *Thirteen Appeals*] (same). Dennis Curtis and Judith Resnik were appellate counsel for some IRPAs and coined the phrase (Individually-Retained Plaintiffs' Attorneys, IRPAs) in their briefs; the opinions in both cases use the term.

[13] That these layers of lawyers need coordination has been apparent for some time. Initially, informal networks of lawyers began by selecting their own leaders—an approach supported by the first set of guidelines. Manual for Complex Litigation § 1.92, at 90-91, § 4.53, at 157 (5th ed. 1982) ("Lead counsel are chosen by the groups of parties having a

are well documented, the statutes and rules that create the occasions for group litigation do not reflect the relationships of such gains to outcomes for the parties, the diverse roles for lawyers, or the methods for calculating fees and the specific fees paid. Neither the major vehicles in federal litigation by which groups are currently amassed (the class action rule and the multidistrict litigation statute) nor contemporary proposals to expand group litigation (such as by means of revision of federal jurisdictional grants,[14] interstate transfers,[15] and the American Law Institute's proposed "consolidation" of complex litigation[16]) mention the impact of aggregation on the financial incen-

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common interest," and in "'exceptional circumstances'" or when parties fail to choose, the court may do so.). By the mid-1980s, and illustrative of the trend toward increasing judicial managerial control, however, the *Manual for Complex Litigation* advised judges to oversee the appointment of steering committees for the plaintiffs' attorneys. Manual for Complex Litigation, Second § 20.224 (1985) [hereinafter Manual Second].

In the 1995 edition, the *Manual* outlined four categories of lawyers: "[l]iaison counsel: charged with essentially administrative matters, such as communications between the court and other counsel" and who need not be a lawyer; "[l]ead counsel: charged with major responsibility for formulating (after consultation with other counsel) and presenting positions"; "[t]rial counsel: [who] serves as a principal attorney for the group at trial"; and "[c]ommittees of counsel," such as steering committees: "formed to serve a wide range of functions." Manual Third, supra note 11, § 20.221, at 27 & n.59. The *Manual Third* recommends that judges "take an active part in making the decision on the appointment of counsel" and set forth tasks for such lawyers in court orders or other documents. Id. §§ 20.222, 20.224; see also id. § 33.22 (detailing case management orders in Silicone Gel Breast Implant Litigation as exemplary).

14 See, e.g., Multiparty, Multiforum Jurisdiction Act of 1991, H.R. 1100, 103d Cong., 1st Sess. (1991).

15 Unif. Transfer of Litigation Act § 101, 14 U.L.A. 115 (West Supp. 1994). See generally Edward H. Cooper, Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act, 54 La. L. Rev. 897 (1994).

16 American Law Inst., Complex Litigation: Statutory Recommendations and Analysis with Reporter's Study: A Model System for State-to-State Transfer and Consolidation chs. 3-5 (1994) [hereinafter ALI Complex Litigation] (proposing federal intrasystem consolidation, consolidation in state courts, and federal-state intersystem consolidation). Another ALI project, developing a restatement on the law of lawyers, considers the question of reasonable fees but has not (at least yet) considered how to think about reasonableness in the context of many lawyers working within a large-scale aggregated litigation. Restatement of the Law, The Law Governing Lawyers § 46 (Tentative Draft No. 4, 1991) [hereinafter ALI Draft Law Governing Lawyers] (Ch. 3, Topic 1 "Legal Controls on Attorney Fees"; Section 46, entitled "Lawful and Reasonable Fees," applies in proceedings such as "suits by lawyers for fees").

Judge Schwarzer and others have recently proposed amendments to the existing multidistrict litigation statute to facilitate "coordination of discovery in cases dispersed in state and federal courts without implicating substantive law choices or delaying trials in state court." William W Schwarzer, Alan Hirsch & Edward Sussman, Judicial Federalism: A Proposal To Amend the Multidistrict Litigation Statute To Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts, 73 Tex. L. Rev. 1529, 1532 (1995). Although not addressing IRPAs and fees, Schwarzer et al. assume that "[r]epresentation of the parties . . . would be principally by lead counsel, as it is now"; individual lawyers could appear only by special leave. Id. at 1560. They note that lawyers

tives of lawyers, on their relations with clients, or on the work performed.[17]

Congress has paid somewhat more attention to these issues; the 1994 amendments to the Bankruptcy Act offer some direction about fees to be paid to bankruptcy lawyers,[18] and the recently enacted Private Securities Litigation Reform Act of 1995[19] provides a mechanism for selection of lead counsel and discusses payment of fees.[20] But these statutes, like current ethical codes and academic commentary on aggregation, do not address relationships *among* the many lawyers who may be a part of aggregates, some of whom may work solely for individual plaintiffs, and some of whom may work simultaneously for individual clients, and, as PSC members, for the plaintiff group as a whole.[21]

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unenthusiastic about aggregation can "compound the court's management burden and confound its efforts to move the litigation toward expeditious resolution." Id. at 1548.

[17] In contrast to these litigation-focused rules, some proposals for administrative regimes address lawyer-client fee arrangements. See, e.g., The Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-945(c) (1994), a portion of which was upheld in United States Dep't of Labor v. Triplett, 494 U.S. 715, 727 (1990); see also Lester Brickman, The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress, 13 Cardozo L. Rev. 1891, 1892, 1915-16 (1992). Brickman advocates that attorneys for successful claimants be paid reasonable fees based on hourly rates that take into account several factors, including comparable rates for lawyers in administrative proceedings, the "risk, if any, borne by the attorney," and the need of claimants for access. He also recommends that, under limited circumstances, attorneys for unsuccessful claimants be paid as well. Id. at 1916.

[18] 11 U.S.C. § 330(a) (1994) provides in part that a court may award attorneys "reasonable compensation for actual, necessary services"; courts are to "consider the nature, the extent, and the value of such services, taking into account all relevant factors," including time spent, rates charged, and the utility and benefit of the services. This statute also requires courts to consider whether the time charged was "commensurate with the complexity, importance, and nature of the problem," and how the compensation relates to that charged by "comparably skilled practitioners" in nonbankruptcy cases. Id. These provisions were amended in 1994 to prohibit payment for duplication of services. 11 U.S.C. § 330(a)(4)(A)(i); see also 11 U.S.C. § 503(b)(4) (1994) (allowing reasonable attorneys' fees in administration of estate).

[19] Pub. L. No. 104-67, 109 Stat. 737 (to be codified in scattered sections of 15 U.S.C.).

[20] Newly enacted 15 U.S.C.A. § 77z-1(a)(3)(B)(v) (West Supp. 1996) ("Selection of lead counsel") provides: "The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C.A. § 77z-1(a)(6) ("Restrictions on payment of attorneys' fees and expenses") provides: "Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." Both sections are discussed infra notes 128, 174 and accompanying text.

[21] See, e.g., Jack Weinstein, Individual Justice in Mass Tort Litigation 40-41 (1995) [hereinafter Weinstein, Individual Justice] (arguing that ethical issues in mass torts have not "been given the special attention they deserve"); Carrie Menkel-Meadow, Ethics and the Settlements of Mass Torts: When the Rules Meet the Road, 80 Cornell L. Rev. 1159, 1172 (1995) (describing current rules as unresponsive to issues of mass torts); Joan Steinman, The Effects of Case Consolidation on the Procedural Rights of Litigants: What

The emergence of mass torts as an important part of aggregate litigation provides an opportunity to reflect on the relationships of individuals to their lawyers, to each other, and to the court; to consider the representation of individuals singly and as groups or subgroups; and to understand how the rules on judicial awards of attorneys' fees affect relationships, representation, and the processes and outcomes of aggregate litigation. While group litigation has a long historical pedigree,[22] and commentators' attention has been focused on the impact of attorneys' fees on group litigation,[23] the concerns that we raise here have not been explored. In the past decade, several articles have discussed the effects of "entrepreneurial" lawyers,[24] the difficulties of monitoring such lawyers' behavior,[25] and some of the "distributional dilemmas" encountered when class lawyers assess proposed settlements.[26] But in part because paradigmatic group litigations were not

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They Are, What They Might Be: Non-Jurisdictional Matters (pt. 2), 42 UCLA L. Rev. 967, 1051 (1995) (discussing increase in consolidated cases, with lead and liaison counsel, and existence of what she terms "apportionment issues").

22 Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 75-85 (1987) [hereinafter Yeazell, Modern Class Action].

23 See, e.g., John P. Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds, 87 Harv. L. Rev. 1597, 1601-12 (1974) [hereinafter Dawson, Attorney Fees from Funds] (providing a history of common benefit fee award rule); Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 719-20 (1941) (examining the need for class action suits, recognizing the role of attorneys in private enforcement by class actions, and raising concerns about those lawyers' "loyalty" to the class given their own incentives).

24 E.g., John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877 (1987) [hereinafter Coffee, Entrepreneurial Litigation]. See also Janet C. Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 534-48 (1991) (examining the incentives of all the participants, plaintiffs' attorneys included, in class action securities litigation).

25 Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1 (1991) [hereinafter Macey & Miller, The Plaintiffs' Attorney's Role]; see also Coffee, Entrepreneurial Litigation, supra note 24; Jonathan R. Macey & Geoffrey P. Miller, Auctioning Class Action and Derivative Lawsuits: A Rejoinder, 87 Nw. U. L. Rev. 458 (1993) [hereinafter Macey & Miller, Auctioning Class Action and Derivative Lawsuits]; Roberta Romano, The Shareholder Suit: Litigation Without Foundation?, 7 J. L., Econ. & Organization 55, 55-56 (1991); Randall S. Thomas & Robert G. Hansen, Auctioning Class Action and Derivative Lawsuits: A Critical Analysis, 87 Nw. U. L. Rev. 423 (1993).

26 Nancy Morawetz, Bargaining, Class Representation, and Fairness, 54 Ohio St. L.J. 1, 2 (1993) [hereinafter Morawetz, Bargaining] (little guidance has been provided on how class action lawyers "should understand the nature of their duty to represent the members of a class" as a whole); see also Mary K. Kane, Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer, 66 Tex. L. Rev. 385 (1987) (urging greater judicial oversight); Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183 (1982) [hereinafter Rhode, Class Conflicts] (proposing methods to respond through increased communication to diverse views within the class). See generally John Leubsdorf, Pluralizing the

mass torts (in which a multitude of individual claimants had filed cases prior to aggregation, and some of them could have pursued their claims individually) and in part because of the absence of discussion of multiple sets of *lawyers* within a single aggregated litigation, the relationships of individual lawyers to individual clients within aggregated cases have not drawn the attention of judges crafting doctrine or of academics proposing policy.

The current law of attorneys' fees in aggregate litigation illustrates this point; the doctrine contemplates relatively anonymous groups of people, collectively represented by a single set of lawyers, who are paid either by defendants pursuant to statutorily mandated fee shifts or by groups of plaintiffs who share in the "common benefit" conferred by a litigation. Judges order such fees either by calculating a "lodestar" (an hourly rate times the number of hours spent, sometimes enhanced by a "multiplier" intended to reflect unusual risks or efforts) or by charging a percentage of the fund (POF).[27]

It is our view, however, that both of these models ignore important features of aggregate tort context, in which some claimants may have entered into contingency-fee contracts with individual lawyers long before the litigation was aggregated, other claimants secure representation after and only because of aggregation, and yet others proceed with no individual lawyers at all.[28] While there is some overlap with the kind of class action that enables access to courts by individuals who would otherwise not be able to litigate, aggregation in mass torts also diverges from this model in several respects. First, it can result in either the "invasion" or the potential for superintendence (depending on one's point of view) of some existing attorney-client relationships and the resulting fees to be paid. Second, in contrast to a single set of attorneys representing an undifferentiated group of plaintiffs (or what economists describe as a single agent acting on behalf of a host of principals), in mass torts, many lawyers who have a variety of relationships (to each other, to individual clients, and to the court) are on the scene. Third, because of the multiple sets of lawyers, the existence of an aggregate may cost individual litigants more in charges by lawyers for expenses than litigants would have incurred had the cases

Client-Lawyer Relationship, 77 Cornell L. Rev. 825 (1992) (discussing lawyers in and for groups); Mary Twitchell, The Ethical Dilemmas of Lawyers on Teams, 72 Minn. L. Rev. 697, 735-43, 764-72 (1988) (calling for coordination needed among lawyers in general, including in large-scale cases).

[27] See infra Part III.B.

[28] Contrast for example, plane crashes, fires, or building collapses, in which virtually all claimants have retained lawyers, and product liability actions, in which notification of the existence of a settlement fund often results in thousands of unrepresented claimants seeking compensation.

not been aggregated, and the attorney fees themselves need to be allocated among the various groups of lawyers.[29] In Part II, we discuss the various kinds of "individually-retained" lawyers, the tasks of PSC attorneys, and the diverse roles played by the many lawyers within aggregate tort litigation.

How to pay lawyers who operate within these newly minted configurations is a key policy question. Attorney fees not only create incentives for bringing litigation; they also provide a powerful mechanism for shaping the course and outcomes of filed cases. When courts interpose themselves between litigants and lawyers—by selecting lawyers to take the primary roles in dealing with defendants and with the court itself, and by leaving others to provide legal services to individual clients—judges also take on some responsibility for determining which lawyer services will be valued and for how much. Part III reviews the law on legal fees and considers why mechanisms for aggregation address neither how to pay lawyers in general nor the special problems raised by mass tort aggregates in particular.

When disbursing fees at the end of a specific litigation, judges have measured the value of the legal activity by the sums transferred to the victor or, in the nonmonetary context, by the outcome of a change in a legal rule. Our analysis of the history and context from which attorney-fee law emerged explains why judges and lawyers have fastened onto "outcome" as a touchstone for determining payment, and our discussion of the work of IRPAs and PSC members in these cases explains the interdependencies among lawyer groups that create disincentives for them to press for altering fee-payment methods.[30]

Although explainable and expedient, current arrangements do not respond to significant problems. From virtually every perspective, calls are coming for reform.[31] Changes are needed in how courts man-

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[29] For many judges and lawyers in the contemporary legal arena, aggregation is assumed to be an efficient response to large numbers of similar cases that they fear will clog dockets. Whether the promise of efficiency has been met is an empirical question not yet answered. See Hensler, ADR in Mass Personal Injury Litigation, supra note 3, at 1593-94 (discussing the mixed evidence of efficiency gains).

[30] See Charles W. Wolfram, Mass Torts—Messy Ethics, 80 Cornell L. Rev. 1228, 1233-34 (1995) (arguing that claimants might have the greatest incentive to make improvements in the current regime). Whether claimants have the ability is another question. See, e.g., Letter from Brian Sullivan to Dr. Deborah Hensler (Oct. 1995) (on file with authors) (writing that his 81-year-old father has had his asbestos claim pending for 12 years, that he found Hensler's name in a newspaper, and that he "was just looking for some information when these cases will be completed").

[31] Some plaintiffs' lawyers argue that aggregate tort litigation is an anathema to United States legal institutions; one recent article's title—"The Tort that Ate the Constitution"—captures this theme. Roger Parloff, The Tort that Ate the Constitution, Am. Lawyer, July-Aug. 1994, at 74. Others include Susan P. Koniak, Feasting While the Widow Weeps: *Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995); Roger C. Cramton,

age aggregate litigation, in how lawyers behave within these aggregates, and in the conception of the roles of the claimants themselves.

To inform this reconceptualization, in Part IV, we examine two competing visions of the purposes of litigation and of courts themselves. The first, which we term "enacting rights," aspires to a court system in conversation with litigants and with the citizenry about the normative context in which we live and its practical import. Courts are celebrated because their processes have the capacity to dignify and respect individuals' entitlements to voice and efficacy. Empirical support for these insights comes from social scientists, who, when systematically studying litigants' experiences and attitudes, report that tort litigants share judicial and legal theorists' beliefs that process matters. While outcomes are an important result of process, outcomes are—from these vantage points—not the sole function of process. To-

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Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction, 80 Cornell L. Rev. 811 (1995). Parloff, Koniak, and Cramton discuss Georgine v. Amchem Products, Inc., 157 F.R.D. 246 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996), settling a class of "future" asbestos claimants. The legality of the "futures" asbestos class action is on appeal before the Third Circuit, with Professor Larry Tribe arguing on behalf of opponents of the settlement that the settlement was collusive and that its representational structure fails due process mandates. Initial Brief of Appellants at 29-36, 65-72, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-CV-00215) (on file with authors).

Some defendants' perspectives are provided by a Fortune Magazine's 1995 cover story, "Fatal Litigation," which suggested that aggregation enables some plaintiffs' lawyers to bring weak if not false claims in sufficient quantity as to require defendants to choose between settlement and bankruptcy. Nocera, Fatal Litigation I, supra note 2, at 62. This viewpoint also animated Judge Posner's recent dismantling of a class action in a case claiming HIV infection from blood. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-99 (7th Cir.) (discussing the pressure to settle from the number of claims consolidated), cert. denied, 116 S. Ct. 184 (1995). Proposals to regulate plaintiffs' attorneys also come from the Manhattan Institute, which recently published a monograph arguing for limitations on contingency fees. See Lester Brickman, Michael Horowitz & Jeffrey O'Connell, Rethinking Contingency Fees 26-28 (1994) [hereinafter Brickman et al., Rethinking Contingency Fees]. In 1995, Congress also revised securities class action litigation; in part that legislation was prompted by the view of too-easily filed lawsuits by plaintiffs' attorneys. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (to be codified in scattered sections of 15 U.S.C.).

Legal academics have also made proposals to alter fee arrangements. See, e.g., the call for auctions of claims by Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25.

Finally, rulemakers have convened several conferences and commissioned research to examine the workings of class actions. In 1994 and 1995, the Advisory Committee on the Federal Rules of Civil Procedure convened a series of working conferences (including the Symposium of which this article is a part) on class actions. E.g., Symposium, Mass Tortes: Serving Up Just Desserts, 80 Cornell L. Rev. 811 (1995) [hereinafter, Symposium, Mass Tortes]; Symposium, National Mass Tort Conference, 73 Tex. L. Rev. 1523 (1995) [hereinafter Symposium, National Mass Tort Conference]; see also Willging et al., Empirical Analysis of Rule 23, supra note 2, at 81 (reporting results of research undertaken at request of Advisory Committee).

gether, judicial, political, and empirical perspectives provide a vision of litigation as imbued with political and social import and located in a liberal theory which values individual autonomy and participation within a democracy. Yet those who espouse these perspectives have founded their views largely on the paradigm of individual litigation. They have not much discussed aggregation, the financing of litigation, the role of lawyers, or how to shape aggregate cases to enable any of that to which they aspire—voice, participation, rights seeking, empowerment—to occur.

A competing vision, which we label "effectuating outcomes," is largely but not exclusively associated with law and economics; litigation is seen as a system designed to achieve voluntary compliance with legal norms by imposing costs for their violations. For some within this school, the focus on individualization and on process is a distraction, if not superfluous or harmful.[32] The outcome-oriented approach is accompanied with attention to the costs of the litigation transaction (including lawyers' fees) and to changes in the scale of lawsuits. Aggregation is a subject of interest within this literature, which also includes concrete advice about how to regulate transaction costs through the use of attorney fees in aggregate litigation. The proposal of a judicial auction to determine which lawyers control the litigation is a prime example of ideas about how to minimize the costs of process and how to align incentives of lawyer-agents and client-principals.[33]

For us, both visions of litigation miss what the other has to offer. The aspirations for expressing rights through process fail to account for economic incentives of lawyers and groups of litigants; the focus on outcomes misses the social and political relationships that litigation embodies and enacts. We share with economists the view that rules on attorneys' fees and costs are a central means by which to make policy, but we do not agree that courts are only in the business (a word used advisedly) of creating incentives for norm obedience by transferring wealth.

We are neither nostalgic nor romantic about bygone eras.[34] Unlike some commentators, we do not rely on individual litigation (with

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[32] E.g., David Rosenberg, Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases, 71 N.Y.U. L. Rev. 210, 214-15 (1996) (criticizing proceduralists' focus on individual control, which Rosenberg equates with self-determination, arguing that from the perspective of torts policy, deterrence and compensation objectives are better achieved by collectivization of risk-based harms in mass exposure cases and that such an approach maximizes plaintiffs' "rational" interests).

[33] See, e.g., Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 105-16.

[34] Rather, we are acutely aware that one way to tell the history of this century's experience with adjudication is that it is in decline. See Judith Resnik, Failing Faith: Adjudica-

representation by a lawyer of a particular client in an adversary setting to be concluded with adjudication) as the relevant baseline for today's discussion. Over the last thirty years, aggregate litigation has moved from a specially justified and occasional exception to a more common and often welcomed response to a set of legal claims. This shift has been accompanied (and in part enabled) by substantial dissatisfaction—with individual litigation (viewed both as resource consumptive and as failing to generate equity across similarly situated claimants) and with lawyers (viewed as erratic providers of services and as self-interested entrepreneurs). Contemporary conversations about the utility and desirability of individual representation are thus appropriately freighted with suspicion of both lawyers and litigation, and these suspicions have deepened as lawyers, when describing their work to justify fee applications, revealed their practices.

On the other hand, we do not believe that either judges or rulemakers who craft large-scale litigations should ignore individual litigants, their lawyers, and the political purposes of litigation.[35] Aggregation affects (enables, alters, or severs) whatever semblance of relationships exists between individual litigants and lawyers; aggregation alters the bargaining power among the litigants. Therefore, policymakers must consider the effects of their choices on litigants' experiences of law and on law itself.

The questions, then, are what litigants want, need, and normatively should get from litigation; what roles lawyers for aggregates and lawyers for individuals, as well as other professionals or lay participants, might play in responding to litigants; and how the law on aggregate structures, costs, and fees affects those roles. In Part V, we suggest a first set of answers to some of these questions. In some ways, our proposals about judicial obligations to oversee both the relationships among members of aggregates and the delivery of legal services within aggregates are congruent with another shift in the world of process—a trend toward the convergence of rules of procedure and rules of ethics, which is animated by judicial efforts to gain control over their docket by regulating lawyers' behavior. The law on attorneys' fees and costs is a tool of regulation—like the sanction provisions of Rule 11 of the Federal Rules of Civil Procedure, the judicial management regime of Rule 16, and some of the revised discovery

tory Procedure in Decline, 53 U. Chi. L. Rev. 494 (1986); Judith Resnik, Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century, 41 UCLA L. Rev. 1471 (1994) [hereinafter Resnik, Whose Judgment?].

[35] We are not alone. See Weinstein, Individual Justice, supra note 21, at 3 ("Chief among our current concerns should be the 'individual aspect' of mass litigations.").

rules.[36] Our hope is that claimants, judges, and lawyers can develop a rule structure to use the vast resources (monetary and otherwise) within aggregates creatively to fashion procedures, engender relations, and make payments for that which they claim to value.

II

THE WORK OF LAWYERS IN LARGE-SCALE TORT AGGREGATES: THE ROLES OF PLAINTIFFS' STEERING COMMITTEES AND OF INDIVIDUALLY-RETAINED PLAINTIFFS' ATTORNEYS

In this Part, we provide an overview of the distinctive characteristics of lawyering structures within large-scale tort aggregates, most of which are not yet visible in either case law or in academic literature.[37] Our focus is on the roles that different plaintiffs' lawyers play.[38]

A. Gatekeeping

Most mass tort cases begin with individual lawyers (IRPAs)—paid by contingency fees—filing lawsuits. In the discourse of large-scale torts, some of these lawyers are now referred to as "trail blazers"

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[36] Fed. R. Civ. P. 11(c) (authorizing courts to impose sanctions, sua sponte or on a motion, on lawyers who file pleadings not grounded in law and fact); Fed. R. Civ. P. 16 (authorizing judicial officers to direct parties to participate in pretrial conferences, encouraging resolutions without trials, and mandating judges to structure the pretrial process by entering scheduling orders); Fed. R. Civ. P. 26(a)(1) (requiring parties to disclose certain material "without awaiting a discovery request").

[37] The materials presented below come from an amalgam of sources, including interviews with participants in many aggregate litigations, commentary presented by judges and lawyers at conferences on aggregate litigation, including Symposium, The Institute of Judicial Administration Research Conference on Class Actions, 71 N.Y.U. L. Rev. 1 (1996) (Conference on Class Actions and Complex Litigation held at New York University School of Law in April 1995, cosponsored by the Institute for Judicial Administration at New York University School of Law and the Advisory Committee on the Federal Rules of Civil Procedure, to consider problems in aggregate litigation); Symposium, Mass Tortes, supra note 31 (Symposium held at Cornell Law School in October 1994 about the settlement of and the ethical issues in mass torts); Symposium, National Mass Tort Conference, supra note 31 (National Mass Tort Conference held in Cincinnati, Ohio, in November 1994, sponsored by the National Center for State Courts to enable judges and lawyers to compare methods for handling massive litigations); Conference, A Practical Look at Complex MDL and Mass Tort Litigation, Conference at Northwestern School of Law, Lewis & Clark College, Portland, Or. (Oct. 12, 1995) (at which judges and lawyers discussed their experiences in large-scale litigation), from documents in lawsuits, from reported cases, and from case studies. See, e.g., Hensler et al., Asbestos in the Courts, supra note 8; Hensler & Peterson, supra note 11.

[38] When we refer below to what such lawyers do, some of that work may be performed by individuals (paralegals, secretaries, junior associates, or others) within a law firm other than by a client's named lawyer.

or those who "set the table."[39] Questions exist about how well IRPAs function as gatekeepers, selecting and rejecting cases to file. One concern is that their resources are insufficient to permit them to take on meritorious cases. Assumptions about rationally acting contingency-fee lawyers posit that they only file cases in which they can expect their yields to optimize their investments,[40] and that in certain types of mass torts, defendants' resources overwhelm those of individual contingency-fee lawyers. David Rosenberg, for example, has argued that certain forms of socially useful mass tort cases will not be filed by individual contingency-fee lawyers.[41]

The converse of the concern that IRPAs too easily reject valid claims is the critique that they are insufficiently careful—that too many nonmeritorious cases are filed on the assumption that defendants will settle nuisance cases and pay sufficient returns to make such an enterprise profitable for lawyers.[42] A recent study of medical malpractice offers support for both criticisms: many injuries caused by negligence go unredressed, and many claims are filed in which negligence has not been uncovered.[43] Information about aggregate torts

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[39] Transcript of Hearing on Application of Attorneys' Fees at 75, 44, Bowling v. Pfizer, Inc., No. C-1-91-256 (S.D. Ohio 1995) [hereinafter Bowling Fee Hearing Transcript] (on file with authors).

[40] Twenty percent of injured claimants in RAND's injury compensation study reported that lawyers rejected taking their cases based on the amounts of money involved. Deborah R. Hensler, The Real World of Tort Litigation (forthcoming 1996) (manuscript at 12, on file with authors) [hereinafter Hensler, The Real World]. Lawyers may also be lazy gatekeepers, underenergized, and hence insufficiently pursuing meritorious legal claims. In an empirical survey of class action lawyers, Bryant Garth, Ilene H. Nagel, and S. Jay Plager found too little "creativity in initiation" of litigation among lawyers who were (in their terms) legal "mercenaries" (as contrasted with "social advocates"). Bryant Garth, Ilene Nagel & S.J. Plager, The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation, 61 S. Cal. L. Rev. 353, 356, 374-78 (1988) (finding that salaried lawyers at public interest or at government-funded legal services offices, who were freed from fee-generating work, undertook innovative lawsuits while attorneys dependent on attorneys' fees tended to piggyback their filings of private antitrust and securities cases upon government-initiated investigations and litigation). Whether such "free riding" is efficient was not discussed.

[41] David Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 849, 889-92 (1984) [hereinafter Rosenberg, Causal Connection].

[42] While concerns about lawyers' lack of selectivity are often raised in the context of securities class action and particularly "stock drop" cases, see, e.g., Ralph K. Winter, Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America, 42 Duke L.J. 945, 949-50 (1993), these concerns have also surfaced in the context of tort litigation. For example, Coffee describes a lawyer who obtained retainers from more than 7000 clients in the Bhopal poisonous gas litigation. Coffee, Entrepreneurial Litigation, supra note 24, at 886; see also Nocera, Fatal Litigation II, supra note 2, at 138 (discussing voluminous filings in the Silicone Breast Implant Litigation).

[43] Paul C. Weiler, Howard H. Hiatt, Joseph P. Newhouse, William G. Johnson, Troyen A. Brennan & Lucian L. Leape, A Measure of Malpractice: Medical Injury, Malpractice

permits a parallel inference; the number of claims filed subsequent to court-ordered notice in both the Dalkon Shield and the Silicone Breast Implant Litigations suggests both that individualized tort litigation failed to ensure access for some claimants and that easier access resulted in some, perhaps substantial, overclaiming.[44]

In short, IRPAs may be imperfect gatekeepers, but, absent a much different regulatory apparatus, they will retain that role. While some cases—such as some of the current tobacco litigation—are formulated by lawyers envisioning an aggregate from the beginning,[45] in

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Litigation, and Patient Compensation 139-40 (1993) (finding that one malpractice claim was filed for every 7.5 hospital patients who had suffered a "real tort," and finding that evidence of negligence was provided in one-sixth of the cases actually filed). Education about the utility and viability of claiming is an important factor in seeking redress. See Hensler, The Real World, supra note 40, at 12. A related question is whether, were rules of solicitation different, clients could become more effective shoppers for lawyers.

[44] In both, widespread notice in the media resulted in the filing of many times more claims than those filed by individual tort lawyers. See Herbert M. Kritzer, Public Notification Campaigns in Mass Litigation: The Dalkon Shield Case, 13 Just. Sys. J. 220, 223 (1988-89) (describing media notification and the subsequent filing of more than 300,000 additional claims, of which about 200,000 were deemed valid); Barry Meier, Judge Discloses New Details on Settlement of Implant Suit, N.Y. Times, Oct. 28, 1995, at 10 (discussing revision of settlement proposal after some 430,000 claimants filed after notice was provided of an initial settlement); see also Glenn Collins, Big Publicity Effort Seen in Tobacco Class Action, N.Y. Times, Mar. 9, 1995, at D2 (describing use of newspaper and magazine advertising, "900" numbers, and the Internet); cf. Hensler, The Real World, supra note 40, at 6 (describing RAND's survey findings of injured individuals' pursuit of liability claims; tort liability is "strongly associated with attributions of causation and fault. . . . [O]nly ten percent of those who had been injured took some action that could be construed as 'claiming.'"); see also Hensler, ADR in Mass Personal Injury Litigation, supra note 3, at 1598-99 (describing that the circumstances and severity of the accident and injury contribute to the likelihood of the filing of a claim and noting that the "precise rate of claiming" in mass torts remains indeterminate because of lack of data). According to Hensler and Peterson, rates of claiming are higher for mass torts than for other kinds of injuries and rates of claiming will vary depending on the context. Hensler & Peterson, supra note 11, at 1025.

[45] See, e.g., Castano v. American Tobacco Co., 160 F.R.D. 544, 549-60 (E.D. La. 1995) (conditionally certifying a plaintiff class of "nicotine dependent persons" for several issues, including liability for fraud, breach of express or implied warranties, intentional and negligent torts, and punitive damages against many tobacco companies), rev'd, No. 95-30725, 1996 U.S. App. LEXIS 11815 (5th Cir. May 23, 1996); Castano v. American Tobacco Co., 162 F.R.D. 112, 117 (E.D. La. 1995) (certifying the decision for interlocutory appeal and staying proceedings); Castano v. American Tobacco Co., 889 F. Supp. 904, 907 (E.D. La. 1995) (permitting discovery to proceed); see also Barnaby J. Feder, One Company Seen Settling Tobacco Suit, N.Y. Times, Mar. 13, 1996, at D1 (describing a proposed settlement on behalf of Liggett & Myers, one of the *Castano* defendants). The appeal of the class action certification in *Castano* was to be heard in April 1996, before Judges Jerry E. Smith, John M. Duhé, Jr., and Harold DeMoss, Jr., of the Fifth Circuit. Glenn Collins, Panel Is Named for Tobacco Class Action, N.Y. Times, Mar. 26, 1996, at D2.

See also Glenn Collins, A Tobacco Case's Legal Buccaneers, N.Y. Times, Mar. 6, 1995, at D1, D3 [hereinafter Collins, Legal Buccaneers] (quoting Wendell Gauthier, member of the tobacco litigation PSC as saying, "'[o]ur biggest motivation is money' . . . 'but we also have our pride. The tobacco companies have made it so expensive to sue them that they've bankrupted a string of lawyers and tried to scare the plaintiffs' bar away from the court-

many instances, individual lawyers will continue to start a series of cases that will later be aggregated, either by judges or by lawyers, and either when "mature"[46] or earlier.

The description of various filing patterns reflects the next point: that there is more than one kind of "individual" lawyer. First are those operating on an individual basis, which is to say that lawyer and client seek each other out individually, meet personally to discuss and to evaluate a case, and then enter into a contract for legal services.[47] Thereafter, the lawyer continues to view the client as an individual and to treat the case individually. Some of these individual case-oriented attorneys may come to represent scores or more of similarly situated plaintiffs in what becomes a mass litigation. A subset or variation on this pattern should also be noted: some lawyers keep certain kinds of cases but refer others to lawyers specializing in a particular field. Contractual arrangements result, in which referring and representing lawyers share fees.

In contrast to one-on-one attorneys are a second set of lawyers who, while they have individual clients, get them by relatively anonymous exchanges such as sign-ups in union halls or by advertisements.

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house'"). While the *Castano* lawsuit is a class, ab initio, that litigation comes after many individual cases pursued various liability theories against tobacco companies. See Robert L. Rabin, A Sociolegal History of Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 858 (1992) (discussing the limiting frame that tort provides for responding to the harms caused by smoking and the difficulties encountered by individual litigants and their attorneys).

[46] Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev. 659 (1989) (raising concern that collectivization may occur before sufficient development of facts and law has occurred by virtue of individualized litigation). We note but hold aside several questions: Should such early venturers, many of whom may have individual cases that lose, get premiums for their risk-taking and for ferreting out possible injuries? Should clients, some of whom lost because their cases were tried before information was uncovered, be compensated, after the fact, if a large recovery is obtained for similarly situated individuals? Should those who win early be required to transfer some of those recoveries to subsequent plaintiffs who do not prevail? Who decides the boundaries of the group formed?

A few of these issues are either illustrated by or addressed in the literature. See, e.g., Philip Hager, State Farm To Pay Women $157 Million for Job Bias, L.A. Times, Apr. 29, 1992, at A1 (describing the voluntary contributions of more than $320,000 made by successful women plaintiffs in a settlement of a class action employment gender discrimination case to other plaintiffs who had lost earlier cases against the same defendant); Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 114-15 (considering the idea of compensating the "first movers"—rewarding lawyers who ferret out claims); Nancy Morawetz, Underinclusive Class Actions, 71 N.Y.U. L. Rev. 402, 415-20 (discussing the ways in which lawyers decide the parameters of class action lawsuits).

[47] While changes in the legal profession are fast moving, individual lawyers continue to attract some clients by reputation, personal interaction, third-party reference, or advertisement; many within the legal profession respect the ability of lawyers to attract clients; in the corporate context, such lawyers are described as "rainmakers" who can bring in clients. Lawyers who pursue clients in other contexts are sometimes termed "ambulance chasers."

To rely on market metaphors, these lawyers might be understood as wholesalers, as compared to the first set who might be seen as dealing retail. The wholesalers recruit large numbers of clients, handle their "inventory" of clients in groups, and sometimes enter into block settlements with defendants on behalf of a "stable" of cases.[48]

A third group of lawyers appears to operate primarily as entrepreneurs, and in the context of mass torts, are now termed "tort class action lawyers." They enter litigation planning on its aggregation, and they anticipate from the outset that they will be appointed to leading roles. They appear to conceive of the litigation primarily as a massive economic deal and of their role as the financiers and transaction managers. For many of these lawyers, large numbers of clients are a means to an end, which is a "global" settlement.

These three sets of lawyers should not be conceived to be pure types or to cover the landscape. We currently lack the empirical data that would reveal the variations and frequencies thus far; moreover, the practice is evolving rapidly. What we do know is that lawyers may function differently both over time and depending on the kind of case—handling some cases individually, referring others on, wholesaling in other settings, and, if amassing sufficient capital, participating as class counsel. Further, lawyers may share clients, with layers of agreements and a range of contractual payment obligations between and among them.[49]

But identifying three kinds of lawyers helps to detail differentiation of functions and of talents. The individual lawyer may be well versed in fact investigation, skilled in interpersonal relations with clients, and adept at communicating with juries. Lawyers representing large groups of more anonymous clients may develop streamlined strategies for information collection and mass communication, thereby both creating and achieving economies of scale. These lawyers may also develop effective strategies for achieving large-scale set-

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[48] See Hensler et al., Asbestos in the Courts, supra note 8, at 94-95; Weinstein, Individual Justice, supra note 21, at 74; see also Georgene M. Vairo, The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?, 61 Fordham L. Rev. 617, 619-21 (1992) (criticizing lawyers who represented large numbers of claimants in the Dalkon Shield Trust). See generally Deborah L. Rhode, Solicitation, 36 J. Legal Educ. 317, 319-20 (1986) (discussing the Bhopal disaster specifically and the problems of overcharging and underrepresentation).

John Coffee reports that a relatively small number of plaintiffs' firms provide services to large numbers of claimants in most mass torts. John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1364-65 (1995) [hereinafter Coffee, Class Wars]. He distinguishes between "boutique firms" that screen clients more carefully than do "wholesalers," comprised of lawyers who in turn "invest little in individual case preparation." Id. at 1365.

[49] See, e.g., Coffee's discussion of fee splitting, but only in the context of the members of a PSC. Coffee, Entrepreneurial Litigation, supra note 24, at 902-03.

tlements, which both provide compensation for current clients and enable the creation of a financial base for securing and representing new groups of claimants.

The class action lawyers, who frequently serve on PSCs, may have yet more extensive staff and computer facilities, and, most importantly, greater financial wherewithal to "bankroll" litigation.[50] They also have interest in establishing and maintaining relationships with judges (and perhaps with prospective defendants and their lawyers), who may turn to these lawyers to play key roles in group litigation. Because class action lawyers' relationships with plaintiffs in the litigation are the most attenuated of the three sets of lawyers, and their interest in maintaining the unity of the group is the highest, they may have the least interest—relative to the other sets of lawyers—in promoting mechanisms to focus on individual plaintiffs and their potentially diverse interests and the most interest in securing an aggregate outcome through settlement, with the fees attendant.

B. Financing the Litigation, Augmenting Resources, and Monitoring Representative Counsel

In personal injury litigation, individual lawyers front the costs of litigation for their own clients.[51] In large-scale cases, judges and lawyers arrange for pooling resources at the front-end to finance the litigation, and then, at the back-end, determine how the fees, net of expenses, will be divided among participating lawyers. Membership in PSCs may be conditioned on a "down payment" of hundreds of thousands of dollars, the commitment of staff, and/or yearly dues. Assessments of lower amounts from IRPAs are routine.[52]

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[50] They may be very adept at what Gilson and Mnookin term (in the context of a different legal practice) "value-creating opportunities." Ronald J. Gilson & Robert H. Mnookin, Foreword: Business Lawyers and Value Creation for Clients, 74 Or. L. Rev. 1, 8 (1995).

[51] Lawyers recover both costs and fees if they are successful. If unsuccessful, clients in states that have adopted the ABA's Model Rules of Professional Conduct can be relieved of the obligation to repay costs. Model Rules of Professional Conduct Rule 1.8(e)(1) (1995). Clients are "ultimately liable" for costs in states that still adhere to the ABA's Code of Professional Responsibility, see Model Code of Professional Responsibility DR 5-103 (1980), but the repayment obligation may neither be enforced nor be readily enforceable.

[52] See In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.—II, 953 F.2d 162, 164, 165-67 (4th Cir. 1992) (overturning in part an administrative order as overbroad in taxing every plaintiff $1000 plus "0.5 [percent] of the value of settlement or verdict" entered based on the assumption that all derived benefits from a steering committee's discovery); In re San Juan Dupont Plaza Hotel Fire Litig., MDL 721, 1989 WL 168401, at *10-*15 (D.P.R. Dec. 2, 1988) (Pretrial Order No. 127, Amended Case Management Order) (describing assessment/financing scheme). The lawyers who have formed one of the tobacco class actions required some 60 participating firms to contribute $100,000 each, "fill-

In addition to augmenting cash resources, IRPAs are sometimes a source of legal resources. Like the large amount of capital needed to finance the litigation, a good many lawyering activities are involved, many of them resulting from the scale of the undertaking. Because the plaintiffs' attorneys' financial incentives are to "build a pot," some plaintiffs' lawyers are eager to include a large number of claimants. Further, to make possible very large recovery funds, these lawyers may (depending on the kind of case) seek to name as defendants an array of individuals and businesses, ranging from direct suppliers or providers in product cases, to owners and builders in building collapses and hotel fires, to others, such as former owners, product and service suppliers, and manufacturers. Each defendant in turn may bring one or more layers of insurance to the bargaining table.

Preparing these sprawling cases requires substantial fact investigation and knowledge of relationships among defendants. The requisite data may include information on individual-specific causation and injury, as well as groupwide discovery related to liability and general causation, and then understandings of the contractual agreements among defendants and of insurance coverage obligations. Also required is research on legal rules that may vary across jurisdictions, affecting either groups of claimants or individuals. Negotiations may proceed as a whole or in subsets, including one-on-one deals. Depending on the issue in dispute at a particular phase, groups of defendants may join with sets of plaintiffs on certain issues and diverge on others.

The availability, therefore, of many lawyers beyond the five to twenty on PSCs provides the potential to distribute some of this work. Lawyers on PSCs are often described as working frantically under difficult time pressures;[53] IRPAs can be "extra hands," augmenting PSCs' resources by taking on assignments for the group, such as covering depositions or investigative work, or doing the work of learning from individual clients about the nature of claims and potential proof.

The existence of two sets of lawyers, as well as of special masters or other court appointees in some aggregates, also offers some possibility of monitoring the work done within the aggregate. Many of the plaintiffs' lawyers have more access to information and a greater ability to assess decisionmaking by lead lawyers than do many claimants themselves. IRPAs' financial interests may also prompt them to lobby

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ing an annual war chest of nearly $6 million." Collins, Legal Buccaneers, supra note 45, at D1.

[53] See, for example, Peter Schuck's description of the workload pressures in Agent Orange litigation. Peter H. Schuck, Agent Orange on Trial 119-24 (1986) [hereinafter Schuck, Agent Orange].

against early settlements that might reap great benefits for lead counsel but could result in smaller individual payouts, on which IRPAs' fees depend.

IRPAs' ability to perform monitoring useful to clients varies, depending in part on the degree to which they coordinate among themselves and in part on what they conceive to be their own and their clients' interests. For example, some IRPAs may hope that, by ingratiating themselves with PSC members, they will be asked to join the "club" and, in subsequent mass torts, will have a share of more clients or will receive recommendations from PSC members to be on the next PSC. Alternatively, by threatening to or holding out scores of clients from a group settlement, IRPAs may hope to receive assurances that their own contingency-fee contracts will be protected—rather than supervised and limited—in the payout scheme. Moreover, given that both IRPAs and PSCs have parallel interests in a favorable outcome, tensions of monitoring each other could inhibit useful teamwork.

C. Helping Clients Relate to the Law: Information, Evaluation, Education, Coventuring

Turning from some of the relationships among lawyers to that of lawyer to client, one aspect of what lawyers do is explain to clients how the legal system works.[54] Another is to give value to a litigant's claim by case preparation and investigation, while yet another role is to help a litigant assess the utility of what law can offer for that individual.[55] Lawyers might also help to inspire or organize clients into self-conscious political claimants, or dampen such interest.[56] Further, lawyers communicate clients' claims to judges, other factfinders, or dispute resolution personnel. Below we fill out a few exemplary specifics in the context of aggregate torts.

1. Discovery, Trial, Settlement, and Negotiating Claims Facilities

The degree to which discovery is individuated in aggregation varies with the kind of case and kind of injuries alleged as well as with the stage of the proceedings. In some mass torts, individual depositions

[54] Austin Sarat & William L.F. Felstiner, Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office, 98 Yale L.J. 1663, 1664 (1989) [hereinafter Sarat & Felstiner, Lawyers and Legal Consciousness].

[55] Morawetz, Bargaining, supra note 26, at 16-17 (explaining that different class members may attribute different value and meaning to proposed remedies in both the antitrust and public benefits context).

[56] See Karen M. Hicks, Surviving the Dalkon Shield IUD: Women v. The Pharmaceutical Industry 100-01 (1994) (describing both kinds of lawyers); Martha F. Davis, Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973, at 29-31 (1993) (describing a conception of welfare litigation as part of a social movement).

are taken, individual interrogatories filled out, and individual experts contacted to prove economic and/or physical losses. In some instances, PSC members may provide assistance by providing formats for answering depositions, but in many cases, PSC members are themselves engaged in intensive activities that leave no time for individual-specific work; IRPAs may be left to their own devices for much of the individual case preparation, and that work in turn may be either minimal or substantial.

Lawyers are not the only source of that information. In some litigations, special masters provide information on the degree of injury suffered by individual plaintiffs and the value of such claims.[57] In yet other mass torts, little attention is given to evaluation of individual claims. The collective structure subsumes the issues that would have been the subject of discovery had the case been litigated individually.[58]

During the pretrial phase, judges typically discourage IRPAs from contacting them directly; communication from lawyers to the court goes through PSC members. Similarly, issues relating to defendants en masse are the preserve of the PSC lawyers, who usually undertake the negotiations with defendants. In some cases, however, group settlement values may be derived from individual values, ascertained through negotiation by IRPAs of individual cases for settlement.[59] Trials occasionally occur, and either PSC members or IRPAs or both may try representative lawsuits.[60]

After valuation, whether done individually or en masse, IRPAs often have the role of directly relating proposed or decided outcomes

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[57] See, e.g., Sobol, supra note 9, at 170-77 (describing data collection by Special Master Francis McGovern to assist in valuing the claim in the Dalkon Shield bankruptcy); see also Francis E. McGovern, The Alabama DDT Settlement Fund, Law & Contemp. Probs., Autumn 1990, at 61, 63-64 (discussing data collection by special master).

[58] For example, in the Agent Orange litigation, the lawyers negotiating for the class did not know the number of claimants nor their degrees of injury. Schuck, Agent Orange, supra note 53, at 161-62. Alternatively, if cases are bifurcated or trifurcated, the question of individual injury may take a back seat to general causation, with a focus on underlying scientific questions rather than on plaintiffs' injuries. See, e.g., In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig., 624 F. Supp. 1212, 1222 (S.D. Ohio 1985).

[59] E.g., *Nineteen Appeals*, 982 F.2d 603 (1st Cir. 1992). Each IRPA met with a "settlement judge," presented a packet of materials about the injuries sustained by particular clients, and negotiated a value for each plaintiff by discussing the case with the settlement judge, who played the role of a claims appraiser or of a defendant. The total amount of the individual valuations thereby established the plaintiffs' monetary goals for settlement and/or trial. Id. at 605.

[60] See, e.g., id. at 605 ("collaborative" team of three PSC members and four IRPAs handled 12 representative trials); Cimino v. Raymark Indus. Inc., 751 F. Supp. 649, 653 (E.D. Tex. 1990) (58 lawyers involved in the consolidated trials of representative cases), appeal docketed, No. 93-4452 (5th Cir. argued Feb. 8, 1995).

to clients, a task that is sometimes described as "controlling" the clients[61] or "selling" them on the desirability of an agreement.[62] Alternatively, IRPAs may counsel that litigants exit[63] or threaten to do so, which in turn could be aimed either at controlling the PSC's offers of compromise or at resisting judicial pressures to settle. IRPAs can also be conduits between clients and PSC members—providing clients with information about settlement offers and providing PSC members with

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[61] See, e.g., Peter Passell, Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers, N.Y. Times, Mar. 24, 1995, at B6 (describing claimants' challenge that former lawyers used "high-pressure tactics to force acceptance of settlement offers" in a mass tort involving a fire at a chemical complex in which 23 people died and many hundreds were injured).

[62] See, e.g., Schuck, Agent Orange, supra note 53, at 200 (discussing a lawyer who believed that he played an important role in persuading plaintiffs-veterans of the desirability of the settlement).

[63] The issues raised by exit are many, including the legal availability of exit, its practical viability for individual litigants and lawyers, and its strategic implications for the litigation as a whole. For example, exit is not permitted if the aggregate is a mandatory class action or bankruptcy. Further, as judges cross jurisdictional lines to work together on mass torts, the possibility of filing in state court to avoid federal aggregate proceedings is decreasingly a means of exit. See Manual Third, supra note 11, § 33.23 (advocating coordination of proceedings between state and federal judges to reduce "duplication of effort" and including suggestions of holding joint hearings and working together on settlement efforts); Judith Resnik, History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination, 98 W. Va. L. Rev. 171, 203-08 (1996) (describing "judicial federalism" in which state and federal judges sit together or coordinate management of large-scale cases). This amalgamation of state-federal cases is illustrative of how quickly the world is changing; when Coffee wrote in the mid-1980s, a state lawsuit seemed a more reliable means of avoiding inclusion in the group. See Coffee, Entrepreneurial Litigation, supra note 24, at 910-11 (describing a strategy of filing a state action prior to a federal one and thereby having the option of litigating in state court).

Further, even if "opting out" is possible legally, questions about the practical possibilities of opting out remain: Will one's case go to the back of the line? Will individual lawyers be willing to bear the risk of the expenses of an individual trial? Will judicial pressure be brought to bear? Cf. id. at 915-16, in which Coffee assumes that plaintiffs who opt out will do better in terms of recovery—not only that such plaintiffs might be able to get first dibs on funds but also because staying with the group means that high-stake plaintiffs' claims may be averaged with lower-stake claims. Coffee invokes the Hyatt Skywalk example, in which a state court litigant received over $10 million in recovery at trial, in contrast to the payment of $20 million paid in settlement to all state plaintiffs in settlement. See id. at 913-15 (citing In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982)). In contrast, under the rules established by the Dalkon Shield Claimants Trust, those who want to try cases are at the end of the queue. See Dalkon Shield Option Packet, provided by the Trust (Mar. 1990) (on file with authors).

Moreover, staying in the aggregate may alter individual or group settlements. See, e.g., Voidance of Defendants' Judgment/Settlement Sharing Agreement, Order No. 221 at 2, 6, In re San Juan Dupont Plaza Hotel Fire Litig., MDL 721 (D.P.R. May 8, 1989) (on file with authors) (agreement for sharing defense costs by defendants also included "exclusive settlement mechanism," which trial court concluded prohibited "individual settlements" by defendants and therefore voided it as against public policy). On the plaintiffs' side, the possibility of exit and/or bargaining around it may be enhanced when plaintiffs or their lawyers threaten a collective migration of significant numbers of claimants.

information about clients' perceptions of the utility of proposed resolutions.[64]

Further, to the extent a proposed settlement provides that distribution of funds will depend upon distinctions among claimants and/or provision of information by claimants, IRPAs may have information that PSC members lack. For example, IRPAS may know the kinds of evidentiary materials available, which in turn may illuminate the acceptability of the rules by which claims facilities will operate.[65] Of course, with richer knowledge may come keen awareness of conflicts within the aggregate, that some methods of distribution favor one group or another. Such potential for conflict has prompted a debate within the plaintiffs' bar about whether a mass tort class action lawyer should have his or her own clients when serving on a PSC, but the problem is not unique to the tort context.[66]

After formulas of distribution are established, often with grids and schedules, individual claimants still need to find out and perhaps disagree about where they fit. Depending upon how a distribution is structured, the work of an attorney in this phase may vary from perfunctory assistance with forms[67] to preparing a complex claim and try-

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[64] See, e.g., Morawetz, Bargaining, supra note 26, at 16-19 (arguing that the "real value" of remedies—the utility to clients—should be a dominant factor in aggregate negotiations).

[65] For example, under provisions of the Dalkon Trust, a document negotiated by group lawyers operating under the supervision of a deeply engaged trial judge, medical records or an affidavit from a "health care provider" are needed to receive compensation in excess of $725. See Dalkon Shield Option Packet, supra note 63. Many claimants had received Shields from clinics or from doctors who were no longer in practice. Further, no details of the rules the Trust would use for settlement negotiations and alternative dispute resolution were provided in the agreement. The subsequent objections by claimants, that the rules established by the Trust were unfairly restrictive, were rejected by the Fourth Circuit, deferring to the district court's approval of the choices of rules made by the administrators of the claims facility. In re A.H. Robins Co., 42 F.3d 870, 875 (4th Cir. 1994) (upholding arbitration rules promulgated by trustee); see also Mark A. Peterson, Giving Away Money: Comparative Comments on Claims Resolution Facilities, Law & Contemp. Probs., Autumn 1990, at 113 (1990) (describing Dalkon Shield Trust's refusal to negotiate and other threats); Schuck, Agent Orange, supra note 53, at 161-62 (discussing the limited knowledge of the Plaintiffs' Management Committee of the patterns of alleged injuries within the class).

[66] See, e.g., Morawetz, Bargaining, supra note 26, at 25 (discussing how, within a group competing for funds, less exacting proof requirements may disadvantage one category of claimants over others).

[67] Some have criticized the fees paid to plaintiffs' lawyers for the work performed during this stage of litigation. See Vairo, supra note 48, at 620 n.10 (complaining about lawyers who receive contingency fees for such work); see also In re A.H. Robins Co., No. 85-01307-R (E.D. Va. Mar. 1, 1995) (Order Disallowing Unreasonable Attorneys Fees on Pro Rata Distribution) (on file with authors); In re A.H. Robins Co., No. 85-01307-R (E.D. Va. May 2, 1995) (Order & Mem.) (on file with authors) (concluding that lawyers representing claimants would be overcompensated, were they to receive the full amounts of their contingency fees on the subsequent distributions of funds, Judge Merhige issued an order,

ing it within an administrative structure of a claims facility.[68] IRPAs may again function as gatekeepers, either boosting claimants' awareness of their rights or screening and sorting claimants. While some tort litigation funds have been "oversubscribed,"[69] some consumer class action funds appear to be undersubscribed.[70]

2. *Voice, Vindication, Attention, or Subordination*

The right to counsel, embodied in constitutional doctrine and statutory mandates, imagines lawyers as empowering litigants in their battle with the state. In class actions, lawyers have been called "private attorneys general,"[71] a term that links the class lawyer to the state's or the "people's" lawyer. If the analogy is played out, the clients for whom "private attorneys general" work can be as anonymous as are the "people" on whose behalf "the government" stands up in court. In contrast, IRPAs have the potential to be closer to clients. As our discussion of the different kinds of "individual lawyers" above suggests, such closeness may not in fact exist or, if it does, may be productive or destructive.[72] In some instances, IRPAs work with cli-

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"Disallowing Unreasonable Attorneys Fees on Pro Rata Distribution" and prohibiting lawyers, absent a specific showing, from receiving "any compensation or fees . . . in excess of ten percent of such pro rata distribution by the Trust to the Claimant"), appeal pending sub nom. In re A.H. Robins, Co., Bergstrom v. Dalkon Shield Claimants Trust, No. 95-2239-L (4th Cir. argued Mar. 5, 1996, before Judges Russell, Chapman, and Widener of the Fourth Circuit).

[68] Peterson, supra note 65, at 113-15.

[69] Id. at 119 (reporting that, by November 1990, Manville Trust had 150,000 claims, 50% more claims within the first two years than had been predicted for the life of the trust).

[70] See Gail Hillebrand & Daniel Torrence, Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits, 28 Santa Clara L. Rev. 747, 749-51 (1988) (finding that, in a state antitrust case involving overcharges for blue jeans, 14-33% of eligible class members filed claims; that the rate of claiming in commercial litigation with higher stakes was greater, such as a reported 77% rate of claiming in the In re Folding Carton Antitrust Litigation, 557 F. Supp. 1091 (N.D. Ill. 1983), aff'd in part, rev'd in part, 744 F.2d 1252 (7th Cir. 1984), cert. dismissed, 471 U.S. 1113 (1985)).

Instances of low-claim rates suggest either the need for measures to better inform claimants of available remedies or raise questions about the nature of such settlements. Id. at 760-61. Hillebrand and Torrence argue that in consumer class actions, rates of filing claims varied with the demographics of claimants and that lower income, non-English-speaking, and less educated claimants did not reap the benefits of these remedies because claims procedures skewed the ability to obtain benefits toward more affluent and better educated claimants; they called for a reorientation of processes to provide for the diverse needs of all claimants. Id.

[71] See, e.g., John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 669 (1986) [hereinafter Coffee, The Plaintiff's Attorney] (using that term); Garth et al., supra note 40, at 353 (same).

[72] See infra Part IV.C.

ents to pursue legal claims and help them vindicate rights.[73] Some IRPAs provide not only legal advice but also attention, consolation, and appreciation; other IRPAs are inaccessible and unavailable to their clients.

D. The Creation of an Ad Hoc Law Firm

One other aspect of large-scale tort litigation needs to be mapped. Until recently, in the prototypical class action, plaintiffs' lawyers were either all in one firm or from a few firms that jointly ran the case.[74] In contrast, the practice in aggregated torts is for a judge to appoint a PSC of five to twenty lawyers who, in essence, become an ad hoc law firm created to litigate a particular case. Sometimes the overhead of such a creation may be minimal; the participants use their home offices as their base and come together by travel and telecommunications. In other instances, the ad hoc firm rents office space, hires staff, buys office equipment, prints stationery, and "sets up shop."[75]

Who are such a "firm's" clients? Judges, in effect, create the firms and (according to the *Manual for Complex Litigation*) should remind them of "their responsibility to the court and their obligation to act fairly, efficiently, and economically in the interests of all parties and their counsel."[76] What are the obligations owed by this "firm" to lawyers not appointed? To clients of those lawyers? To the judge who appointed the PSC? How is one to mediate conflicts between one's own individual clients and the group as a whole?[77] What forms of fee-

[73] As discussed infra Part IV.C, some commentators see lawyers as subordinating clients, while others posit lawyers as vindicators of clients' rights. These are not mutually exclusive roles. See, for example, Lucie White's account of her individual representation of a welfare recipient who disputed the government's request for reimbursement. Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1 (1990) [hereinafter White, Notes on the Hearing]. Readers are left with a mixed sense of the lawyer's role: at one level, White's lawyering might have helped to open lines of argument, but that lawyering was forever removed from the experiences and realities of the person represented.

[74] Compare recent class actions, including Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), rev'd, No. 95-30725, 1996 U.S. App. LEXIS 11815 (5th Cir. May 23, 1996) in which some 60 firms are reportedly involved. See Collins, Legal Buccaneers, supra note 45, at D1.

[75] We know of no empirical data that permit conclusions about the frequency of particular forms of this practice.

[76] Manual Third, supra note 11, § 20.22.

[77] One might ask who the clients of PSC members are. Courts have commented about obligations of such lawyers to all plaintiffs, rather than only to those clients who had individually retained PSC members. See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig., 888 F.2d 940, 942 (1st Cir. 1989) (quoting the district court's discussion that the PSC represents "'by its very nature . . . *all* plaintiffs'"); In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 216, 223 (2d Cir. 1987) (stating that lead counsel had a "fiduciary duty" not to "over-

sharing and splitting are permissible?[78] How should the costs of these firms be allocated among plaintiffs' attorneys, between attorneys and their clients, and among the plaintiffs, who often do not receive identical monetary amounts when awards are made? Law in mass torts has yet to expound much by way of rules or to explain these relationships.[79]

Here some background about billing customs is in order to make plain the kinds of problems posed by these ad hoc firms. The two dominant payment modes are hourly rates and contingent fees.[80]

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reach" in class fee application (quoting Lewis v. Teleprompter Corp., 88 F.R.D. 11, 18 (S.D.N.Y. 1980))); In re Air Crash Disaster at Malaga, Spain, 769 F. Supp. 90, 91 (E.D.N.Y. 1991) (citing "duties to plaintiffs" owed by lead counsel). However, neither codes nor case law detail what duties that representative capacity imposes. See, e.g., New Jersey Dep't of Envtl. Protection v. Gloucester Envtl. Management Servs., Inc., 138 F.R.D. 421, 430 (D.N.J. 1991) ("Although the relationship between Liaison Counsel and group members is not an attorney-client relationship, the conduct of attorneys may nonetheless be guided by analogy to the Rules of Professional Conduct with respect to fees and billing arrangements.").

[78] One financing mechanism has been ruled out by the Second Circuit. See *Agent Orange*, 818 F.2d at 240 (Appeal of David Dean) (invalidating an agreement among lawyers, in which some lawyers were to receive premiums for investing capital, to be paid out of other attorneys' fees awarded by the court). In practice, courts have not often required information about the agreements among PSC lawyers or among PSC and IRPAs, including how clients are shared among lawyers. Cf. Fed. R. Bankr. P. 2016(a), which requires that an application for compensation be accompanied by disclosure of any agreements made for payment in connection with the case, including whether other persons expect to share in compensation; fee-sharing agreements within law or accounting firms of which the applicant is a member or associate do not have to be provided; E. & S.D.N.Y. Loc. R. 5(a) (requiring that attorneys who request fees in "stockholder and class actions" provide notice which "shall include a statement of the . . . amounts requested . . . and shall disclose any fee sharing agreements with anyone").

[79] The *Manual for Complex Litigation* suggests equitable sharing of expenses and fees of PSCs by those who benefit and calls for periodic billing but leaves the terms of such compensation to "agreement among counsel" with court approval. Manual Third, supra note 11, § 20.223. The *Manual* also calls for court monitoring of such billing, for consideration of a "tentative budget" and for early determination of the methods for compensating fees but does not provide detailed standards for how to assess the reasonableness of payments. See id. § 24.2 ("Proceedings to Award Fees").

The academic literature is similarly unresponsive to these configurations. See, e.g., Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 Colum. L. Rev. 509, 550-57 (1994) [hereinafter Gilson & Mnookin, Disputing Through Agents] (arguing the centrality of lawyers' agency roles in understanding dispute resolution and the need for lawyers to increase their cooperative behavior). Gilson and Mnookin, however, assume models of practice of individual attorneys or of small and large firms, rather than the increasingly formalized collectives of lawyers who are structured into a temporary firm by virtue of appointment to PSCs. Id. at 522-34.

[80] Repeat-playing clients have begun to bargain for variations, sometimes combining features (such as guaranteeing a lower base rate and including a contingency bonus) as well as adopting a "uniform task-based billing system" that organizes fees not by attorneys' time but by tasks. See, e.g., Zöe Baird, A Client's Experience with Implementing Value Billing, 77 Judicature 198, 198-200 (1994) (describing Aetna's implementation of this form

When lawyers charge by the hour, they factor into billing rates certain items of overhead, such as the cost of maintaining offices, phones, and support personnel. In addition, these lawyers may charge clients for hours spent by paralegals or associates (whose hourly rates, in turn, also build in overhead costs). Other charges to clients may be the expenses or "costs" associated with a particular matter for items such as photocopying, travel, express mail, and the retention of experts.[81]

Contingency-fee lawyers have a similar, but not identical, set of overhead expenses and similar direct costs. Typically, contingent-fee percentages are expected to capture all staff costs including paralegal or associate work. Whether contingency-fee lawyers calculate their fee as a percentage of the gross award before expenses paid directly by the client are taken out or on the net amount *after* expenses works either to the advantage of the lawyer or the client. According to the American Bar Association, for either hourly or contingent billing, all charges should be specified in advance when the parties enter into retainer agreements.[82]

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of billing); Uniform Task-Based Management System: Litigation Code Set, Litig. News, June/July 1995, at 4 (describing a budgeting and billing system developed by the American Bar Association, the American Corporate Counsel Association, and Price Waterhouse LLP to create a uniform computer-based mechanism by which to enhance client control over attorney bills and inform clients of the cost of the work done on their behalf); Richard H. Alpert & Fred H. Bartlit, Opposing Counsel: Task-Based Billing, Litig. News, June/July 1995, at 11 (including a debate between a corporate counsel and a corporate litigator about the pros and cons of such a system).

[81] Substantial variation exists; for example, some law firms charge for secretarial work. See Karen Dillon, Dumb and Dumber, Am. Law., Oct. 1995, at 5, 7 (describing $50 per hour charges for daytime secretaries that exceed overhead costs and could result in millions of dollars in profits). Further, the use of services such as photocopying as "profit centers" is a source of controversy. According to Dillon, the reports of cutting such charges by law firms is overstated, and many firms continue to bill at 25¢ a page for photocopying, two dollars per fax, and 50% markups on LEXIS costs. Id. at 46. Many of the corporate counsel did not know what they were charged for "disbursements." Id. at 5-7, 42, 46. For an example of detailed objections to law firm charges, see Omnibus Objection of the United States Trustee to Various First Interim Applications for Approval of Professional Fees and Reimbursement of Expenses, In re F & M Distributors, Inc., No. 94-522115 (Bankr. E.D. Mich. May 18, 1995) (on file with authors). According to a staff member at the United States Trustee's Office, Judge Shapero ruled, on May 25, 1995, and September 28, 1995, on the objections; in his decision from the bench, he sustained many objections; the United States Trustee's Office estimated that the reductions approximated 10% across the board. Thereafter, the parties settled. Conversation with U.S. Trustee Staff Member (Apr. 8, 1996).

[82] In ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (1993), the Committee concluded that in the absence of specified fee agreements:

> the lawyer is obliged to charge the client no more than the direct cost associated with the service (*i.e.*, the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (*e.g.*, the salary of a photocopy machine operator).

None of the extant ethical mandates about fees address the creation of PSCs. Moreover, it is not clear who should or does negotiate any of the details of the PSC billing practices. The possibilities include judges on behalf of plaintiffs, IRPAs who may have their own fees at issue as well, and litigants directly. Currently, some judges issue case management orders when they appoint PSC members and provide some guidelines, such as stating that no first-class travel will be reimbursed, only "reasonable" hotel and meal costs will be honored, and the like.[83] No nationwide standard establishes what constitutes reasonable charges.[84] Some judges cut lawyers' claims for travel expenses;[85] others inform lawyers that they will not pay full hourly rates for hours worked beyond eight in a day;[86] some permit twenty-five-cent copying costs, and others refuse.[87] In addition, some

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Id. at 9.

[83] See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig., MDL 721, 1989 WL 168401, at *10-*15 (D.P.R. Dec. 2, 1988) (Pretrial Order No. 127, Amended Case Management Order); see also Alan Hirsch & Diane Sheehey, Federal Judicial Center, Awarding Attorneys' Fees and Managing Fee Litigation 95-117 (1994) (detailing techniques judges have used for managing these issues—sometimes in advance and other times at the conclusion of litigation).

[84] Richard Bieder proposes that a group of lawyers, clients, and judges promulgate uniform rates, akin to the Internal Revenue Service's schedule on what constitutes appropriate deductions for travel expenses or government per diems. Richard Bieder, Comments Presented at A Practical Look at Complex MDL and Mass Tort Litigation, Conference at Northwestern School of Law, Lewis & Clark College, Portland, Or. (Oct. 12, 1995). In March 1995, the Executive Office for United States Trustees promulgated uniform guidelines for the trustees to apply when monitoring costs. The guidelines provide that photocopying and fax should be compensated at "actual costs," with disclosure of both per page and aggregate charges and documentation of how the actual cost figure is calculated, that mileage be compensated at IRS mileage rates, and that charges not be made for overhead absent "extraordinary circumstances." Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330, 11 U.S.C.S. § 330, Section IV.I (Law. Coop. Supp. July 1995) [hereinafter United States Trustee Guidelines]. Overhead is defined as "all continuous administrative or general costs or expenses incident to the operation of the professional's office not particularly attributable to an individual client or case." Id. Section IV.I.7.

[85] See, e.g., Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 957 (1st Cir. 1984) (holding that a charge of $917.24 for two nights when arguing in the United States Supreme Court was unreasonable); Mokover v. NECO Enters., Inc., 785 F. Supp. 1083, 1093-94 (D.R.I. 1992) (reducing travel expenses by 50%); Fleet Bank of Me. v. Trivers, 799 F. Supp. 1248, 1250 (D. Me. 1992) ("'This court does not permit travel time to be recovered at anything approaching a usual billing rate.'" (quoting Auburn Police Union v. Tierney, 762 F. Supp. 3, 4 (D. Me. 1991))).

[86] E.g., Telephone Interview with Judge Richard Bilby, United States District Court Judge, District of Arizona (Nov. 8, 1995).

[87] Compare In re San Juan Dupont Plaza Hotel Fire Litig., MDL 721 (D.P.R. Nov. 23, 1993) (Order No. 510-A) and MDL 721 (D.P.R. Jan. 28, 1994) (Order No. 520) (upholding PSC charges of 25¢ a page for photocopying and almost $1 million as "costs" for the retention of a lawyer experienced in insurance litigation who was charged to clients as an "expert"), appeals docketed, No. 95-2285 (1st Cir. 1995) with Haroco, Inc. v. American Nat'l

lawyers seek reimbursement for the costs of operating a separate PSC office as well as for their own firm's staff time.

When these billing customs are placed in the context of mass tort litigation, it becomes plain that aggregation has the potential to increase the costs of litigation to individual clients (perhaps controverting the assumption that aggregation is a source of economy for litigants). To date, in cases in which IRPAs and PSC members both provide legal services, PSC fees are generally deducted from the IRPAs' contracted contingency fees, the total of which comprises the "common fund" of fees allocated between sets of lawyers. IRPAs and their clients are both conceptualized as having benefitted from the aggregate lawyering and therefore taxed (either by the lodestar or POF method) for the fees.[88] A "sleeper," however, is the issue of "costs"—the charges that come directly from the clients.[89] If clients are charged, separately from attorneys' fees, the costs of running the aggregate lawyers' offices or for bank trust charges and other "miscellaneous" expenses, as well as charged by IRPAs for the specific costs of individual cases, then the plaintiffs may pay more for the fact of aggregation.[90]

How should one think about the possibility of such a surcharge? Much of the justification of aggregation is that it offers economies of scale; anticipated is a reduction in transaction costs, implicitly those of litigants. (Given that defendants, the judicial system, and the plain-

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Bank & Trust Co., 38 F.3d 1429, 1441 (7th Cir. 1994) ("'[C]harges for in-house reproduction may not exceed the charges of an outside print shop.'" (quoting Martin v. United States, 931 F.2d 453, 455 (7th Cir. 1991))); Spicer v. Chicago Bd. Options Exch., 844 F. Supp. 1226, 1260 (N.D. Ill. 1993) (reducing photocopying charges from 25¢ to 10¢ per page). See also Dillon, supra note 81, at 42 (reporting results of a survey of New York firms' practices on charges assessed clients as costs).

[88] See infra Part III.B.

[89] A few judges are beginning to attend to the interrelationship of fees and costs and to the possibility that lawyers may try to shift items that would reduce their own profits from "fees" into separately reimbursable "costs." See, e.g., In re Wells Fargo Sec. Litig., 157 F.R.D. 467, 470 (N.D. Cal. 1994) (requiring, in the context of appraising proposals to become lead counsel in a securities class action, that bids include costs and fees and further noting that "an attorney generally has no incentive to minimize litigation expenses unless his fee award is inversely related to such expenses," and that "when an attorney treats a resource devoted to litigation as a reimbursable expense, the attorney has a clear incentive to substitute that research for those paid out of the attorney fee").

[90] The *Manual for Complex Litigation* adverts to this possibility. Manual Third, supra note 11, § 20.221 (urging judges not to appoint committees that may "substantially increase[ ] costs" but providing little guidance on how to assess the tradeoffs); see also Alan Abrahamson, Payments Raise Questions Over Lawyers' Fees, L.A. Times, Oct. 22, 1995, at B1, B3 (describing two firms involved on behalf of a specific plaintiff in a silicone breast implant case, in which payments to the firms of $4.2 million in fees and costs exceeded an individual's recovery; the lawyers' explanation was that the fees paid by the defendant included payment for work done by those lawyers for other clients).

tiffs each incur costs, the beneficiaries of a claimed reduction in transaction costs could be participants other than plaintiffs.) Other commentary posits that aggregation affects outcomes; John Coffee argues that in certain contexts, aggregation will transfer money from high-value claimants to low-value claimants—all paid from a common pot.[91] When such intra-plaintiff transfers occur, should that fact affect charges made to plaintiffs for the costs of aggregation? Should claimants who obtain large sums be taxed identically to those who receive small amounts? What forms of subsidization are appropriate?

We do not purport here to answer these basic equity questions. Rather, we want to make them, along with the fact of the diverse lawyering roles and the many lawyers, central issues of discussion within aggregation proposals. The problem posed (or opportunity offered) by the existence of individual lawyering within the aggregate has to be explored.

III
UNADDRESSED ISSUES: PAYING LAWYERS IN GENERAL AND PAYING FOR INDIVIDUALIZED WORK IN PARTICULAR

Why don't procedural rubrics for aggregation (specifically the MDL statute and class action rule) directly address the differing roles of lawyers or the ways in which they will be paid? How does that absence illuminate current arrangements and the potential for change? This Part considers the history of contemporary aggregate forms, their justifications, and the development of legal doctrine on fees.

A. Creating Aggregates Without Directly Addressing Lawyers' Roles, Case Financing, and Fees

The absence of discussion of fees in the 1960s' provisions for aggregation—MDL and class actions—makes some sense when the origins of these mechanisms (rather than their contemporary functions) are considered. Take the MDL first. As Judith Resnik has explained, in theory MDLs were designed "only" to consolidate already pending lawsuits, filed by attorneys retained by individual clients, typically via contingency-fee contracts.[92] Such consolidation was (again in theory) "only" for pretrial processes. The MDL statute was billed as an effective mechanism for responding to what was on the judicial plate; its

[91] See Coffee, Entrepreneurial Litigation, supra note 24, at 904-10; see also Hensler et al., Asbestos in the Courts, supra note 8, at 96.

[92] Resnik, From "Cases" to "Litigation," supra note 2, at 33-35.

purposes were managerial, to economize on resources and to coordinate activities among identified participants. Formally, MDL respected the individual character of the lawsuits that came within its rubric. Each case remained technically separate, brought together to share discovery or the like, then disaggregated for disposition.[93] With that framing, the statute did not present an occasion upon which to reconsider the fee arrangements among individual lawyers, individual clients, and the lawyers for the group as a whole; from the litigation context of the 1960s, it is not surprising that the judicial promoters of the legislation did not foresee the scope of the role for today's lead counsel in MDLs nor the potential of multidistrict litigation to affect individual attorney-client relations.

In contrast, the class action rule (also drafted in the 1960s) might have taken some attorney-fee issues into account, but only in the context of a single set of lawyers for the class. The class mechanism was designed to enable the bringing of claims not already filed.[94] Class actions assumed the existence of claims (not yet "cases") in which neither lawyer-client relationship nor lawsuit would exist, save by formation of the class.[95] Class action framers—from Harry Kalven and Maurice Rosenfield in the 1940s to Ben Kaplan and the Advisory Committee in the 1960s—plainly understood that lawyers were central to the procedure they crafted.[96] Not only did Kalven and Rosenfield

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[93] Id.

[94] See Memorandum from Benjamin Kaplan and Albert M. Sacks to Advisory Committee on Civil Rules (Apr. 21, 1965), Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedure, 1935-1988, microformed on CIS No. CI-7004-074 (Congressional Info. Serv.) [hereinafter CIS Judicial Conference Records]. Kaplan addressed a concern in the bar that a "flexible" category of class actions might force essentially legislative actions on unwilling parties:

> "the class may have a high degree of cohesion . . . , or the amounts at stake for individuals may be so small that separate suits would be impracticable." It seems to us that subdivision (b)(3) is responsive to current conditions in which large numbers of persons may be similarly affected by alleged wrong-doing and a class action rather than individual actions may be the only realistic method of vindicating rights.

Id. No. CI-7005-011 (section EE-2 of memorandum) (citation omitted).

[95] Recent research found that of 152 certified class actions reviewed, the "median level of individual recoveries ranged from $315-$528 and the maximum awards ranged from $1505 to $5331 per class member." Willging et al., Empirical Analysis of Rule 23, supra note 2, at 84-85. What these data do not reveal is whether class certification was necessary to facilitate meritorious claims; it is possible that the amount of individual recoveries reflects a mixture of high value and much weaker claims.

[96] The 1960s Advisory Committee's records include occasional references to lawyers and fees. See, e.g., Letter from David W. Louisell to Ben Kaplan (Apr. 20, 1962), CIS Judicial Conference Records, supra note 94, No. CI-6812-009, at -011 (asking whether the Committee should consider "contingent fee arrangements by which apparently many if not most plaintiffs' class suits are financed" as part of its work); Letter from Geoffrey C. Hazard, Jr. to Ben Kaplan (Feb. 28, 1962), id. No. CI-6811-084, at No. CI-6812-001 ("Explicit

consider the problems of "loyalty" of class action lawyers, they also foresaw and accepted large fees as the incentives that would animate lawyers' interest in private enforcement of the law.[97]

But the class action rule did not contemplate the contemporary situation, in which layers of lawyers operate. Rather, the focus was on a single lawyer for a large number of unrepresented claimants, not on lawyer-client relations preexisting the aggregate. Indeed, one of the reasons for excluding torts from class action status in the 1960s was the view that the financial incentives of the contingent fee sufficiently motivated the plaintiffs' tort bar to litigate such cases so that no additional mechanisms were needed to enhance access to courts in this category of cases.[98]

While assumptions about the limits of rulemaking powers[99] and the desire to avoid unnecessary controversy explain the absence of discussion of lawyers' roles and fees in the class action rule of the 1960s, the reluctance of contemporary rulemakers to focus on these problems is more troubling. Aggregation itself is established; dozens of examples of specific cases provide windows into its impact, and the interaction among lawyer fees, the prospect of profits, and aggregation is now well marked.

Moreover, no longer does a strong dichotomy between MDL consolidation and class action hold. Despite MDL's formal respect for individual lawsuits and its provision for release of individual cases for trial,[100] MDL creates in practice a kind of de facto mandatory class action, albeit for a limited purpose.[101] During the pretrial process, liti-

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recognition should be given to the problem of attorneys' fees. This is often the heart of the matter.").

97 Kalven & Rosenfield, supra note 23, at 715-20; see id. at 717 ("It is thus seen that the class suit is a vehicle for paying lawyers handsomely to be champions of semi-public rights.").

98 Cf. Rosenberg, Causal Connection, supra note 41, at 889-93 (arguing that, given defense resources, individual contingent-fee lawyers were insufficient to ensure plaintiff access). For a discussion of factors that animated the exclusion of tort litigation from the class action rubric, see Resnik, From "Cases" to "Litigation," supra note 2, at 15-16.

99 One doctrinal explanation for the lack of discussion is the view that under the Rules Enabling Act, 28 U.S.C. § 2072 (1994), rulemaking on fees affects substantive rights beyond judicial rulemaking authority. Attorney fees have been interpreted in diversity litigation to be "substantive" under Erie v. Tompkins R.R. Co., 304 U.S. 64 (1938), and governed by state law. See, e.g., Security Mut. Life Ins. Co. of New York v. Contemporary Real Estate Assocs., 979 F.2d 329, 331-32 (3d Cir. 1992); see also infra Part III.B.1 (discussing federal court powers in class actions over fees).

100 See 28 U.S.C. § 1407(a) (1994) (providing for remands of each action transferred at or before "the conclusion of . . . pretrial proceedings").

101 For discussion of why MDLs were not accompanied by controversy similar to that embroiling class actions, see Resnik, From "Cases" to "Litigation," supra note 2, at 46-48 (analyzing how procedural innovations aimed at efficiency are perceived to be of less political moment than those aspiring to enable access to courts).

gants cannot "opt out" and proceed as solo actors. And during that pretrial process, neither judges nor litigants permit hundreds of individual lawyers to undertake repetitive discovery; instead they insist on coordinated litigation. Under the MDL rubric, lawyers select or trial judges appoint "lead counsel" and PSCs.[102] As noted above, those lawyers become lawyers for a group yet have an even less defined set of ethical obligations than has the class action lawyer.[103] And judges award such lawyers fees that are taken from funds recovered in recognition of the work on behalf of the whole.[104] Because the MDL statute is now used as a model for proposals to enhance the powers of aggregation,[105] lawyering and its costs within such "consolidated" actions should also be central issues. In short, whether reviewing MDLs or class actions or some variations on these themes, policymakers ought to consider the problems of IRPAs, PSCs, and the sets of individuals and clients that both represent.

One other piece of the history of the interaction between MDL and class actions over these last decades needs to be sketched. The convergence of MDL and class actions demonstrates how, over the last twenty years, the distinctions among purposes for group litigation (one predicated on expediting pending, individual cases and the other aimed at enabling filing of new cases) have conflated. Efficiency has come to include not only the termination of pending cases but also the desire—at least, on the part of some—to "invite" future claims in the hopes of resolving them all.[106] Class actions have also evolved beyond

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[102] See Manual Second, supra note 13, § 31.13 (describing court's power to appoint "attorneys to act as lead or liaison counsel"); see also Paul D. Rheingold, The Development of Litigation Groups, 6 Am. J. Trial Advoc. 1, 4 (1982) (arguing that, unless court-appointed, lawyers' committees lack power to make binding decisions).

[103] See supra Part II.D.

[104] See Rheingold, supra note 102, at 3-5 (describing lawyer-created networks and the economic incentives to gain leadership in such groups); id. at 10-11 (explaining that fee awards rely on either percentage of fund, lodestar, or "rate per case" methods). The source of judicial authority in such cases is the equitable "common fund" or "common benefit" doctrine. See discussion infra Part III.B.2.

[105] See ALI Complex Litigation, supra note 16, at 21; Schwarzer et al., supra note 16, at 1532-33, also described in William W Schwarzer, State-Federal Judicial Relationships: A Legislative Agenda in Proceedings of the Western Regional Conference on State-Federal Judicial Relationships, 155 F.R.D. 233, 262-69 (1994).

[106] Illustrative is the ALI's recent Complex Litigation Project. ALI Complex Litigation, supra note 16. While the Project describes its proposal as a "consolidation" mechanism, the ALI also proposed a means by which to seek out claims. Id. § 5.05, at 275-77 ("The court may issue a notice of intervention and preclusion to individuals who are not yet parties to a consolidated action but whose joinder is deemed an integral part of making a comprehensive adjudication of a complex litigation."). With the power of consolidation and the ability to invite intervention, all in the search for finality and binding, conclusive results, the ALI project's consolidated actions look a lot like their cousins, class actions. The reporter comment does note the "family similarity between class actions and consoli-

the initial conception of them as enabling rights enforcement;[107] a good deal of today's interest stems from a vision of class actions as efficient,[108] particularly in arenas like mass torts. Some judges hope that, while forming a class may enable filings not otherwise brought, class actions also operate as a means of processing the high quantity of claims that are expected to be brought individually.[109] On the other hand, the potential that class action leverage improperly affects settlement negotiations has also been the grounds for rejection of class certifications.[110]

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dated actions," distinguishing them by the fact that plaintiffs' lawyers create the scope of class actions, whereas under the ALI version, the court would create the enlarged scope of consolidated action. Id. § 5.05, at 287 n.11. Under the ALI's plan, a court could decide that the pending cases do not capture all the relevant participants and request that individuals or groups file *new* lawsuits—called in the ALI report "unasserted claims." Id. § 5.05, at 275-77.

To distinguish itself from class actions in which preclusion is predicated on the adequacy of representation, the ALI project would preclude nonparties from whom the court has "invite[d] . . . participation" but who declined. Id. § 5.05, at 287 n.11.

107 A goal, some argue, that has been abandoned, at least in particular litigating contexts. See Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases, 33 B.C. L. Rev. 211, 257 (1992) (arguing that Supreme Court decisions have "eliminated Rule 23 as an accessible vehicle for Title VII plaintiffs and detracted from the policy of collective relief that impelled" the drafting of Rule 23).

108 See, e.g., the recent decision that a settlement of a state class action can have preclusive effect by releasing claims within the exclusive jurisdiction of the federal courts. Matsushita Elec. Indus. Co. v. Epstein, No. 94-1809, 1996 WL 79477, at *11 (U.S. Feb. 27, 1996).

109 Yeazell, Modern Class Action, supra note 22, at 46-58 (discussing that both features, enabling and efficiency, historically have been part of the class purpose).

110 See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-99 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995). Other federal appellate courts have expressed hesitancy about district court readiness to certify classes or approve settlements in class actions. See, e.g., In re American Medical Sys., 75 F.3d 1069, 1074 (6th Cir. 1996) (granting mandamus to vacate conditional class certification in a products liability case involving alleged injuries from penile prostheses); see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 797-800 (3d Cir.) (disapproving the settlement of a consumer class action and holding that the district courts may not vary the criteria of class action certification depending upon whether the certification is accompanied by a proposed settlement or not), cert. denied, 116 S. Ct. 88 (1995); see also Edward H. Cooper, Rule 23: Challenges to the Rulemaking Process, 71 N.Y.U. L. Rev. 13 (1996) [hereinafter Cooper, Rule 23] (describing interest in "substantial curtailment of class action practice" on the one hand and in alterations on the other to "capture and perhaps improve [on] the growing efforts to adapt the present rules to the needs of dispersed mass injuries").

While some federal judges are counseling hesitancy about class certifications, lawyers report a blossoming of class action practice in state courts; without empirical research, it is difficult to assess claims either of retrenchment or expansion of class actions. Some defendants appear to believe that they need to be aggressive in fending off class action filings. See, e.g., Robyn Meredith, Chrysler Lawsuit Takes Aim at Class Actions, N.Y. Times, Mar. 27, 1996, at A14 (reporting Chrysler's filing against five attorneys for allegedly unethical practices in class action litigation).

The thirty years of experiences with MDLs and class actions provide additional context for the problems considered by this essay. First, the appearance of many individual lawyers representing individual clients prompts interest in "efficient" management, which in turn prompts selection of lead counsel—from the available pool of lawyers—to focus on tasks directed by the court. The PSCs we described above stem from the desire to simplify the structure and centralize lawyering. What IRPAs, still obliged by contract to represent clients in the litigation, do is perforce less visible to the court and/or defendants' counsel, and what the lead lawyers do is similarly opaque to individual clients.

Second, during the same decades in which aggregation has become familiar to lawyers and judges by virtue of MDL and class actions, adjudication itself has been undergoing significant changes. The orientation has shifted from a focus on regulatory rights-pronouncement and individual litigants to an emphasis on dispute resolution, which has been facilitated by court adoption of settlement conferences, court-annexed arbitration, and other modes of encouraging consensual dispositions.[111] An interaction between aggregate modes of dispute processing and an increasing emphasis on dispute resolution affects the impetus behind collecting a large number of claimants. The goal is not only to enable fair distribution among competing rights-seekers, but also to create a framework for what is termed "global peace"—a resolution that promises to limit not only defendants' exposure to future lawsuits but also the courts' exposure to more litigants.[112]

Third, the commingling of purposes for group litigation—enabling and efficiency—is another factor creating a context in which rule drafters attend little to individuals within the aggregate. While sweeping heretofore "individual" cases into aggregates, preservation of individuality is not a goal. The American Law Institute's Complex Litigation proposal, the MDL statute, the use of bankruptcy, and the class action rule support a general proposition of law, circa 1996, that while (in the words of the ALI) individual control over litigation is both relevant and "weighty,"[113] particularly in the mass tort context, individual interests are not "immutable."[114]

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111 See Judith Resnik, Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication, 10 Ohio St. J. on Disp. Resol. 211 (1995); Resnik, Whose Judgment?, supra note 34.

112 Hensler, ADR in Mass Personal Injury Litigation, supra note 3, at 1613-18.

113 ALI Complex Litigation, supra note 16, § 3.01, at 46 (citing Roger Trangsrud, Joinder Alternatives in Mass Tort Litigation, 70 Cornell L. Rev. 779 (1985)).

114 Id.

Fourth, despite a robust literature on the economic opportunities that aggregation creates for "entrepreneurial lawyers," lawyers and judges who formulate aggregation rules remain reluctant to take on the issues of what roles to assign lawyers within the aggregate and how much to pay in fees. While detailed provisions may not be appropriate for statutes and rules,[115] even the ALI's many-faceted Complex Litigation Project addresses neither the fees nor the financing of the large litigations it would create.[116]

Contemporary suggestions about revision of the 1966 class action rule also do not come to terms with the issues of diverse relationships, depending on the kind of class action, among lawyers, litigants, and fees.[117] A February 1995 draft of possible revisions to Rule 23 recognized explicitly the role of lawyers and financing in group litigation,[118]

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115 The recently revised *Manual for Complex Litigation, Third* elaborates on the existence of many lawyers within an aggregate but not the relations among them. See Manual Third, supra note 11, § 20.221; see also supra note 13.

116 The ALI Project seems to anticipate that its complex litigation would be in the hands of a lawyers' executive committee or management committee. ALI Complex Litigation, supra note 16, § 3.01 cmt. c. A central set of counsel would play the primary role, with individual attorneys playing minor roles. Id. § 3.01, at 51 nn.17-19 (discussing cooperation and the problems of lawyers). As Judge Weinstein also notes, the ALI's ongoing work on a Restatement of the Law Governing Lawyers also does not address these issues in any detail. Weinstein, Individual Justice, supra note 21, at 44; see also Linda S. Mullenix, Unfinished Symphony: The Complex Litigation Project Rests, 54 La. L. Rev. 977, 981 (1994) (arguing that the ALI project failed to address many issues of relevance to the resolution of mass torts).

Similarly, the proposed alteration of federal jurisdiction to relax diversity requirements for multiparty, multiclaim litigation does not address paying the lawyers for such litigation. See Thomas D. Rowe, Jr. & Kenneth D. Sibley, Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction, 135 U. Pa. L. Rev. 7 (1986); Thomas D. Rowe, Jr., Jurisdictional and Transfer Proposals for Complex Litigation, 10 Rev. Litig. 325 (1991).

117 For discussion of the problems that rulemakers have in this area, see the thoughtful overview provided by Professor Edward H. Cooper, who is the Reporter to the Advisory Committee on Civil Rules. Cooper, Rule 23, supra note 110. What the shape of any actual proposed revision of Rule 23 will be is not yet clear. As Professor Cooper details, three drafts of a revised rule have been circulated in the past few years. Id. at 13-14 (describing the preparation of a "comprehensive draft" by the Honorable Sam Pointer, when he chaired the Advisory Committee, and then analyzing the 1995 proposal and appending two drafts, circulated in 1995, when the Honorable Patrick Higginbotham chaired the Advisory Committee). The Advisory Committee met in April 1996 to finalize proposals; it has, however, forwarded a copy of the November draft to the Standing Committee to appraise it of the direction in which the Advisory Committee may be going. Id. at app. B at 68.

118 Case law under current Rule 23 has understood "adequacy" of representation to depend on lawyers as well as on the named representatives. The February 1995 draft of Rule 23(a)(4) would have moved lawyers into the text of the rule, to require consideration of whether the "representative parties and their *attorneys* are willing and able to fairly and adequately" protect interests of class members. Id. at app. A at 53 (Proposed Rule 23(a)(4), Feb. 1995 draft) (emphasis added). Revised Rule 23(c)(1)(A)(v) would have authorized judges to condition a class on putative members "bearing a fair share of litigation expenses incurred by the representative parties." This provision was explained as provid-

and plainly anticipated that mass torts could come within class action purview.[119] But the draft provided no details of the obligations of judges to superintend the relationships that we have sketched among the many lawyers involved in varying ways within a litigation.[120] The November 1995 draft, which could be understood as attempting to circumscribe class actions,[121] also provided little guidance about how judges should work with the many lawyers and clients within mass tort aggregates, or respond to the tensions now apparent. For example, the proposal would require judges to make a preliminary appraisal of the merits as a predicate to the certification of damage class actions.[122] But the proposal is silent on a critical aspect of any such hearing: Which lawyers will represent which claimants or appear on behalf of the proposed "class"?[123] How shall those lawyers be selected? And paid? Further, by underscoring the distinctions among potential class members, the proposal might make class certification more difficult in mass torts;[124] to that extent, the draft would thereby move some mass torts out of Rule 23 and over to the MDL statute, in which issues of individual and group lawyering would have to be faced.

Fifth, experience with aggregated litigation demonstrates that, while the role of individuals within the aggregate varies, individualization is not erased by the group form. In some instances, plaintiffs are fairly described as "figureheads"[125] whose names provide a symbolic

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ing compensation in defendant class actions. The assumption was that in plaintiff class actions, the common fund doctrine would enable fee reallocation. Id. at app. A at 55 (Proposed Rule 23(c)(1)(A)(v), Feb. 1995 draft). Proposed Rule 23(d)(1)(C)(iii) would have offered judges the ability to provide class members with an opportunity to "signify whether they consider the representative fair and adequate." Id. at app. A at 56-57 (Proposed Rule 23(d)(1)(C)(iii), Feb. 1995 draft).

119 Id. at app. A. at 53-54 (Proposed Rule 23(b), Feb. 1995 draft).

120 The proposed rule does discuss the possibility of disaggregation (and/or bifurcation or trifurcation) for specific issues. Id. at app. A at 55-56 (Proposed Rule 23(c)(2), Feb. 1995 draft).

121 See, for example, the possibility of requiring a preliminary hearing on the "probable success on the merits of the class claims, issues, or defenses" as a predicate to certification. Id. at app. B. at 69 (Proposed Rule 23(b)(1)(3)(E), Nov. 1995 draft).

122 See id.

123 The proposal does provide that after a class has been certified, notice would include information on how class members could bring "challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members." See id. at app. B at 71 (Proposed Rule 23(c)(2)(A)(i), Nov. 1995 draft).

124 See, for example, the proposed language of Rule 23(b)(1)(B)(3), requiring that a district court find that questions common to the certified class predominate over individual questions and that the class is both a superior and "necessary" method for the disposition of the matter. Id. at app. B. at 69 (Proposed Rule 23(b)(1)(B)(3), Nov. 1995 draft). On the other hand, the proposal also plainly contemplates mass tort aggregate class certification and further that classes can be certified on certain questions but not on others. See id. at app. B. at 69-70 (Proposed Rule 23(b)(3) and 23(b)(4), Nov. 1995 draft).

125 Winter, supra note 42, at 947.

function but whose specific injuries (and requisite "personal stake" in the outcome[126]) are indistinguishable from others within their cohort.[127] Securities class actions have been the example often but not exclusively given for this genre.[128] But commercial litigation does not avoid all individualized questions; as Nancy Morawetz has explained, class members may not benefit equally nor attach the same value to remedies.[129] Turning to injunctive actions, such as institutional reform litigation, conflicts within groups of similarly situated litigants are occasionally acknowledged. According to Deborah Rhode's "taxonomy of conflicts" within the structural reform context, differing "constituencies" within the collective may have varying appraisals of the status quo and of various proposed changes.[130] But in both injunctive and commercial class actions, judges and the public may be less aware of intragroup disagreements, in part because of the absence of access to legal services for individual members of or groups within the class.[131]

Tort litigation is the genre in which individual variations within the class are most readily perceived. It is not only its prior exemption from aggregation that has marked its individual character; while lead/class/group lawyers may perform an array of services, an array of specific tasks (some of which are fairly characterized as legal services to individuals) is not encompassed in or addressed by those managing and litigating the lawsuit as a whole. As detailed above, during the pretrial phase, IRPAs may be involved in individualized discovery, settlement negotiations, and then, if a trial occurs, in trying representative cases. In the distribution phase, claims facilities sometimes pro-

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126 And hence, within the federal courts, having standing to litigate. See generally Board of Sch. Comm'rs v. Jacobs, 420 U.S. 128 (1975), as modified by United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (requiring that a personal stake in the litigation was needed at least at the time of filing, if not at certification, of a class).

127 A distinctive concern about the role of a named plaintiff is whether that individual exerts any power or has any specific role to play in class suits. See Jean Wegman Burns, Decorative Figureheads: Eliminating Class Representatives in Class Actions, 42 Hastings L.J. 165, 167-86 (1990) (arguing that the named class plaintiff has no legal authority and serves no useful purpose).

128 See Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 93 (asserting that in large-scale, small-claims shareholder derivative cases, "courts should forthrightly acknowledge that the named plaintiff is a figurehead"). In the 1995 securities legislation, Congress has responded by specifying a series of conditions that lead plaintiffs must fulfill, including that the plaintiff did not purchase the security for the purpose of litigation and must have "the largest financial interest in the relief sought" or otherwise demonstrate adequacy to represent other plaintiffs' interests. 15 U.S.C.A. § 77z-1(a)(3)(B)(iii)(I)(bb) (West Supp. 1996).

129 For example, consumers may value in-kind relief (coupons for airplane trips or products at discounted prices) differently. Morawetz, Bargaining, supra note 26, at 13-16 (discussing Cuisinart antitrust litigation).

130 Rhode, Class Conflicts, supra note 26, at 1186.

131 Id. at 1200.

vide individualized methods to determine distributions of funds; even when grids are used, questions arise about where individuals fit on a grid.[132] Some form of personalized guidance—delivered by lawyers or others—may be needed to enable individual recoveries.[133] In short, *disaggregation* occurs both *before* and after resolution, as individual plaintiffs make distinctive claims on the services of someone—lawyers, courts, or administrators.[134]

But a client-oriented set of tasks is not the only basis for individualization; the impulse toward individualism comes also from IRPAs' economic interests and power, or what Stephen Yeazell has termed "economic individualism."[135] Lawyers whose incomes derive from contingency-fee contracts have economic incentives to argue for and preserve some forms of individual client representation. Lawyers who represent classes in turn depend on IRPAs to persuade their clients not to opt out of mass settlements and thereby undermine global deals.

The description of lawyering within tort aggregates and the recent history of aggregation thus provide a series of "givens" of the contemporary debate about large-scale litigation and for this essay. First, aggregation will exist (in some form). While enthusiasm may wax and wane, judges and lawyers have too strong an investment to pull back substantially. Second, at least for some time to come, litigants' claims of rights to individualized representation, and lawyers' interests in that treatment, will require court attention and response. Reforms to ban individual representation are unlikely in light of lawyers' economic interests and their potential political clout, as well as in light of more widely shared commitments to individualism, to freedom of con-

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132 While Georgene Vairo, Chairperson of the Dalkon Shield Claimants Trust, has argued that the Trust's design was aimed to reduce the role of lawyers and is critical of some of the lawyers who appear before the Trust, the Trust has not eliminated all roles for advocates. See Vairo, supra note 48, at 652; see also discussion of the claims liquidation process in In re Joint Eastern & Southern Districts Asbestos Litigation, 120 B.R. 648, 677 (Bankr. E. & S.D.N.Y. 1990) (app. C).

133 Here we disagree with Mullenix that this mass tort aggregation is the same as any other "representative" action. Linda S. Mullenix, Mass Tort as Public Law Litigation: Paradigm Misplaced, 88 Nw. U. L. Rev. 579, 586-87 (1994) [hereinafter Mullenix, Mass Tort as Public Law Litigation].

134 Cf. id. (arguing that "the quintessential feature of mass tort litigation is that it is by definition aggregate litigation and, therefore, by its nature *representational* litigation"). Her assumption minimizes attention to the role of individualization within the aggregate. Mullenix also criticized Judge Weinstein for his description of mass torts as public law cases. Id. at 580-82. See Jack Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U. L. Rev. 469, 543 (1994) [hereinafter Weinstein, Ethical Dilemmas].

135 Stephen C. Yeazell, Collective Litigation as Collective Action, 1989 U. Ill. L. Rev. 43, 59 [hereinafter Yeazell, Collective Action].

tract, and to a constitutional structure of liberal individualism.[136] Third, judges are and will continue to be involved in distributing fees among sets of lawyers, and it is to the current state of fee law that we now turn.

B. Formulating Fee Payment Rules

Paralleling the development and expansion of techniques to aggregate cases was, of course, the creation of rules for payment of fees to the lawyers who represented groups. The law of fees is of particular relevance here because fees are assumed to be the primary consideration of lawyers when deciding to file lawsuits.[137] Thus fee rules are a critical tool by which policymakers could structure relationships and representation within aggregates. Moreover, the work for which lawyers are paid reflects and engenders value; judicial discussions of attorneys' fees are thus a source of information about what such values are. Below we provide a brief overview of contemporary doctrine. Intersecting in the case law are four factors: the source of courts' power to award fees, the method by which fees are calculated, the work that is compensable, and the kinds of cases in which fees are awarded. As the discussion below develops, missing from sustained consideration are IRPAs, the provision of services to individuals within an aggregate, and recognition of aggregation's potential to increase costs charged to litigants.

1. Courts' Power over Fees

Courts have power over fees either because Congress has said so (in the context of requiring defendants to pay attorneys' fees of pre-

[136] The Manhattan Institute proposal on contingent fees, mindful of such interests, argued for government regulation—not abolition—of contingency fees. See infra notes 205-07 and accompanying text. Its implicit rejection in the winter of 1994 by the American Bar Association demonstrates our point about the practical limits of reform aspirations. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-389 (1994); see also ALI Draft Law Governing Lawyers, supra note 16, § 46 cmt. b (discussing "the American free market for legal services").

[137] A few commentators describe other aspirations. See, e.g., Davis, supra note 56, at 22-39 (discussing Ed Sparer's conception of lawyering); Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992) [hereinafter López, Rebellious Lawyering]; Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 295-96 (1993) (both López and Kronman call for lawyers to have aspirations other than private remuneration); see also infra Part IV.C.

vailing plaintiffs,[138] in the bankruptcy arena,[139] and in other statutory litigation schemes) or because courts have found their own authority. If fee payments are part of a proposed class action settlement, then Rule 23's requirement that class actions be neither "dismissed" nor "compromised" without court approval has licensed judicial inquiry into and authority over fees.[140]

When judges want to award fees in class actions that do not involve statutory fee shifts or in MDLs that involve neither class actions nor statutory fee shifts, judges turn to the equitable doctrine of the "common fund" or "common benefit." Dating from the nineteenth century, this doctrine provides that when a plaintiff confers a benefit on others or creates a common fund in which others share, those beneficiaries have an obligation to reimburse the plaintiff for the costs (including lawyers' fees) of achieving the victory.[141] Under this equitable doctrine, courts award compensation from a group of plaintiffs to a lawyer whom they have *not* retained but who succeeds in estab-

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138 See, e.g., 42 U.S.C. § 1988 (1994) (civil rights). This fee-shifting provision functions in some ways as does the class action—to enable private enforcement of the law. According to the legislative history, Congress worried about the supply of lawyers and hoped, by fee-shifting, to attract lawyers to an area. See S. Rep. No. 1101, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910-13 (discussing what became 42 U.S.C. § 1988); see also Blum v. Stenson, 465 U.S. 886, 895 (1984) (finding the lodestar to be the appropriate basis for calculation of a "reasonable fee," including fees for legal services provided by nonprofit law offices that do not charge clients).

As of 1987, of some 200 federal fee-shifting statutes, most were one-way fee shifts in which attorneys for prevailing plaintiffs received fees from losing defendants. Prevailing defendants, in contrast, only received fees upon a court finding special justification, such as bad faith or frivolous litigation. See Richard Larson, The Origins and History of Attorneys' Fees Law, in Court Awards of Attorneys' Fees: Litigating Antitrust, Civil Rights, Public Interest, and Securities Cases 9, 30 (Guy T. Saperstein & Melvyn I. Weiss eds., 1987). Justice Brennan provided a list of federal fee-shifting statutes in Marek v. Chesny, 473 U.S. 1 app. at 43-51 (1985) (Brennan, J., dissenting).

139 11 U.S.C. § 330(a) (1994).

140 Fed. R. Civ. P. 23(e). Judges have also relied occasionally upon Rule 23(a)(4), which requires judicial superintendence of the adequacy of representation.

141 Trustees v. Greenough, 105 U.S. 527 (1881). In that case, a bondholder in the Florida Railroad Company sued the trustees of the Internal Improvement Fund of Florida, a land fund pledged as security for the bonds, for alleged fraudulent conveyance of lands and failure to meet obligations. The bondholder preserved the asset (land) that was sold for the benefit of himself and other bondholders, and then sought compensation for the expenses out of the proceeds of the sale. The Supreme Court agreed that the other bondholders should "contribute their due proportion of the expenses which he has fairly incurred." Id. at 532; see also Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164-65 (1939) (relying on the equitable powers of courts to provide successful litigants with counsel fees and litigation expenses).

lishing either a fund[142] or conferring a benefit on that group's members.[143]

A related but distinct issue is whether and when courts have power to *change* a fee contract agreed to by an individual lawyer and a client. In general, courts have deferred to contractual rights, typically brought to judges' attention by a lawyer seeking to compel payment by a client. For example, a court-calculated fee award (owed by defendant by statute to a prevailing plaintiff) does not insulate a client from having to pay a lawyer the agreed upon one-third of a recovery, even when that one third exceeds the "reasonable" fee as determined by a judge.[144] However, on some occasions, courts have exercised their "inherent" or other powers[145] or enforced statutory and ethical rules to limit fee payments in specific kinds of cases.[146] Moreover,

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[142] In Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885), the Supreme Court concluded that, under the *Greenough* premise, lawyers had an independent claim for compensation from a fund. Id. at 124-25.

[143] See, e.g., *Sprague*, 307 U.S. at 162, 167 (conferring the benefit of the creation of liens on the proceeds of bonds rather than the creation of a fund per se); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970) (concluding that the benefit of uncovering misleading proxy statement provided a basis for fee reallocation).

[144] Venegas v. Mitchell, 495 U.S. 82, 87 (1990). The defendant's payment is a setoff; the lawyer cannot collect two fees. The existence of a contingency-fee contract that requires a payment of far less than what a court finds a "reasonable fee" also does not insulate a defendant from having to pay more to that plaintiff's attorney under a statutory fee shift. Blanchard v. Bergeron, 489 U.S. 87, 93-95 (1989).

[145] See, e.g., Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 119-21 (3d Cir. 1976) (en banc) (charging co-plaintiffs for costs of common benefit lawyers and concluding that rather than consider or alter independently agreed-to contingent-fee contracts, the court should allocate, pro rata, the costs of common benefit lawyers to the class); Dunn v. H.K. Porter, Co., 602 F.2d 1105, 1109-10 (3d Cir. 1979) (finding that, while some class members had entered into contingent-fee agreement with class counsel, Rule 23 authorized court inquiry into the reasonableness of the fees); see also Jack B. Weinstein & Eileen B. Hershenov, The Effect of Equity on Mass Tort Law, 1991 U. Ill. L. Rev. 269, 326 (arguing that aggregate measures enable court protection of the "financial interests of plaintiffs when they diverge from the interests of their attorneys by controlling transaction costs and by reviewing settlements and attorneys' fees"); Vairo, supra note 48, at 620 (asking whether courts should control contingent fees); id. at 654 n.135 (questioning fees paid to contingency-fee lawyers based on the claim that unrepresented claimants in the claims facility netted amounts equivalent to those of claimants who had paid lawyers' fees).

[146] For example, ethical codes forbid contingent fees in criminal cases and substantially restrict contingency fees in family law cases. Model Rules of Professional Conduct Rule 1.5(d) (1995); Model Code of Professional Responsibility DR 2-106(c) (1980); Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards 54-59 (1996) (outlining selected state variations of these rules). In addition, some states have limited contingency fees in medical malpractice claims. E.g., Cal. Bus. & Prof. Code § 6146 (West 1990) (limiting fees to 40% of the first $50,000 in recovery, to 33% of the next $50,000, to 25% of the next $500,000 and to 15% of any amount exceeding $600,000); see also ALI Draft Law Governing Lawyers, supra note 16, § 47; In re San Juan Dupont Plaza Hotel Fire Litig., 768 F. Supp. 912, 922 (D.P.R. 1991) (limiting contingent fees when plaintiffs are

judicial assertion of authority over individual contingent agreements in contemporary mass torts constitutes a trend toward increased court involvement in fees paid in these kinds of cases.[147]

2. *The Methods by Which Fees Are Awarded*

Whether prompted by congressional mandate or interpretation of their own powers, judges have articulated methods of fee payment, focused either on the time expended by the attorney, the hourly rate that such a lawyer could recoup in the marketplace, the attendant risk of the litigation and its complexity, or on the amount of money obtained by virtue of the lawyer's efforts. Over the past twenty-five

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minors), order vacated on other grounds sub nom. *Nineteen Appeals*, 982 F.2d 603 (1st Cir. 1992).

Courts have been reluctant to intervene in fee contracts between knowledgeable clients and their attorneys. See, e.g., Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 875 (9th Cir.), cert. denied, 444 U.S. 981 (1979). Courts have sometimes intervened when a client is lacking information and a fee is excessive in light of the time spent by the lawyer. See, e.g., Bushman v. State Bar, 522 P.2d 312 (Cal. 1974). See generally Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 129-38 (1995).

147 See, e.g., In re A.H. Robins Co., No. 85-01307-R, slip op. at 3 (E.D. Va. Mar. 1, 1995) (Order Disallowing Unreasonable Attorneys Fees on Pro Rata Distribution) (on file with authors) (relying on the court's power "to supervise members of the bar, its inherent powers to regulate attorney-client relations and compliance with ethical standards by attorneys" as well as equitable powers in bankruptcy and in general, and disallowing, subject to motions by attorneys for reinstatement, full payment of the contractual contingent fees on the pro rata distributions to Dalkon Fund claimants); In re A.H. Robins Co., No. 85-01307-R, slip op. at 20, 16-20 (E.D. Va. May 2, 1995) (Order & Mem.) (on file with authors) (characterizing the payments as "bonuses" to the claimants, characterizing the attorneys' work as ministerial, asserting that a "relatively small number of lawyers" have been "paid handsomely" and reiterating the disallowance of full payments of contingency fees) (appeal pending, in which one issue is the jurisdiction and power of a bankruptcy court to control such fees); In re A.H. Robins Co., No. 85-01307-R, slip op. at 2 (E.D. Va. Oct. 20, 1995) (Order Regarding Payment of Pro Rata Distribution Funds) (on file with authors) (ordering that "each claimant shall receive ninety percent of the gross amount of the installment payment without regard to any additional claim from counsel for costs or any other claim"), appeal pending sub nom. In re A.H. Robins, Co., Bergstrom v. Dalkon Shield Claimants Trust, No. 95-2239-L (4th Cir. argued Mar. 5, 1996, before Judges Russell, Chapman, and Widener of the Fourth Circuit), (discussed supra note 67); *Thirteen Appeals*, 56 F.3d 295 (1st Cir. 1995) (ordering 50-50 split between IRPAs and PSC members); In re Joint Eastern & Southern Dists. Asbestos Litig., 120 B.R. 648 app. C at 677 (Bankr. E. & S.D.N.Y. 1990) (limiting attorneys' fees for "claims liquidation" to the "*lower* of the fee provided in the contract between claimant and counsel or 25%").

The now defunct proposed settlement in the breast implant case also addressed fees. See Breast Implant Litigation Settlement Notice ¶ 24(b)(3)(4), In re Silicone Gel Breast Implant Litig., MDL 926 (N.D. Ala. revised Sept. 16, 1994) (asserting authority over all attorney-fee payments of plaintiff class; not permitting enforcement of contingency-fee contracts entered into after March 1, 1994, when the existence of a proposed settlement was generally known; and reserving the right to "set maximum limits on the contingency percentages that may be recognized" on those contracts allowed, to "afford equity among counsel" and to pay the services of "common benefit" counsel).

years, the case law and commentary have come to rest on two approaches, the "lodestar" and the "percentage of the fund" (POF).[148]

The application of these methods varies somewhat depending on the source of judicial authority to award fees.[149] In nonstatutory cases, either a percentage of the fund or the lodestar method may be used; many courts have expressed a preference for the POF test,[150] while a few have opted for the lodestar,[151] and some circuits let the district courts choose.[152] When the lodestar calculation is used, it is based on a variety of formulations, such as a multifactor analysis

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148 See generally Manual Third, supra note 11, § 24.11-.13; Mary Frances Derfner & Arthur D. Wolf, Court Awarded Attorney Fees ch. 15 (1994); Arthur R. Miller, Attorneys' Fees in Class Actions (1980). For discussion of a mixture of the two (the "hybrid method"), see infra notes 172-73 and accompanying text. A variant of the percentage method, by which a judge sets an attorney fee for lead counsel early in a litigation (instead of at its conclusion) by selecting lead counsel based on choosing among competitive bidders, is discussed infra notes 380-85 and accompanying text.

Many statutes require the award of a "reasonable fee," and only a few specify factors to be taken into account when courts make such awards. See, e.g., 11 U.S.C. § 330(a)(1) (1994), discussed supra note 18; 15 U.S.C. § 2060(f) (1994) (consumer product safety) (A "reasonable attorney's fee is a fee . . . based upon . . . actual time expended by an attorney in providing advice and legal services in connection with representing a person [and] such reasonable expenses . . . incurred, . . . computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding the fee."). Despite congressional specificity in bankruptcy, courts have relied on a variety of formulas to award fees; methods of calculating fees are discussed in Ralph C. McCullough, II, Attorneys' Fees in Bankruptcy: Toward Further Reform, 95 Com. L.J. 133 (1990). Some courts use the "*Johnson* factors," others the "*Lindy*" approach, others a "straight" lodestar, and yet others a "percentage of the recovery." See discussion infra notes 149-78 and accompanying text; see also Symposium, Paying the Piper: Rethinking Professional Compensation in Bankruptcy, 1 Am. Bankr. Inst. L. Rev. 231 (1993). For the argument that bankruptcy fee awards should follow class action methodology because of the functional resemblance between the two procedures and that both should use the percentage of the fund recovery, see Christine Jagde & Mamie Stathatos, Professional Fees in Bankruptcy: Percentage-of-the-Recovery Method—A "Solvent" Response for Bankruptcy Proceedings?, 1 Am. Bankr. Inst. L. Rev. 471 (1993).

149 See generally Hirsch & Sheehey, supra note 83.

150 See, e.g., Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (applying a percentage method); Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) (requiring a percentage method in common fund cases).

151 See, e.g., In re Boesky Sec. Litig., 888 F. Supp. 551, 560-61 (S.D.N.Y. 1995) (reiterating that equitable fund fee awards must be calculated using the lodestar method as held in City of Detroit v. Grinell Corp., 495 F.2d 448 (2d Cir. 1974)); see also McLendon v. Continental Group, Inc., 872 F. Supp. 142, 163-64 (D.N.J. 1994) (relying on a lodestar in part because of the difficulties of setting a percentage after settlement).

152 See *Thirteen Appeals*, 56 F.3d 295, 306-08 (1st Cir. 1995) (holding that district courts have discretion to choose); In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1296, 1299-1301 (9th Cir. 1994) (upholding district court's choice); Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 516 (6th Cir. 1993) (concluding that district courts have discretion on methodology as long as the award is "reasonable under the circumstances"); In re Continental Ill. Sec. Litig., 962 F.2d 566, 572-73 (7th Cir. 1992) (leaving method of calculation to the choice of the district court but suggesting a preference for percentage method); Brown v. Phillips Petroleum, 838 F.2d 451, 456 (10th Cir.) (holding

(called "*Johnson* factors"[153]) or a somewhat pared-down, overlapping list (the "*Lindy* factors"[154]). In statutory fee-shifting cases, the Supreme Court has instructed that fee calculations must be done by the lodestar method[155] and that no "enhancements" or "multipliers" can be awarded for the risk of nonpayment.[156]

The common fund/common benefit fee calculation might also have been tied to the same lodestar analysis. This equitable doctrine could be understood as correcting a free-rider problem by equalizing expenses among those plaintiffs who hired a lawyer and those who did not but had benefitted (either in monetary or other form) from the lawyer's work. Professor John Dawson and Samuel Berger argued

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that a district court's award, based on a percentage of fund, was not abuse of discretion), cert. denied, 488 U.S. 822 (1988).

153 The name comes from a Fifth Circuit opinion, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), which involved a statutory fee shift in a Title VII class action. Its factors are: 1) time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill required to perform the legal services properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the case; 11) the nature and the length of the professional relationship with the client; and 12) awards in similar cases. Id. at 717-19.

154 This test is named after the Third Circuit case of Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), on remand, 383 F. Supp. 999 (E.D. Pa. 1974), rev'd on other grounds, 540 F.2d 102 (3d Cir. 1976) (en banc). *Lindy* involved the settlement of an antitrust class action involving plumbing fixtures. Having determined that statutory fee shifting in antitrust cases was not available when cases were settled rather than tried, id. at 164-65, the court relied on equitable powers to order that fees be reallocated among successful plaintiff members of the settlement class, id. at 122. *Lindy* fee calculations oblige a judge to consider hours spent, the rate, the "'contingent nature of success,'" and the "'extent, if any to which the quality of an attorney's work mandates either increasing or decreasing the amount.'" Id. at 108 (quoting the district court). *Lindy* also required that, "[a]bsent extraordinary circumstances, the unrepresented claimants should pay for the attorneys' services in proportion to their benefit from them—measured by the percentage of the class' recovery" they received. Id.

For discussion of the overlap between the *Johnson* and *Lindy* approaches, see Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 244-45 (1985) [hereinafter Third Circuit Report] (concluding that the most important factors under either approach are the time spent, the rates, and the work done).

155 See City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (describing the lodestar as the "guiding light of our fee shifting jurisprudence").

156 Id. at 561-67. For discussion of whether the nonenhancement for risk principle should apply in common fund cases, see the concurring opinion in *Nineteen Appeals*, 982 F.2d 603, 619-20 (1st Cir. 1992) (Lay, J., concurring) (arguing for *Dague*'s application); Florin v. Nationsbank of Ga., N.A., 34 F.3d 560, 564-65 (7th Cir. 1994) (concluding that "the holding in *Dague* should not extend to this case," and that "*Dague*, by its terms, applies only to statutory fee-shifting cases"). For consideration of enhancements for other than risk, see, e.g., Gomez v. Gates, 804 F. Supp. 69, 75-76, 79 (C.D. Cal. 1992) (providing a 1.75 multiplier for "undesirability" because the plaintiffs were engaged in a robbery when the defendants, police officers, allegedly used unlawful force).

that the equitable principles on which this approach is predicated—restitution and avoidance of unjust enrichment—required only that work performed or costs incurred by the person who conferred the benefit should be compensated.[157] As Dawson pointed out, common benefit lawyers could be "fully compensated" by the individual client obliged to pay a fee.[158] Further, to the extent that the existence of beneficiaries other than the actual client caused the lawyer to incur additional costs or expend extra efforts, courts might have ordered co-plaintiffs to pay for such expenses or work. Instead, a good many courts calculate fee awards by awarding a percentage of the total fund recouped to the common benefit lawyer—a payment that Dawson called an "extra fee."[159]

Payment of that premium enables the common fund fee doctrine to perform a function similar to the class action rule as well as to share features of one-way fee-shifting statutes and contingency fees. When the amount paid to the lawyer exceeds the amount that the hiring plaintiff was obliged to pay, then the common benefit fee award creates an incentive for lawyers to file and win such cases. These bonuses also provide inducements to consolidate. If judges pay lawyers such bonuses (either by using the percentage method or enhancing the lodestar amount), they both endorse the concept of a "bounty-hunting" lawyer as doing something socially useful and turn those lawyers into what Dawson and Berger termed "profit sharers."[160]

Over the past decade, the debate about the relative efficiencies of the two dominant modes of payment has intensified, as has criticism of the private market contingency-fee arrangement. Commentators complain that the entire enterprise—fee awards—is burdensome to judges and wasteful of their scarce time.[161] Each method of fee calcu-

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157 See Dawson, Attorney Fees from Funds, supra note 23, at 1601-02; Samuel R. Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 299 (1977). Professor Dawson also argued that whatever fee arrangement existed between the individual client and the attorney who conferred a common benefit should not be "controlling: the fee . . . agreed on . . . may be unreasonably high or abnormally low . . . ." The test should be the "reasonable value of the legal services rendered." John P. Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849, 853-54 (1975) [hereinafter Dawson, Public Interest Litigation].

158 See Dawson, Attorney Fees from Funds, supra note 23, at 1604-07.

159 Id. at 1605.

160 Id. at 1609.

161 E.g., Third Circuit Report, 108 F.R.D. 237, 254-64 (1985) (making many recommendations framed to conserve court time devoted to fees); Alexander, supra note 24, at 578 (arguing that judicial consideration of fee records is a "positively breathtaking waste of an Article III judge's time"); Cooper, Rule 23, supra note 110, at app. A. at 57 (Proposed Rule 23(e), Feb. 1995 draft) (providing for referral to special master for evaluation of proposed settlements, including, presumably consideration of fee agreements made therein). In 1993, the Federal Rules of Civil Procedure were amended to authorize the use of special

lation also has its own critics. Reliance on the lodestar, with its hourly rates, may create incentives to "pad" hours, waste time, or prolong the litigation.[162] Given high "agency" and other costs, small-claims plaintiffs have little possibility of monitoring their class action attorney,[163] so that supervision of hours and expenses falls to the courts and, if done carefully, is time-consuming.[164] Further, if judges are permitted to "enhance" the hourly rate by multiplying it by some amount (e.g., 1.5 or 2.5), they gain wide-ranging discretion, potentially exercised in an arbitrary fashion.[165]

Percentage of the fund recovery, while simpler to administer,[166] rests entirely on judicial discretion.[167] Judges select a figure whose arbitrariness is cushioned only by reference to other similarly arbi-

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masters outside the parameters of Rule 23 to work on fee calculations and thereby to reduce the time investment of judges. Fed. R. Civ. P. 54(d)(2)(D) (permitting issues of valuation to be referred to a special master who would not otherwise meet the criteria of Rule 53 for such appointment and the fee decision itself to be referred to a magistrate judge "as if it were a dispositive pretrial matter"). See Notice Concerning Amendments to Federal Rules, 151 F.R.D. 145 (1993) (explaining that, given the absence of congressional action, the amendments to the federal rules became effective December 1, 1993).

To minimize the time spent, some courts have employed sampling techniques, whereby a subset of time sheets are reviewed. See, e.g., Harman v. Lyphomed, Inc., 945 F.2d 969, 975 (7th Cir. 1991) (approving district court's use of this procedure to estimate the number of hours to be compensated); Evans v. City of Evanston, 941 F.2d 473, 477 (7th Cir. 1991) (finding that a sampling technique applied by a district court was not arbitrary).

162 Coffee, The Plaintiff's Attorney, supra note 71, at 681. Coffee also describes possible "structural collusion" in a lodestar formulation—that plaintiffs' attorneys have an incentive to build up hours, which also helps defendants, interested in delay. Id. at 718; see also Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 4 (arguing about improper incentives as well as problematic estimates of the amount of time worked). In an earlier essay, Coffee also argued that mechanistic application of the lodestar formula created incentives for plaintiffs' attorneys to agree to nonpecuniary settlements that did not constrain misbehaving defendant corporations. See John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working, 42 Md. L. Rev. 215, 246-47 (1983) [hereinafter Coffee, Rescuing the Private Attorney General].

163 See Coffee, The Plaintiff's Attorney, supra note 71, at 724.

164 Third Circuit Report, 108 F.R.D. 237, 246 (1985).

165 See City of Burlington v. Dague, 505 U.S. 557, 566 (1992) (commenting that risk enhancement makes "the setting of fees more complex and arbitrary"); see also Berger, supra note 157, at 310 (describing a survey of 140 fee district court awards, in which the mean hourly rate for antitrust lawyers was $181 and for Title VII employment discrimination lawyers was $40).

166 Illustrative of the difficulties of careful fee supervision under the lodestar approach is Weinberger v. Great Northern Nekoosa Corp., 801 F. Supp. 804, 811-29 (D. Me. 1992) (while disallowing fees in total, specifically reviewing a myriad of charges and awarding specific amounts of compensation for each category of item claimed), aff'd sub nom. BTZ, Inc. v. Great N. Nekoosa Corp., 47 F.3d 463 (1st Cir. 1995). For discussion of the administrative utility of the percentage of the fund method, see Swedish Hospital Corp. v. Shalala, 1 F.3d 1261, 1270 (D.C. Cir. 1993).

167 Dawson called the percentage a "court-directed game of roulette." Dawson, Public Interest Litigation, supra note 157, at 929.

trary decisions. A few so-called "benchmarks" exist. One lawyer-commentator argued some years ago that five to seven percent of the fund was a commonplace fee award to lead lawyers in mass torts.[168] Others invoke the twenty-five to thirty percent figure,[169] which has some rough parallel to the one-third contingency fee.[170] When the amount of the fund is very large, courts have balked at the one-third percentage and used a smaller amount.[171]

The percentage method may also create undesirable incentives, such as prompting lawyers to settle too soon to "cash out." In response, modifications have been proposed, such as percentages fixed at the outset and the use of sliding scales,[172] or of a "hybrid" method under which trial judges evaluate the number of hours actually spent, make a lodestar calculation, and then compare that figure with the percentage that seems reasonable given previous awards in similar cases.[173] As of this writing, the Supreme Court has not chosen in com-

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168 See, e.g., Rheingold, supra note 102, at 10 (reporting five-percent figure but also "precedent for 7-10%" for common benefit lawyers, who presumably were also paid additional sums by virtue of contingency fees from individual clients with whom they had contracts for representation). But see In re Shell Oil Refinery, 155 F.R.D. 552, 573, 569 n.49 (E.D. La. 1993) (awarding in a settlement of an oil refinery explosion nearly 18%—almost $32 million—in fees to a Plaintiffs' Legal Committee consisting of 11 lawyers).

169 See, e.g., 3 Herbert B. Newberg & Alba Conte, Newberg On Class Actions § 14.03, at 14-13 to 14-14 (3d ed. 1992) [hereinafter Newberg on Class Actions] (discussing attorneys' fees in securities and antitrust suits as ranging from 20-30%, and 50% as the upper limit on fee awards for common funds; if multiple firms are involved, the court may allocate among lawyers if they do not do so, and not discussing the issue of whether such a percentage should be applied when both PSC and IRPAs were involved); Manual Third, supra note 11, § 24.121 (also making no distinctions among kinds of cases); see also Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) (affirming a 25% award and noting that amount was a "benchmark" for awards to class counsel).

170 According to Willging et al., Empirical Analysis of Rule 23, supra note 2, at 135, of the class actions in which moneys were distributed, rarely did fees exceed one-third.

171 See, e.g., In re Unisys Corp. Retiree Medical Benefits ERISA Litig., 886 F. Supp. 445, 462 (E.D. Pa. 1995) ("Awarding 20 to 45 percent of the $111 million fund . . . would be manifestly unjust."); 3 Newberg On Class Actions, supra note 169, § 14.03, at 14-14 (reporting that fee percentages became "significantly more modest" as recoveries approached or exceeded $100 million).

172 For example, the Third Circuit's Task Force recommended that fee percentages for common benefit funds be negotiated in advance between bench and bar; no mechanism for litigant involvement was provided. Third Circuit Report, 108 F.R.D. 237, 255 (1985). The report proposed that such negotiation be an "arm's length" discussion, modeled after the contingency-fee agreements that detail the work to be expected, the kinds of risks reasonably anticipated, and the like, and that once agreed upon, "renegotiation should not be permitted." Id. at 256-58. The report added the caveat that, if matters "not within the reasonable contemplation of the parties" at the time of negotiation emerge, modification would be possible. Id. at 258. The Task Force also suggested that the percentage decrease as the amount of the fund increased. Id. at 256.

173 See Hirsch & Sheehey, supra note 83, at 66-67; Strang v. JHM Mortgage Sec. Ltd. Partnership, 890 F. Supp. 499, 502-03 (E.D. Va. 1995) (cross-checking a lodestar and POF calculation to determine that 25% instead of 30% of the fund sufficed). One empirical

mon benefit cases the method by which fees should be paid, and attorney-fee litigation consumes substantial resources.

Further, while Congress addressed attorneys' fees in its 1995 securities legislation, it too has not promoted a single methodology by which courts calculate attorney-fee awards. Congress required that the fees and expenses paid to plaintiffs' lawyers in securities class actions "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[174] The term "reasonable percentage" is defined only in terms of reference to monies actually received by plaintiffs; the legislative history explains that the "reasonable percentage" provides courts with flexibility to determine fees on a case-by-case basis, and further, that Congress has neither stipulated the method by which to calculate fees nor prohibited using the lodestar method for such calculations.[175] Using the damages actually paid as the baseline against which to check reasonableness (as contrasted with the amount in a settlement fund, not all of which may in fact be dispensed to the class) is an innovation; to date, fee calculations are often made before distributions to claimants are completed. Fee calculation focusing upon damages actually paid increases attorneys' incentives to craft mechanisms by which funds are distributed expeditiously and fully.[176] The 1995 securities legislation thus recognizes that the attorney-fee awards can be used to try to alter behavior of lawyers; that act defines the value of work as the sums actually received by class members. Below, we explore both what the case law has considered when authorizing payment to lawyers[177] and other possible metrics of "value."[178]

3. *The Types of Work Compensated*

What is the work for which fees are paid? The discussion of what "counts" for compensation under the lodestar method, while familiar, bears repetition with the mass tort, IRPA, PSC, and individual client configurations in mind. Whether under statutory fee-shifts or by way of equitable doctrine, and whether the lodestar is calculated by

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study suggests that in practice, the two methods produce very similar results. See William J. Lynk, The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation, 23 J. Legal Stud. 185, 195-209 (1994) (reviewing fee awards in class action securities litigation and arguing that the data support the view that courts award fees for a mixture of lawyer effort and results achieved).

174 15 U.S.C.A. § 77z-1(a)(6) (West Supp. 1996).

175 H.R. Rep. No. 369, 104th Cong., 1st Sess. 36 (1995).

176 Compare studies of less than complete distributions of consumer class action funds. See supra note 70.

177 See infra Part III.B.3.

178 See infra Part IV.A-B.

twelve,[179] four,[180] or two factors, the focus is on the monetary or other legal result, not on the individual litigants' experiences with either courts or their lawyers or on the diverse roles played by different lawyers.

Of all the various formulations, only the *Johnson* test includes as a factor the "nature and length of the professional relationship with the client."[181] However, the client's perspective on that relationship is not the basis of inquiry.[182] Courts have defined the relevance of a professional relationship not in interpersonal but in economic terms—that expectations of future business could provide a basis for discounting current services. Fee opinions do not discuss other measures of relationship, such as client satisfaction or understanding; they also ignore forms of participatory lawyering that critical scholars advocate.[183] Moreover, under federal statutory fee-shifting doctrine, only

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179 See the *Johnson* factors, supra note 153.

180 See the *Lindy* factors, supra note 154.

181 Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974) (explaining that a "lawyer in private practice may vary his fee for similar work in the light of the professional relationship of the client with his office"). Of the hundreds of cases citing *Johnson*, few elaborate this factor's meaning. See, e.g., Ruiz v. Estelle, 553 F. Supp. 567, 594 (S.D. Tex. 1982) ("The meaning of this criterion and its effect on the calculation of a 'reasonable' fee has always been unclear."). In *Ruiz*, Judge Justice suggests that this factor could refer to the possibility of future employment by the client of a lawyer and therefore permit a fee reduction in light of the prospect of a future stream of income. Id. A few of the other cases that analyze this factor also mention attorney discounts of rates for "[r]egular clients." See, e.g., Younger v. Glamorgan Pipe & Foundry Co., 418 F. Supp. 743, 795 (W.D. Va. 1976), vacated on other grounds, 561 F.2d 563 (4th Cir. 1977). Other cases note that lawyers do not present information relating to this factor. See, e.g., Sheppard v. Riverview Nursing Centre, Inc., 870 F. Supp. 1369, 1381 (D. Md. 1994). Given the capacity of this factor to limit a lawyer's recovery, plaintiffs' attorneys would have no incentive to do so, and while defense counsel might have incentives to raise the issue, they may lack the relevant information.

182 We found no reported opinion in which a judge described receipt of client testimony about perceptions of the "nature and length of the relationship." In one decision, however, a court mentioned exemplary client communication and contact as bearing on this criterion. See In re Shell Oil Refinery, 155 F.R.D. 552 (E.D. La. 1993). This court noted that, although the lawyers were appointed by the court and did not have the relationship "usual" in litigation, the Plaintiffs' Legal Committee "frequently had face-to-face and telephone contact with the claimants" and that "[c]ounsel responded to innumerable inquiries from class members who needed explanations, assistance, and assurances." Id. at 573. In another decision, involving an individual employment discrimination claim, a court noted that the "relationship [between attorney and client] is already ten years in duration and the time of its termination is not in sight. I do not know how to give this factor any particular weight . . . ." Chisholm v. United States Postal Serv., 570 F. Supp. 1044, 1049-50 (W.D.N.C. 1983). Some of the *Johnson* factors have also been described as permitting enhancement for "superior representation," described as the way counsel worked, given the "results obtained . . . [and] the professional methods utilized." In re Farrah, 141 B.R. 920, 926 (Bankr. W.D. Tex. 1992).

183 See infra Part IV.C.

lawyer time spent on *prevailing claims* is recoverable.[184] The fee decisions consider the provision of legal services not in terms of "personal services rendered" or in terms of political and social action but instead measure the impact of such services by the money recovered or the legal principle enforced or established.[185]

But wide differentials between monetary outcomes gained by plaintiffs and the attorney fees reaped by lawyers have surfaced in the case law in the context of statutory fee-shifting—and in these cases, judges have had to confront whether economic outcomes are the only ones for which lawyers should be paid. The leading example is the Supreme Court's 1986 decision in *City of Riverside v. Rivera*,[186] in which "eight Chicano individuals" were arrested at a party and sued police officers for civil rights violations. A jury awarded $33,350 in compensatory damages, and lawyers sought and were awarded $245,456.25 in fees from the defendants.[187] Writing for the plurality affirming the award, Justice Brennan refused to require that fee awards in civil rights cases be "proportionate to the amount of damages a civil rights plaintiff actually recovers."[188] Brennan's justification was the public stake in this genre of litigation; he argued that, unlike tort litigation, civil rights cases have a social function making inappropriate the equation of the worth of the lawsuit with the money

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184 Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (interpreting civil rights fee shift to prevailing parties as available to those who "'succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit'" (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978))). As subsequently amplified, to obtain a fee award from a defendant, a plaintiff has to "receive at least some relief on the merits of his claim." Hewitt v. Helms, 482 U.S. 755, 760 (1987). Further, declaratory relief may be insufficient for one to prevail, absent a "modification" of a defendant's behavior. Rhodes v. Stewart, 488 U.S. 1, 4 (1988). The "legal relationship" between plaintiff and defendant has to change, either by litigation or settlement. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989) (finding a settlement sufficiently altering of behavior to support a finding that a plaintiff "prevailed"); see also Maher v. Gagne, 448 U.S. 122, 129 (1980). Further, an award of nominal damages makes attorney-fee awards unlikely. Farrar v. Hobby, 506 U.S. 103, 115 (1992), discussed infra note 193.

185 In the criminal context, the Supreme Court has also declined to interpret the Sixth Amendment right to counsel as encompassing the right to a "'meaningful attorney-client relationship.'" See Morris v. Slappy, 461 U.S. 1, 13-14 (1983) (quoting appellate court decision, Morris v. Slappy, 649 F.2d 718, 720 (9th Cir. 1981)) (holding that the substitution of counsel, after another lawyer had prepared the case and after the court had refused to provide a continuance, did not constitute a Sixth Amendment violation, given the substituted lawyer's statement that he had had adequate opportunity for preparation and investigation).

186 477 U.S. 561 (1986).

187 Id. at 564-65 (the rate charged was $125 per hour).

188 Id. at 574. Justice Powell concurred, concluding that the factual findings of the trial court were not clearly erroneous. Id. at 584-86 (Powell, J., concurring).

obtained.[189] From the other opinions in the case, one learns of two other arguments for declining to equate value with monetary awards: either that juries will not measure all plaintiffs' injuries equally because of ethnic, racial, or other biases, or that juries will be reluctant to impose large financial obligations on government officials who are the defendants in civil rights cases.[190]

Some tort theorists believe that tort litigation has deterrent, corrective, and/or distributive functions, expressing values about obligations and relationships among individuals within a community.[191] While these theorists might agree with Chief Justice Rehnquist's equation (in dissent in *City of Riverside*) of civil rights and tort litigation, they may not be pleased that he placed no value, other than the amount of money recouped, on results from either form of litigation. Calling for "billing judgment" and wise investment of resources, he criticized such a differential between lawyers' fees and client damages.[192] Some six years later, in the context of a fee request for more

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189 Id. at 574 ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."). According to the plurality, the social benefits here (a finding of police "'general hostility to the Chicano community'") resulted in deterrence of police misconduct. Id. at 574-75 (citation omitted). Justice Brennan also relied on the congressional history of the civil rights fee statute, with its model of private attorney general, as well as a view that large awards could not be expected in such cases. Id. at 576-80.

190 See Justice Powell's concurrence, with its heavy reliance on trial court findings, id. at 583-84 (Powell, J., concurring), as well as Chief Justice Rehnquist's dissent, in which he quotes the trial judge as saying: "'the size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury.'" Id. at 591 (Rehnquist, C.J., dissenting); see also discussion infra notes 354-55 and accompanying text about "rebellious lawyering," of which this may be an example; rather than stress victimization, clients and lawyers in this case focused on the wrongful behavior of the defendants. For discussion of the effects of gender and race on civil damage awards, see Martha Chamallas, Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument, 63 Fordham L. Rev. 73, 84-89 (1994) (reviewing empirical studies, including some from court-based task forces on gender and minority status, describing lower awards made to women and/or minorities than to whites or men); Regina Graycar, Compensation for Loss of Capacity To Work in the Home, 10 Sydney L. Rev. 528 (1985) (also addressing gender discrimination and damage awards).

191 See, e.g., Rosenberg, Causal Connection, supra note 41, at 907-08; Jules L. Coleman, Tort Law and the Demands of Corrective Justice, 67 Ind. L.J. 349, 361-69 (1992); Jules L. Coleman, The Practice of Corrective Justice, 37 Ariz. L. Rev. 15, 28-31 (1995); see also Steven D. Smith, The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law, 72 Cornell L. Rev. 765, 783-85 (1987) (arguing that tort law's goals include being responsive to injured victims' felt needs for justice and to societal interests in the maintenance and enforcement of its norms); Weinstein, Individual Justice, supra note 21, at 42 ("[M]ass tort litigations often have an underlying, if less focused, purpose which goes beyond mere transfers of wealth—they deal with the health and sense of security of many individuals and the viability of major economic institutions.").

192 *City of Riverside*, 477 U.S. at 594-95 (Rehnquist, C.J., dissenting).

than $250,000 when a jury had awarded nominal damages to a civil rights plaintiff, the Court concluded that while such a plaintiff "prevailed" as defined in the statutory fee-shift, defendants had no obligation under the statute to pay the plaintiff's attorney's fees unless the litigation served public purposes.[193]

Under the current regime, relatively few cases report the award of lawyers' fees when civil rights litigants receive nominal awards.[194] While *City of Riverside*'s nonproportionality rule survives to some extent, when nominal awards are given, courts usually attribute nominal value to the litigation, and the "prevailing" party's lawyers receive no fees from defendants.[195]

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193 Farrar v. Hobby, 506 U.S. 103, 115 (1992). The Farrars had run a home for disturbed teenagers, which had been closed after a death of one of the residents. They sued the Texas Lieutenant Governor, who had issued a press release critical of the home and of others. Id. at 106. Justice O'Connor, concurring, argued for a holding that "[w]hen the plaintiff's success is purely technical or de minimis, no fees can be awarded." Id. at 117. However, she also sought to draw a distinction between nominal and de minimis awards. In her view, one had to evaluate the difference between the amount sought and the amount received, as well as whether public purposes, such as the revelation of a pattern of misconduct, were served. Id. at 121-22. Justices Blackmun, Stevens, and Souter joined Justice White, concurring and dissenting in part, in reading the majority as not precluding fee awards in all cases of nominal damages. Id. at 124.

194 One interesting exception is worth noting. See Lucas v. Guyton, 901 F. Supp. 1047 (D.S.C. 1995), in which a judge awarded attorneys' fees to lawyers representing a death row inmate. A jury had found that Lucas had been beaten by correctional officers and then awarded 10¢ in damages. According to the trial judge, "[d]efendants maliciously and sadistically" beat Cecil Lucas, a man who did not "deserve much sympathy." Id. at 1050. The judge held that the verdict was "in reality a significant accomplishment," that the plaintiff's success went well beyond the amount of the damages by vindicating the constitutional rights of a death row inmate, and awarded some $30,000 in costs and fees. Id. at 1052, 1060.

A few other exceptions can be found in which judges have concluded that some "public concerns" or establishment of a legal principle justify fee awards. See, e.g., Franz v. Lytle, 854 F. Supp. 753, 757 (D. Kan. 1994) (awarding $250 in actual damages for the strip search of a child, and permitting an attorney-fee award of $33,225 because the issue was one of first impression, involving important public question of investigatory practices in neglect cases); Stacy v. Stroud, 845 F. Supp. 1135, 1139 (S.D. W. Va. 1993) (relying on the "public interest concern" implicated by a jury trial on the use of excessive force and defendants' indifference to serious medical needs when making an arrest of a driver and concluding that, despite the plaintiff's award of $4000, some $23,000 in fees to the lawyers was proper); see also Carroll v. Wolpoff & Abramson, 53 F.3d 626, 628-31 (4th Cir. 1995) (upholding $500 fee award, which was below the statutory minimum, in a Fair Debt Collection Practices Act case on the grounds that the district court had discretion to determine that the violation was technical and the plaintiff's success was limited).

195 See, e.g., Cramblit v. Fiske, 33 F.3d 633, 635 (6th Cir. 1994) (declining to award an attorney fee and rejecting the argument that vindication interests sufficed to support a fee award when an unlawful police search claim resulted in a jury award of one dollar in nominal and one dollar in punitive damages). Cf. Keith N. Hylton, Fee Shifting and Incentives To Comply with the Law, 46 Vand. L. Rev. 1069, 1107-09 (1993) (analyzing the effects of fee-shifting rules and arguing for a "liberal interpretation" of prevailing plaintiffs to in-

One other aspect of fee shifting bears noting. Many fee statutes, including the civil rights fee-shifting statute, are "one-way" shifts. Prevailing plaintiffs receive fees; prevailing defendants do not.[196] The refusal to tax *losing plaintiffs* could be understood as acknowledging a social value in or utility of litigation independent of its outcome. Loss does not equate with a penalty for bringing the lawsuit; the justification is that invoking procedure has either personal or social benefits and should not be discouraged,[197] or that two-way risk-shifting would indiscriminately deter litigation because of differential vulnerability among litigants to economic penalties. In contrast, when two-way shifts occur and all "losers" pay, then results become the sole measure of value.[198]

In short, in the context of civil rights fee shifts that oblige defendants to pay plaintiffs' fees, the attorney work that is compensated varies, primarily depending on the monetary value that juries put on the claim. When actual damages are awarded, judges may award lawyers' fees in excess of that amount, thereby finding something of value beyond the dollar damages. When nominal damages are awarded, courts find vindication, rights-seeking, and public interests either insignificant or insufficient to overcome juries' refusal to monetize the value of that vindication. A judgment that a case lacked economic value to the individual is taken to mean that the litigation achieved insufficient public value to require defendants to pay plaintiffs' attorneys who enabled the litigation. But under current law, when defendants win civil rights cases, they cannot recoup their fees from losing plaintiffs, thereby suggesting that some social value is placed on even plaintiffs' failed efforts at rights-seeking.[199]

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clude those who win nominal damages because such fee-shifting would enhance compliance with the law).

196 In a recent case, the Supreme Court interpreted the federal copyright statute's fee-shifting provision to provide for a two-way shift, such that prevailing defendants as well as prevailing plaintiffs recouped fees from their losing opponents but "only as a matter of the court's discretion." See Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1033 (1994).

197 An analogy might be drawn to provision of counsel for criminal defendants—that the activity of defending is useful in and of itself, rather than that such activity is useful only when a defendant is acquitted.

198 We do not here debate current "loser pays" proposals, but our discussion of whether to value litigation solely in terms of monetary outcomes and enforcement of rights has implications for that controversy. See Attorney Accountability, Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995).

199 Defendants can recoup statutory fees only upon a finding that a case was "frivolous, unreasonable, or without foundation." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (holding in a Title VII case that the district court has discretion to make such an award upon such a finding).

Moving from a statutory fee shift that obliges losing defendants to pay plaintiffs' lawyers to those equity cases that impose lawyers' fees on a group of co-plaintiffs, the focus on results is parallel. When the percentage of the fund method is used, the fund—the amount recovered—is the measure of the work for which lawyers are compensated.[200] One critique of the percentage approach echoes the *City of Riverside* trial judge's worries that money awards themselves will be badly calibrated. In the common fund context, Janet Alexander's concern is that the monetary sums of settlements may not be good measures of the "legal value" of cases because they are a product of a variety of incentives to avoid litigation rather than of the merits of claims.[201] Hence the dollar amount of a settlement fails as an accurate economic metric by which to assess fees. Our question is whether the fund is the only outcome of a case; ignored are the processes of litigation as well as whether—or not—lawyers provided to clients legal services that conferred benefits on either those clients, the courts, or the public.

While judges have thus far shown little interest in the difficulties of measuring even the economic value in common fund cases,[202] the arbitrariness of the percentage of the fund payment method and its effect of turning lawyers into "profit sharers" might have been suffi-

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200 When the percentage of the fund method is used in bankruptcy, it is not surprising that the value of the services rendered is readily equated with economic conservation of assets or recovery. The personal injury litigant within bankruptcy was, until recently, an anomaly; bankruptcy was focused on the assets of the debtor and their distribution to creditors. See, e.g., In re Public Serv. Co., 160 B.R. 404, 412 n.10 (Bankr. D.N.H. 1993) ("While the phrase 'quality of representation' is linguistically distinct from the phrase 'results obtained,' this Court considers them to be two sides of the same cause-effect relationship.... The First Circuit has recently joined the concepts as a single 'Exceptional Performance/ Results Enhancement' topic...." (citation omitted)).

201 Alexander, supra note 24, at 578-81 (also discussing that the percentage method that includes both fees and costs in the same lump sum creates an incentive for lawyers to minimize the expenses of investigation and fact gathering in order to maximize their fees).

202 One emerging exception is the question of valuation when the fund includes both monetary recovery and other remedies, such as medical research or promises of future financing, should health problems emerge. See, e.g., Bowling Fee Hearing Transcript, Bowling v. Pfizer, Inc., No. C-1-91-256 (S.D. Ohio 1995); Bowling v. Pfizer, Inc., No. C-1-91-256, slip op. at 48-50 (S.D. Ohio Mar. 1, 1996) (Memorandum and Order on Applications For Attorneys' Fees and Expenses) (on file with authors) (disagreeing with the Class and Special Counsel's proposed valuation of the fund at $165 million—which included potential future payments—and concluding that its value exceeded $100 million and constituted a "substantial benefit" on the class); see also Rosenbaum v. MacAllister, 64 F.3d 1439 (10th Cir. 1995) (holding that a fee award of $2.5 million was excessive and remanding the shareholder derivative case for an evidentiary hearing on the benefits conferred by the litigation); Barry Meier, Math of Class-Action Suit: 'Winning' $2.19 Costs $91.33, N.Y. Times, Dec. 11, 1995, at A1 (describing class action settlement of lawsuit against banks for excess charges on mortgages in which lawyers' fees of $8.5 million were charged to class members, and criticizing valuation of remedy and method of attorney-fee calculation).

cient to remove it from the judiciary's armamentarium and to turn their attention to developing fee rules that attend more to the nature of the work undertaken. But the POF remains in part because it is so deeply familiar, resembling closely the contingency-fee payment system in which risk-taking by lawyers in individual litigation has been financed for some time, and in part because a percentage award frees the judge from vexing inquiries into hours spent by lawyers.[203] The distinguishing feature between the contingency fee and the POF is whether the percentage is set in a contract in advance between client and lawyer or before/after the fact by the court.[204]

But like the percentage of the fund, the contingency fee itself has also been the subject of criticism, which (with the support of the Manhattan Institute) has solidified around a proposed alternative. Lester Brickman, Michael Horowitz, and Jeffrey O'Connell argue for regulation of contingency-fee payments by tying payment to offers of settlement made by defendants.[205] Under their proposal, attorneys could not charge contingency fees on sums obtained by virtue of promptly made settlement offers.[206] This proposal is continuous with the judicial fee allocation methods outlined above; in each, the value of the lawyers' services is equated with the monetary outcome obtained by the client.[207]

In sum, whether by relying on a lodestar calculation or a percentage of the fund method for the payment of attorneys' fees, judges

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[203] See, e.g., Willging et al., Empirical Analysis of Rule 23, supra note 2, at 155 (finding that, in class actions in which money was distributed to claimants, when the percentage of the fund was used to calculate fees, attorneys were paid 27-30% of the funds).

[204] As the ALI Draft Law Governing Lawyers, supra note 16, § 46, at 212, § 47, at 218-20, explains, because the contingency fee requires risk-taking, the sums paid are freed from being measured by the number of hours of work entailed. To the extent courts actually engage in factfinding to determine what constitutes an appropriate percentage, the predicate information is both complex and may be contested. See *Thirteen Appeals*, 56 F.3d 295, 308-13 (1st Cir. 1995).

[205] Brickman et al., Rethinking Contingency Fees, supra note 31, at 26-28. In response to a request from Brickman and others for an ethical ruling, the ABA issued an opinion that, while not directly referring to the Manhattan Institute, concludes that contingent-fee agreements remain ethical and that the percentage need not be limited because of early settlements or in cases when liability is clear, in part rejecting the idea that such a category exists. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-389 (1994).

[206] Brickman et al., Rethinking Contingency Fees, supra note 31, at 27-28.

[207] The Brickman-Horowitz-O'Connell proposal also defines risk solely in monetary terms; risk is conceptualized as the risk of nonpayment in a specific instance, rather than including the general risk of maintaining a contingency-fee law practice or the risk of associating with unpopular causes or clients. Id. at 19. Moreover, not only is the value equated with the immediate economic benefit to an individual, but no place exists within this model for premiums to be paid for engendering outcomes (via settlement or lawmaking) with third-party effects. In contrast, under an enhanced lodestar model or a percentage system, payments could be paid for something other than the economic results.

have developed a body of case law in which outcomes are the central basis of fees and in which the distinct question of separately charged costs has not spawned much doctrine. In contemporary discussions of either court-awarded lawyer fees or of contingency fees, the purpose of lawyering is defined as generating results. Commentators have shared that focus as well. Not much other than the economic consequences of litigation is under discussion. But results are not the only possible measure of value taken from the litigation by individual participants, by the group, and by the public. Lawyers might also be paid for work that enhances the process or the experiences of either litigants or the public. Thus, a further question needs to be asked, about why the issue of the value of litigation has not been more fully explored in fee case law. Below we examine how the occasions upon which fee law was made help to explain its current shape, which in turn offers little guidance for the contemporary problems of handling mass tort aggregates.

4. *The Dominant Paradigms*

Focusing on results is attractive for its very simplicity, especially in the aggregate context, in which individual litigants have neither volunteered to participate in a cohort nor have electoral or other means of expressing their preferences. Sorting out comparative preferences among such group members is avoided. Further, because litigation can impose significant burdens on opponents, using results as the measure of value also avoids considering which strategic activities of litigants have unacceptable effects on opponents and which are within the bounds of adversarialism. Moreover, in the one-way fee context, defendants are paying their opponents' lawyers; asking them to pay more for the quality of their adversaries' legal experiences may seem to be adding insult to injury. Thus, while lawyers can be paid for time spent with clients,[208] fee awards focus on whether lawyer work affects results and/or recoveries, and not on whether lawyer work responds to client concerns about processes or to court and public views of the desirability of such responsiveness.

But current doctrine does not provide a completely coherent picture of results as the sole metric of value. While reliance on results as a metric solves the problem of having to compensate attorneys for *losing* plaintiffs, it does not explain why nominal victories are equated with losing ones or why winning defendants should not be compen-

[208] Under the lodestar method, such hours are billed, and under the contingency or percentage of the fund method, some of the fee could be understood as payment for client contact.

sated. Further, missing from the case law is how to think about *which* lawyers generate results; little by way of rules exist about how or why to pay IRPAs for their roles in aggregate litigation.[209] And, within the academic literature critiquing fee payments, attention is not paid to the provision of legal services to individual litigants within aggregates[210] or to the complexity of intragroup distinctions. The commentary generally emphasizes alignment of incentives between lawyers and the groups they represent and on the outcomes generated.

The shape and focus of the discussion stems from the litigation contexts in which lawyers and judges have articulated and criticized attorney-fee rules. Three paradigms dominate the discussion to date.[211] The first arises from the public interest world with its institutional litigators whose clients include children in school desegregation cases, prisoners, mental patients, or environmental litigants. Whether appropriate or not, clients within institutional civil rights cases have an anonymous aura.[212] The second is represented by the lone private lawyer appearing on behalf of a single client in an individual police brutality, civil rights, or due process case. The third paradigm is commercial, involving securities, antitrust, or consumer litigation. Whether fees are awarded because of a statutory fee-shift mandate or by virtue of a court's equitable powers, the doctrinal analysis in com-

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209 For example, the First Circuit mandated a 50-50 IRPAs/PSC fee split in one litigation, but not much other than a desire for closure justified that division, as contrasted with the 10% of the total recovery for both costs and fees to PSC members that had been set forth in a pretrial order or with the trial judge's subsequent 30-70 IRPAs/PSC allocation, reversed on appeal. *Thirteen Appeals*, 56 F.3d 295, 308-09, 312-13 (1st Cir. 1995); *Nineteen Appeals*, 982 F.2d 603, 608 (1st Cir. 1992).

210 A few discussions mention but do not explore the roles of individual lawyers and clients. See, e.g., Miller, supra note 148, at 246-54, 343-44 (discussing payments to lawyers who are not lead counsel).

211 These paradigms emerge from Supreme Court doctrine, lower court case law, and the commentary. For example, in a review of the 22 Supreme Court attorney statutory fee-shifting cases between 1985 and 1995 (excluding the four cases interpreting the Equal Access to Justice Act), there were seven class or group actions (involving either civil rights or Titles VI or VII), four environmental cases, 10 individual civil rights or Title VII actions, and one patent litigation. The *Johnson* case is also a Title VII class action, while the *Lindy* case involves the settlement of an antitrust plumbing fixtures litigation. See also Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Preliminary Report on Time Study Class Action Cases 1 (Feb. 9, 1995) (in the districts studied, securities cases were the "single largest type of case"—at 24%, or 12 cases—followed by prisoner, other civil rights, and employment litigation) (on file with authors).

212 See, e.g., United States v. City of S.F., 748 F. Supp. 1416, 1430 (N.D. Cal. 1990) ("The very nature of this type of case tends to indicate that an ongoing professional relationship is unlikely. Most counsel are employed by public interest firms. The few who are in private practice . . . do not have a professional relationship with any of the plaintiffs or class members apart from this case.") For discussion of intragroup conflicts that undercut the undifferentiated approach to such plaintiffs, see Rhode, Class Conflicts, supra note 26, at 1186-1202.

mercial aggregates has paralleled that of the institutional civil rights context in that the focus has been on lawyers for the group and the impact of those lawyers on the outcome, measured by monies recovered or redistributed. As in much of large-scale public interest litigation, undifferentiated litigants are assumed in the commercial context as well.

These three paradigms meld well with the history of aggregate procedures detailed above. Class actions were designed for civil rights plaintiffs and for consumers; single sets of lawyers litigated these cases, and attorney-fee doctrine addressed them. But it is a fourth context, the mass tort, that makes plain the inadequacy of the law developed to date. Current rules fail to address the problems of aggregate mass torts, with their layers of lawyers. Who should get paid in these litigations, and for what? Should the value of the litigation be equated with a fund and the bulk of the fees be paid to the lawyers for the aggregate? Are other measures of value available? Should IRPAs be reconceived as referring lawyers, and given incentives by fee law to drop out after aggregation? How much of a role (if any) should clients play in making decisions about paying "their" lawyers?

To respond, we have to move beyond the doctrine and commentary surrounding both attorney-fee award and aggregate litigation; we need to consider the rationales of litigation and the role of lawyers in effectuating those purposes. For some, the fee law's focus on outcomes accurately captures courts' purposes; the problems emerge from agency and market malfunctions. For others, something in addition to monetary outcomes is at stake for litigants and for lawyers. Those alternative approaches are explored below.

IV

COMPETING VISIONS OF COURTS: POLITICAL AND SOCIAL MOMENTS OF MEANING OR INCENTIVES FOR COMPLIANCE

When requiring people to pay lawyers, judges generally have taken as the measure of value the results of litigation. In contrast, when considering the processes that must be afforded to litigants or claimants in administrative settings, judges have articulated a different description of the purposes of their proceedings. Below we consider how fee law and analyses of lawyers' roles relate to claims made by legal, political, social, psychological, and economic theorists about court-based decisionmaking and lawyers. Empirical social science analyses reveal that litigants share with judges and political theorists aspirations for a judicial system that gives litigants something more

than money. Economic models of litigation provide an alternative conception, which, like judges when ordering lawyers' fees to be paid, focuses on a narrower set of expectations for adjudicative processes.[213]

A. Enacting Rights

1. The Process Due

The prominent cases in which judges have set forth explanations of process are those that consider the adequacy of executive, agency, or state court procedures. These "due process" cases provide a window into legal theories of the purposes of process,[214] as does the case law considering when individuals are precluded from litigation. Our interest in this literature is not to consider whether, as a doctrinal matter, one could or should expand preclusion rules or find process adequate in a variety of aggregate mechanisms, nor is it to develop theories of representation. Rather, we are interested here in identifying what animates commitment to process, how those concerns relate to societal views of litigation, and then to understand the relationships among individualization, aggregation, fees, and process.

Judicial statements about due process sometimes describe it as constitutive of the country itself. The words of Justice Frankfurter form a kind of "pledge of allegiance"[215] to process as the mode by

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[213] Other commentators have addressed the purposes of civil litigation and offered abstracted models as well. See, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282-84 (1976) (describing private bipolar, retrospective litigation and "public law litigation," with its multiparty structure, its prospective focus, and the centrality of the judge); Owen M. Fiss, The Social and Political Foundations of Adjudication, 6 Law & Hum. Behav. 121 (1982) [hereinafter Fiss, Social and Political Foundations of Adjudication] (contrasting a "dispute resolution" model, with its focus on individuals in private conflict, with "structural reform" litigation, in which groups and social institutions dispute public values); Kenneth E. Scott, Two Models of the Civil Process, 27 Stan. L. Rev. 937, 937-39 (1975) (describing the "Conflict Resolution Model," in which the emphasis is on peaceable resolution of presumptively private disputes, and the "Behavior Modification Model," in which courts and civil litigation serve to alter "behavior by imposing costs on a person" to effect not only that individual but future conduct of others). Our view is that, whether bipolar or large scale, civil litigation could be seen as centrally about rights enactment (as defined infra Part IV.A) or effectuating outcomes (described infra Part IV.B), or both.

[214] Our focus here is on litigation in general and not only on tort litigation. The specific justifications for tort litigation—deterrence, corrective justice, distributive justice, insurance, and risk-spreading—may themselves illuminate or embody purposes of or for process. While our discussion addresses normative justifications for process that can be transsubstantive, arguments about purposes for process may also vary by litigating context.

[215] Frankfurter's insistence upon the democratic purposes of courts may have been linked to the time in which he wrote and his own attitudes toward United States governance. See, e.g., West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting) (arguing against the invalidation of a statute that required

which United States democratic tradition is enacted at specific moments. Frankfurter argued that "deep-rooted demands of fair play [are] enshrined in the Constitution"[216] and oblige government to provide, "'whenever it is necessary for the protection of the parties . . . an opportunity to be heard respecting the justice of the judgments sought.'"[217] While proclaiming the flexibility of the due process concept, Frankfurter also claimed that its sources were layered on the country's consciousness: "'[d]ue process' is *compounded* of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess."[218] This "principle basic to our society" (which is "the very ethos of the scheme of our society") stems from "essential safeguards for fair judgment which in the course of centuries have come to be associated with due process."[219] Due process is expressly linked to English principles of "'natural justice'"[220] and to "high social and moral values" that adhere in "the procedural safeguard of a fair hearing."[221]

While the sources are history, tradition, the Constitution, judicial applications, and democratic principles, the definition of due process offered is, save for the articulation of the concepts of notice and hearing, close to tautological. "Due process is not a mechanical instrument. It is not a yardstick. It is a process."[222] Its purposes, however, are more clearly articulated: ensuring accuracy and legitimacy of decisionmaking and popular acceptance. Or as Frankfurter put it: "The validity and moral authority of a conclusion largely depend on the

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school children to recite the pledge of allegiance). *Barnette* reversed Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), which Frankfurter had written and which had upheld a flag salute. For discussion of the controversy surrounding *Gobitis*, see Judith Resnik, Constructing the Canon, 2 Yale J.L. & Human. 221, 222-26 (1990).

216 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). The emotive context of the case—the Attorney General's designation of individuals as "communists"—surely animated Frankfurter's exposition.

217 Id. at 162 (quoting Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884)).

218 Id. at 162-63 (emphasis added).

219 Id. at 168, 172. The contemporary tests for the adequacy of process echo these strands. See Mathews v. Eldridge, 424 U.S. 319 (1976); Lassiter v. North Carolina Dep't of Social Servs., 452 U.S. 18 (1981); Medina v. California, 112 U.S. 437 (1992). J. Roland Pennock argues that the "roots of due process grow out of a blend of history and philosophy," that United States constitutional law interpretation can be linked to Kantian and Rawlsian theories of justice, and that the Court has provided a "developmental theory of due process," enabling selection and weighting of values. J. Roland Pennock, Introduction, in NOMOS XVIII: Due Process at xv, xvii (J. Roland Pennock & John W. Chapman eds., 1977) [hereinafter Due Process].

220 *McGrath*, 341 U.S. at 170 n.17 (citation omitted) (citing English materials, including the principle that "[n]o party ought to be condemned unheard").

221 Id. at 167 (evidenced, Frankfurter argued, by the low tolerance for not requiring hearings).

222 Id. at 163.

mode by which it was reached."[223] No "better way" has "been found for generating the feeling, so important to a popular government, that justice has been done."[224]

Process, qua process, is important, and its import does not derive exclusively from the experience of immediate participants in a case, nor is process valued "for its own sake." Process remains instrumental; it is democracy in action, as well as a morality play. The "play is the thing" in that one cannot draw the moral lessons without the play. Frankfurter tended toward the tautological precisely because process's purposes can only be achieved by its enactment.[225] As a consequence, the distinction drawn by some commentators between what are called instrumental or outcome-oriented theories of participation and those described as intrinsic or process-oriented theories of participation[226] do not quite capture the point. While the distinction between process and outcome is useful in some contexts, the dichotomy between the two obscures that process has a host of outcomes, one of which is the decision in a case.

Because the English and United States constitutional traditions initially made political commitments to due process within the framework of individual litigation,[227] the relationship between process and individual participation was straightforward. The rights to notice and to be heard belonged to an individual who had the opportunity to

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223 Id. at 171.

224 Id. at 172. In an accompanying footnote, Frankfurter quoted Daniel Webster on the need to "satisfy the community that right is done." Id. at 172 n.19 (quoting 5 The Writings and Speeches of Daniel Webster 163 (1903)); see also Weinstein, Individual Justice, supra note 21, at 13-14 (arguing that "the legitimacy of our legal institutions depends upon the individual's belief that he or she counts in the system").

225 Speaking from the perspective of theoretical analyses of the late twentieth century, Frankfurter's thoughts can be related to Pierre Bourdieu's work, with its focus on the institutional efficacy of speech and its embeddedness in institutions that both define the ability to speak and the authority of speaker. The tautological nature of Frankfurter's discussion can be reread as illustrative of the inseparable interdependence of speaker and institutional setting in which the speech occurs. See Pierre Bourdieu, Language and Symbolic Power 105-136 (John B. Thompson ed. & Gino Raymond & Matthew Adamson trans., 1991) [hereinafter Bourdieu, Language and Symbolic Power]. As Bourdieu put it: "The mystery of performative magic is thus resolved in the mystery of ministry . . . through which the representative creates the group which creates him . . . ." Id. at 106. Moreover, law is the "quintessential form of 'active' discourse, able by its own operation to produce its effects." Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field, 38 Hastings L.J. 805, 839 (Richard Terdiman trans., 1987) [hereinafter Bourdieu, The Force of Law].

226 See, e.g., Robert G. Bone, Rethinking the "Day in Court" Ideal and Nonparty Preclusion, 67 N.Y.U. L. Rev. 193, 201-02 (1992) [hereinafter Bone, Rethinking the "Day in Court" Ideal] (distinguishing the two theories).

227 See, e.g., Yeazell, Collective Action, supra note 135, at 48-51 (describing the history of the "individualistic" traditions of the common law and its "ideal of individualized justice").

participate.[228] Aggregate modes of adjudication by definition make elastic the concept of participation; not everyone can personally partake, and some have urged rejection of aggregation precisely on those grounds. Judges struggled through this problem by settling on the concepts of notice and representation: that when interests of one party had sufficient similarity to interests of another, participation by the one, with notice to the other, sufficed.[229]

Generally left out of the judicial conception of due process is the role of lawyers in civil adjudication. Indeed, while Justice Brennan noted that "'[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel,"[230] the due process clause has not been defined to require the provision of counsel in most civil contexts.[231] Unlike litigants who describe their own experiences of law as mediated by lawyers, or empiricists who study lawyers' effects on litigants' attitudes, judges articulate a vision of civil process independent of lawyers.

Judicial theorizing of process values comes in two major doctrinal contexts—the due process cases (in which litigants are pitted against the state) and the preclusion cases (in which public or private litigants oppose each other, and the question of relationships among present and absent litigants is at stake). This extensive judicial discussion of the values of process stands in contrast to what judges say and do when asked to award lawyers' fees. Attorney-fee cases provide few odes to the value of procedural fairness. Rather, in the fee context,

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228 As Robert Bone explains, "the conventional understanding of the day in court" that assumed "all individuals have a right to participate personally in all kinds of cases" is overstated and in some instances erroneous and should not be equated with "freedom to make one's own strategic litigation choices." Bone, Rethinking the "Day in Court" Ideal, supra note 226, at 204, 206; see also Owen M. Fiss, The Allure of Individualism, 78 Iowa L. Rev. 965, 965-66 (1993) [hereinafter Fiss, Allure of Individualism] (criticizing an overly attentive focus on individualism as having the potential to undermine structural reform litigation).

229 See Hansberry v. Lee, 311 U.S. 32, 41-42 (1940). One of the intriguing findings of recent empirical work on class actions is that despite Rule 23(e)'s mandatory requirement of notice prior to court approval of settlements or dismissals in class actions, in about one-quarter of the cases studied in which settlements were brought to the attention of the courts, no notice was sent to class members. Willging et al., Empirical Analysis of Rule 23, supra note 2, at 125, 132 (also finding that notices "rarely" included estimates of the size of the proposed class or of the net settlement amounts, or information about fund administration).

230 Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

231 Only when termination of parental rights is at issue has the Court concluded that due process may require the appointment of counsel. Lassiter v. North Carolina Dep't of Social Servs., 452 U.S. 18, 27-28 (1981) (describing the "presumption" against requiring counsel as a constitutional matter in civil cases and mandating a case-by-case analysis of the individual interests at stake, the governmental interests, and the risk of error).

judges generally equate the instrumental utility of process only with its outcomes in terms of either monetary relief or legal rule.

Given the paradigms in which fee petitions arise,[232] the differing approaches in the two sets of cases may stem from the context in which the questions have been asked thus far. If Congress is read to have justified one-way fee-shifting to create incentives for private attorneys general to deter wrongful behavior, results alone may be the appropriate implementing measure of Congress's mandate. Further, when judges assign fee payments to co-plaintiffs, the assumption is that anonymous litigants all receive similar monetary benefits. Some form of public/private distinctions may also be at work. Due process cases and civil rights litigation may be conceived to have public benefits, whereas other forms of litigation are seen as only about "private ends" in turn equated with money.[233]

Alternatively, judges may be willing to talk more process than they will require be supplied by fees paid either by defendants or by a group of plaintiffs who do not have contracts with the lawyers seeking fees. That interpretation is supported by another aspect of due process doctrine, which is its application. The enthusiasm for process values associated with the 1970 Supreme Court decision in *Goldberg v. Kelly*[234] was limited by its 1976 decision in *Mathews v. Eldridge*,[235] in which the Court relied on utilitarian balancing to determine the process due.[236] As Jerry Mashaw has explained, under that decision the basic measure of the value of process is its ability to enhance accuracy.[237] No value is placed on the capacity of process to dignify participants or to advance equality. Thus, some symmetry exists between fee law and due process law: whether obliging fee payments or mandating agencies to provide procedure, judges assess only outcomes.

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232 See supra Part III.B.4.

233 See supra notes 174-207 and accompanying text.

234 397 U.S. 254, 262-63 (1970) (holding that the due process clause required that welfare recipients be afforded the opportunity for an oral hearing prior to the termination of benefits).

235 424 U.S. 319, 340 (1976) (holding that due process did not require an oral hearing prior to the termination of disability benefits).

236 The method required is that a court assess the "private and governmental interests at stake," id. at 340, and whether the additional procedures requested will result in more accurate outcomes than result from current procedures. Id. at 335. In many of the cases in which this test is applied, the records contain very little by way of empirical information upon which judges can make such assessments.

237 Jerry L. Mashaw, The Supreme Court's Due Process Calculus For Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28, 43 (1976) [hereinafter Mashaw, The Supreme Court's Due Process Calculus].

Other process theorists have elaborated upon the judicial discussions of due process and propose values other than results. This is neither the place to detail them nor to elucidate their differences but rather to provide a sense of the themes. Legal theorist Frank Michelman has equated access to litigation with the right to vote; for him litigation is a basic political process in the United States, enabling individuals to understand themselves as efficacious.[238] Process's purposes are "*revelation* and *participation*," in which an individual learns of the reasons behind governmental action and has an opportunity to contribute to that decision.[239]

Jerry Mashaw has linked process to dignitary interests; relying on natural law traditions, he sees procedural due process as a means by which the state respects the autonomy of individuals as "dignified or self-respecting moral and political agents."[240] Others, such as Deborah Rhode and Owen Fiss, have tied court-based participatory norms to Burkean theories of governance,[241] that the legitimacy of courts rests on their dialogic capacities to articulate public norms and values and that their ability in turn to articulate such norms stems in part from the processes on which courts depend.[242] While not focused on courts in particular, Cass Sunstein's insistence on the "expressive

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238 Frank I. Michelman, The Supreme Court and Litigation Access Fees: The Right To Protect One's Rights (pt. 2), 1974 Duke L.J. 527, 534-40; see also Yeazell, Collective Action, supra note 135, at 44 ("[C]ollective litigation is a form of collective action.").

239 See Frank I. Michelman, Formal and Associational Aims in Procedural Due Process, in Due Process, supra note 219, at 126, 127-28. Compare the procedural empirical findings that litigants perceive they have little control over the legal process. See E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System, 24 Law & Soc'y Rev. 953, 967, 968 tbl. 2 (1990) [hereinafter Lind et al., Tort Litigants' Evaluations of Their Experiences]. Sarat and Felstiner also found that, in divorce litigation, lawyers counseled clients not to have expectations of control or of nonarbitrary decisionmaking. See Sarat & Felstiner, Lawyers and Legal Consciousness, supra note 54, at 1674.

240 Jerry L. Mashaw, Due Process in the Administrative State 160-71 (1985). Finding Justice Frankfurter's resort to "fundamental fairness" insufficient ("I, for one, would like to have something more to say," id. at 182), Mashaw turns to political theory (Locke, Bentham, Kant, and Rawls) to develop a theory located within liberal political traditions. Id. at 183-99. In that book as well as in an earlier essay, Mashaw distinguished the dignitary and equality values from particular modes of process. See Mashaw, The Supreme Court's Due Process Calculus, supra note 237, at 46. For elaboration of the history of due process, see Charles A. Miller, The Forest of Due Process of Law: The American Constitutional Tradition, in Due Process, supra note 219, at 3. While Robert Bone agrees that autonomy is a central aspect of process-oriented theories, he believes such theories to be flawed. See Bone, Rethinking the "Day in Court" Ideal, supra note 226, at 269-70, 279-85.

241 Rhode, Class Conflicts, supra note 26, at 1200-01.

242 See, e.g., Fiss, Social and Political Foundations of Adjudication, supra note 213, at 125; Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 2 (1979).

function of law"[243] makes a related point: that "simple consequentialism is not a feasible project for law" because law has social effects that sometimes engender evaluative attitudes.[244]

Philosopher Thomas Scanlon argues that due process is linked to a "single intuitive idea—the unacceptability of arbitrary power—which constitutes its moral foundation."[245] Because "the basis of due process requirements lies in a condition on the legitimacy of power-conferring institutions," deprivations by the state are not the only instances in which due process is relevant; misuse of power is a problem in settings when the state is not a party.[246] Moreover, because moral intuitions are at work, tests such as "shock[ing] the conscience" aptly capture moments when, given the value placed upon nonintervention, justifications are insufficient.[247] Political scientist David Resnick also focuses on the "moral costs of practices" to argue that "morally abhorrent" mechanisms as well as morally abhorrent outcomes are curtailed by due process requirements.[248] A symbolic role for courts is argued by Australian theorist John Frow, who asks that we understand trials as societal enactments bridging generations and mediating obligations of the living to the dead, some wrongfully killed.[249]

Pierre Bourdieu is one of a few theorists of juridical processes who plainly articulates the role of lawyers. Bourdieu's discussion is related to sociolegal literature on dispute resolution; he describes one of the mechanisms by which individuals "name, blame, and claim" (to borrow William Felstiner, Richard Abel, and Austin Sarat's phrase[250]), identifying that they understand themselves as injured, assign blame to others, and seek social redress.[251] Bourdieu argues that the "feeling of injustice" is not equally shared but "depends closely upon the position one occupies in the social space. The conversion of an unperceived harm into one that is perceived, named, and specifically attributed presupposes a labor of construction of social reality

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243 Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779, 780 (1994).

244 Id. at 821.

245 T.M. Scanlon, Due Process, in Due Process, supra note 219, at 93, 121.

246 Id. at 106.

247 See id. at 120.

248 David Resnick, Due Process and Procedural Justice, in Due Process, supra note 219, at 206, 218-220.

249 John Frow, Response to Steven Mailloux's Paper, Measuring Justice in Legal and Literary Theory (forthcoming) (manuscript at 4, on file with authors) ("[L]aw continues to serve a religious function.").

250 William L.F. Felstiner, Richard L. Abel & Austin Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ., 15 Law & Soc'y Rev. 631 (1980).

251 Bourdieu, The Force of Law, supra note 225, at 833.

which falls largely to professionals."[252] Legal professionals thus have the power of "*revealing* rights" or negating those subjective intuitions. Professionals in turn are guided by financial interests and their ethical and political understandings; by closing off the "field" to nonprofessionals, they have the social power ("symbolic capital" is Bourdieu's term[253]) to monopolize entry to the understanding of legal entitlements.[254]

2. *Plaintiffs and Empiricism*

Frankfurter's link of process to popular acceptance of authoritarian decisions and theorists' aspirations for process to constitute socially meaningful events are borne out by empirical research on litigants: a good many people within the United States have some form of what Sally Engle Merry describes as "legal consciousness."[255] As one study of litigants put it, the "most frequently cited objective of lay litigants [both plaintiffs and defendants] in adjudicatory proceedings was to 'tell my side of the story . . . .'"[256] What law has summa-

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252 Id. Deborah Hensler disagrees; in her view, attribution of fault occurs at the individual social level without necessarily involving recourse to professionals, although lawyers and other professionals may facilitate such attributions. For discussion of this process in the context of injury, see Deborah R. Hensler, M. Susan Marquis, Allan F. Abrahamse, Sandra H. Berry, Patricia A. Ebener, Elizabeth G. Lewis, E. Allan Lind, Robert J. MacCoun, Willard G. Manning, Jeannette A. Rogowski & Mary E. Vaiana, Costs and Compensation for Accidental Injuries in the United States 142-72 (RAND No. R-3999-HHS/ICJ 1991).

253 For discussion of Bourdieu's use of this term, see Richard Terdiman, Introduction to Bourdieu, The Force of Law, supra note 225, at 812 (describing "symbolic capital" to mean the "authority, knowledge, prestige, or other forms of symbolic wealth that are readily converted into traditional wealth").

254 Bourdieu, The Force of Law, supra note 225, at 834-37.

255 Sally Engle Merry, Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans 5-6 (1990) (concluding in a study of neighborhood and family disputes that people's "normal way of doing things" includes legal consciousness, defined as going to court and talking about rights and entitlements); see also Sylvia A. Law, Some Reflections on *Goldberg v. Kelly* at Twenty Years, 56 Brook. L. Rev. 805, 816 (1990) (describing her experiences in litigating due process cases for welfare recipients and stating that her clients "liked 'rights.' . . . It was no accident that American poor people formed 'The National Welfare Rights Organization' (NWRO) rather than, as in England, a 'Claimants Union.'").

256 Hensler, Myths and Realities, supra note 1, at 99; see also Robert J. MacCoun, E. Allan Lind, Deborah R. Hensler, David L. Bryant & Patricia A. Ebener, Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program 2-3, 62, 63 tbl. 4.10 (RAND No. R-3676-ICJ 1988). And the corollary—that judges should hear and pay attention—has long had a place in legal consciousness. In some Renaissance Italian communal buildings, images of the Virgin Mary in paintings of the Last Judgment were accompanied by the inscription "Odi l'Altra parte" ("Hear the other side"). Dennis E. Curtis & Judith Resnik, Images of Justice, 96 Yale L.J. 1727, 1745 n.57 (1987). A similar Latin inscription "Audite et Alteram Partem" ("Hear also the other side") appears above the entry door of the Town Hall, built 1448-59, of Gouda, Holland. Id.

rized under the "due process" rubric, social scientists capture as a bundle of interests, needs, or wants described in a variety of ways—vindication, attention, accountability, information, accuracy, comfort, respect, recognition, dignity, efficacy, empowerment, justice—and link these to what happens in courts. Research on litigants, particularly in the context of tort law, reveals a group of individuals who seek something in addition to money.[257] Some of these claims come from individual accounts and some from aggregated responses to social science surveys.

a. Case Studies of Tort Plaintiffs. A host of recent writing as well as a few films offer descriptive interpretations of tort plaintiffs, some of whom were members of a group.[258] In her book,[259] Sandra Gilbert, better known as a feminist literary theorist than a tort plaintiff,[260] describes her pain and bewilderment at the sudden and unexpected death of her husband during an operation. Gilbert details her subsequent quest for information and understanding about the causes

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257 In our (Judith Resnik's and Dennis Curtis's) own experience as prison lawyers, prisoners also are not only focused upon formal remedies. They seek recognition by society as rights-holders and as having a modicum of authority—demonstrated by the power to be heard in court, to listen to a prison official be cross-examined, to hear that the state has been made to respond to their claims of wrongdoing. See also Tom R. Tyler, Jonathan Casper & Bonnie Fisher, Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedure, 33 Am. J. Pol. Sci. 629, 640-41 (1989) (reporting data from interviews with 329 criminal defendants and concluding that perceptions of procedural fairness affected attitudes towards judicial authority and government more so than did outcomes and favorable sentences).

258 Because our focus is on fee payments to lawyers for plaintiffs, we do not here review the relatively sparse literature on defendants' experiences of the tort system. One study of malpractice does detail the experience of defendant doctors and found that "the direct financial burden of malpractice litigation paled by comparison with the psychological burden that our personal interviews of physicians disclosed. Doctors consistently expressed great distress, even anguish, over having their professional performance and competence attacked—perhaps even publicly stigmatized in open court—in a claim brought by a patient whom the doctor had been trying to care for." Weiler et al., supra note 43, at 126.

Other criticism of the system is plentiful but couched less in terms of personal experiences and studies of litigants and more in terms of critiques of doctrine, rules, and jury decisionmaking that result in wrongly faulting defendants for injuries they have not caused. See, e.g., Peter Huber, Galileo's Revenge: Junk Science in the Courtroom 118 (1991); Jethro Lieberman, The Litigious Society 33 (1981); Warren K. Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991); see also Phantom Risk: Scientific Inference and the Law 28-31 (Kenneth R. Foster, David E. Bernstein & Peter W. Huber eds., 1993).

259 Sandra M. Gilbert, Wrongful Death: A Medical Tragedy (1995) [hereinafter Gilbert, Wrongful Death], excerpted in L.A. Times, Jan. 29, 1995 (Magazine), at 17.

260 See, e.g., Sandra Gilbert & Susan Gubar, The Madwoman in the Attic: The Woman Writer and the Nineteenth Century Literary Imagination (1979); Sandra Gilbert & Susan Gubar, No Man's Land: The Place of the Woman Writer in the Twentieth Century (1988).

of the death[261] and her dissatisfaction with her lawyers and the legal system through which she received a monetary recovery.[262] Her opening epigram comes from a 1983 California opinion: "In a wrongful death action, grief or sorrow of the heirs is not a proper element of damage."[263] Her book is a moving protest against a health-care system that she experienced as depersonalized and lacking in accountability, as well as against the way in which "her" lawyers provided services and law offered limited acknowledgement of her injuries.[264]

Karen M. Hicks's book, *Surviving the Dalkon Shield IUD*,[265] offers a related political perspective; as Gilbert brings her professional training in English literature to bear, Hicks's background in social science informs her work. The book is based on interviews with hundreds of "Dalkon Shield survivors" and field notes on her own experiences and analyzes the creation and work of the Dalkon Shield Information Network (DSIN), a political organization of which Hicks was the "principal founder."[266] Hicks sees the creation of this organization as a challenge to the legal system that in her view discounted women's injuries and made them invisible.[267] Her claim is that the interests of the pharmaceutical industry and of the legal system coin-

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261 Her husband bled to death after an operation; Gilbert claimed that physicians failed to perform tests to detect the problem. Gilbert, Wrongful Death, supra note 259, at 176-82, 205, 213-14.

262 Gilbert explains her intent to provide her "story as fully and frankly as" she could; the only fact to be withheld was the amount of the "relatively small sum" she and her children received, "a sum that the terms of a legal settlement forbid me to name." Id. at 12.

263 Id. (citing Canavin v. Pacific Southwest Airlines, 148 Cal. App. 3d 512 (1983)). She also offers a "memo on compensation," listing some of what her husband "has missed" since his death. Id. at 332-33.

264 See, for example, her description of the initial intake (a few months of screening, by which time if the case was rejected, the statute of limitations might run), id. at 153-57; the interview and meetings with attorneys, id. at 210-22 (His voice is "crisp and perfunctory."); the constant comparison by the lawyer of her case with others he had that were stronger; her struggle with interrogatories; her discomfort at the deposition and her lawyers' unresponsiveness to her experience of it, id. at 249-258; and the crudeness of the discussion when settlement is proposed and the absence of explanation, id. at 269-71, 273, 275, 315-16.

265 Hicks, supra note 56.

266 Id. at 2. On the role of organizations and social networks in mass tort litigation, see Hensler & Peterson, supra note 11, at 1023-24; Schuck, Agent Orange, supra note 53, at 26, 41, 219 (discussing Vietnam veterans organizations: Citizen Soldier; Vietnam Veterans of America; Agent Orange Victims International; Vietnam Veterans Unifying Group; Agent Orange Children's Fund); see also Amy J. Goldrich, Command Trust Network's Introduction to the Legal System: A Starter Kit To Help You Learn About the Law Just as You Learned About Medical Issues (4th ed. 1994) [hereinafter Goldrich, Command Trust Materials] (on file with authors) (materials from the Command Trust Network, a claimants' group co-founded by Sybil Niden Goldrich and Kathleen W. Anneken participating in the ongoing Silicone Gel Breast Implant Litigation).

267 Hicks, supra note 56, at 12 (describing how network members "thrust themselves into a legal process that neither asked for nor wanted their participation").

cide to suppress attention to the harms done to women.[268] According to her, the litigation represented not recovery of money but social justice.[269]

Hicks describes her naivete at expecting attention from the court; when she went to the chambers of the judge presiding over the Dalkon proceedings, she was informed he did not "meet with *litigants*."[270] Hicks perceives the "social movement" represented by DSIN as responsive to injustice and lack of corporate responsibility; she also details the discord within groups of survivors and the limited ability that DSIN had to contact claimants.[271] For her, the community of "survivors" she helped to build provided a means by which to name a wrong, empowering those otherwise fearful of authority. Her view of lawyers is mixed; some "demonstrated a primary interest in the issues of justice and basic fairness involved in this case, not a simple focus on compensation."[272] Others had only financial interests or were motivated by self-aggrandizement.[273]

Turning from accounts by injured parties to third-party descriptions, sociologist Kai Erikson has written a book[274] that parallels Gilbert's in terms of its emotive power. Erikson was employed by the law firm of Arnold & Porter during its representation of the victims of the Buffalo Creek Flood in the early 1970s. He offers an analysis of the individual and communal losses suffered when a torrent of water and sludge wiped away people, homes, and towns along a river hollow in West Virginia. Whereas Gilbert offers her own first-hand exper-

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268 Id. at 15-65, 118 (describing that DSIN created "an empowering dialogue with Dalkon Shield women" by cracking "the legalistic rhetoric"); see also Joan E. Steinman, Women, Medical Care, and Mass Tort Litigation, 68 Chi.-Kent L. Rev. 409, 410-14 (1993) (reflecting on the prevalence of injuries to women in large-scale tort litigation).

269 Hicks, supra note 56, at 118.

270 Id. at 57. Subsequently, when she tried to speak during the hearing on the plan, she was ejected by marshals from the courtroom. Id. at 70; see also Sobol, supra note 9, at 180 (also describing that, during the hearings on the proposed bankruptcy plan, the courtroom could not accommodate the number of women who wanted to appear and quoting Judge Merhige's view that "'there isn't any need for them to stay around'"). According to Sobol, Judge Merhige explained that "[e]vidence as to the value of any individual's claim is, in the Court's view, irrelevant to this issue [of determining the estimated value of outstanding Dalkon Shield claims] and a claimant will not be permitted to testify or offer evidence of an individual claim." Id. at 179; see also Ronald J. Bacigal, The Limits of Litigation: The Dalkon Shield Controversy 98-99 (Carolina Academic Press 1990).

271 Hicks, supra note 56, at 64-96, 124-32. The mailing list of claimants cost $82,877. Id. at 101.

272 Id. at 100; see also Bacigal, supra note 270, at 114 (quoting Dalkon claimants after the settlement and creation of a $2.475 billion fund: "We've had no recognition or admission about our injuries much less an apology. This has all been depersonalized into only a monetary issue.").

273 Hicks, supra note 56, at 101.

274 Kai T. Erikson, Everything in Its Path (1976).

iences, Erikson piles a myriad of quotes from flood victims before the reader and argues that the repetition is essential for those who are not victims to glimpse the experiences of loss.[275] In a film made about those events, victims spoke of their surprise and anger that the mining company was unresponsive to their injuries.[276] A second book about Buffalo Creek, authored by attorney Gerald Stern, who while at Arnold & Porter represented some claimants, describes their need to have the company "admit responsibility."[277]

In a subsequent series of essays, Erikson reports that what he learned from Buffalo Creek pressed him to understand more about what he calls a "new species of trouble."[278] Erikson asks why, given that about fifty thousand people are killed by car accidents, driving does not prompt individuals to report dread comparable to that described by those exposed to pollution and other forms of toxics. After exploring a range of injuries, from toxic pollutants in river streams to gas leaks, nuclear radiation accidents, and homelessness, Erikson claims that these injuries violate the narrative plot line accompanying ordinary injuries because these "troubles" have no clear beginning or end but rather place individuals in ongoing uncertainty. These injuries stem not from nature but from technology and do harm both to individuals and to the social fabric of communities. From such "new troubles" come feelings of outrage and dislocation, rather than resignation or acceptance.[279]

Peter Schuck's analysis of the Agent Orange litigation offers additional images of tort plaintiffs.[280] The Vietnam Veterans asserted harms not only from dioxin but also from a lack of recognition of injury by a society that had not welcomed them back as heroes. Schuck writes of veterans' views that the Veterans Administration was inaccessible, insensitive, and unresponsive to their needs. Part of what veterans sought was admissions of guilt and acceptance of responsibil-

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275 Id. at 183 ("A few paragraphs of description can scarcely begin to convey what the tragedy must have felt like."); id. at 156 ("The words we will be reading were uttered by solo voices, each of them expressing a private grief in a private way; but they are drawn from a vast chorus of similar voices, and together they tell of experiences common to a whole community.").

276 The Buffalo Creek Flood: An Act of Man (Appalshop Film & Video 1975).

277 Gerald Stern, The Buffalo Creek Disaster at x, 18 (1976). Nancy Morawetz also reports that those suffering from a very different kind of injury—Cuisinart consumers—also sought punishment for the company, alleged to have violated antitrust laws, rather than only monetary compensation. Morawetz, Bargaining, supra note 26, at 15.

278 Kai Erikson, A New Species of Trouble: Explorations in Disaster, Trauma, and Community (1994).

279 Id. at 142-51.

280 See generally Schuck, Agent Orange, supra note 53.

ity.[281] In a film made by a trust fund created from the proceeds of the settlement of that lawsuit, the message was that injuries were not experienced solely by veterans but were shared by families of veterans, all in need of community services, support, and understanding.[282] After presiding over hearings held in five cities across the country about the settlement of the case, Judge Jack Weinstein described his work as listening to veterans and permitting "individual contact."[283] He wrote that individuals wanted participation and exchange: someone to call on the phone, someone to hear their "heartfelt cries for justice," and someone to respond to their "distress."[284] After settlement, more than a "half million telephone calls" were logged by the claims facility established.[285]

Other examples come not directly from litigants but filtered through the press. In what was described as "a unique separate agreement," women who won an employment discrimination case against State Farm Insurance Company agreed to pay part of their damages to the "37 other plaintiffs who decided not to settle and lost their cases in court."[286] As one litigant explained: "'It had been their experiences, their witnesses, their time, their effort and trauma . . . that put pressure on State Farm.'"[287]

By virtue of personal accounts by participants and through in-depth social histories by academics, one learns of groups of people

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281 Id. at 174-76; see also In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 768, 768-70 (E.D.N.Y. 1984) (discussing objections by class members to the settlement because it contained "no admission of guilt, no assignment of blame" and because of government failure to participate and admit its role).

282 Vietnam Veterans, Their Families, Their Legacy (Farragut North Prods. 1994).

283 *Agent Orange,* 597 F. Supp. at 764-75 ("More than a thousand class members have expressed their views . . . . The quotations [here] do not begin to reflect the moving sights and sounds of the hearings . . . ."). Judge Weinstein heard some 600 people at the hearings. Weinstein, Ethical Dilemmas, supra note 134, at 543.

284 Weinstein, Ethical Dilemmas, supra note 134, at 543; see also *Agent Orange,* 597 F. Supp. at 770 (reporting on Veterans' objections that "a trial—win or lose—is preferable to a settlement"); Weinstein, Individual Justice, supra note 21, at 95. In the Agent Orange distribution plan, these views were reflected in that $60 million in funds were used to provide services; one-half was paid to veteran-related groups. Schuck, Agent Orange, supra note 53, at 219. As Schuck put it, by the settlement, Weinstein "established . . . a large new federal benefit program for Vietnam veterans." Id. at 223; see Vietnam Veterans, Their Families, Their Legacy, supra note 282.

285 Weinstein, Ethical Dilemmas, supra note 134, at 543; see also Weinstein, Individual Justice, supra note 21, at 94.

286 Hager, supra note 46, at A1. As of that writing, successful plaintiffs and their attorneys had contributed more than $320,000. Id.

287 Id. (quoting Gloria Bernell Scott, who had pledged $5000 to "begin an 'appreciation fund'"). The 814 women in the settlement were to receive "an average of $193,000," and none would receive "less than $150,000" (minus fees and expenses). The report does not clarify how much the losing plaintiffs would receive, as compared to the winning plaintiffs, nor whether those losing plaintiffs would be charged attorneys' fees. Id. at A8.

trying to cope with experiences of disaster, a part of which entailed their functioning as litigants in court. In many accounts, individuals describe a sense of entitlement to redress[288] and an expectation that courts and law (if not defendants) would be responsive to that right.[289] Lawyers play a prominent role in the writings of plaintiffs. Sandra Gilbert makes plain that her conversations with her lawyers and the opposing counsel constitute a good deal of her experience of the law. As Karen Hicks puts it, "trial lawyers mediate the legal system for victims."[290]

Of course, all of these descriptions are partial—both in the sense of being one-sided and in the sense of being animated by deeply held personal views about the legitimacy of the status of rights-seeking and about the nature of the harms experienced. Moreover, post hoc explanations by plaintiffs of their reasons for pursuing remedies may be influenced by a desire to downplay certain motives and highlight others perceived to be more socially desirable or noble.

Further, detailing tort plaintiffs' needs is not necessarily to suggest that courts could or should be responsive to those needs, be they processed individually or in the aggregate. The kinds of injuries that Erikson sketches have a totality for which it is hard to imagine adequate response—from courts or from other institutions. Even when the injuries are understood to be less invasive, court-based procedures

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288 Perhaps reflective of such popular concerns about the experience of injustice, President Clinton issued an "apology" to those subjected to radiation by the United States in experiments conducted from the 1940s to the 1970s. Remarks by the President in Acceptance of Human Radiation Final Report, 1995 WL 579664, at *2 (White House) (Oct. 3, 1995) (stating that government has a duty to admit to wrongdoing against citizens). The President's apology resulted from recommendations made by a committee formed for the purpose of investigating secret Cold War era government experiments on incompletely informed or unwitting human subjects. The Advisory Committee on Human Radiation Experiments found a small number of experiments in which the government violated medical ethics and harmed individuals. The Committee suggested further factfinding be done regarding other incidents. In those studies identified to have harmed individuals, the Committee recommended a government apology to victims and their families; in one instance, the recommendation of an apology was predicated on the basis of the dignitary harm suffered from the government's failure to obtain consent from subjects. Advisory Comm. on Human Radiation Experiments, Final Report 801-07 (Oct. 1995) (Recommendations 1-3).

289 See Merry, supra note 255, at 2-4. Note that, unlike Coffee's assumption that in mass torts, victims "seldom have much in common besides their injury," Coffee, Entrepreneurial Litigation, supra note 24, at 887, these accounts suggest some degrees of commonality: in Agent Orange, a shared experience of being veterans in an unpopular war; in Dalkon Shield, a shared experience of real or threatened impairment and/or potential loss of fertility. Further, while Coffee identifies the possibility of juries' interests in "levying retribution," id. at 917, he does not explore whether plaintiffs might share that goal.

290 Hicks, supra note 56, at 100; see also Weinstein, Individual Justice, supra note 21, at 12 (discussing lawyers' failures to communicate with clients, and clients' communications of distress to courts). Social theorists agree. See Bourdieu, The Force of Law, supra note 225, at 833-34; Sarat & Felstiner, Lawyers and Legal Consciousness, supra note 54, at 1664.

may well be seen as but one of many modes of redress. And to the extent litigation is one of those modes, it could be conceived to be a process designed to maximize individuals' desires or could also be viewed as a process in which litigants' preferences (while interesting) do not have prescriptive power.[291]

Our point here is first to mark the possibility that courts, lawyers, or others within the litigation context could attend to the expression of some of these needs and, second, to compare these discussions—about people who present themselves as needy because they suffered injuries (whether compensable or not)—with descriptions of litigants who have no knowledge and experience of an injury. Tort cases include many litigants who report injury prior to group litigation.[292] In contrast, a consumer class action is a case in which the existence of injury, such as an overcharge, may not be known. To consider how legal rules might take such distinctions into account, we turn from a focus on studies of particular injuries to discussion of what empirical social scientists have found in systematic studies of civil litigants. These quantitative data provide insight into the views of both plaintiffs and defendants in individual cases. To date we do not have empirical research on litigants' experiences in aggregate litigation.[293]

b. Experiments and Surveys. Empirical studies of litigants come in two forms. One genre is "experimental" and involves neither real litigants nor courts. Rather, psychologists set up mock events,

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[291] Different disciplines consider individual vantage points and use varying terms to capture beliefs reported by or attributed to individuals. Much public policy research, including demographic and economic studies and much of the marketing research in the private sector, relies on reports from individuals about themselves, their experiences, attitudes, and beliefs. See Deborah R. Hensler, Studying Gender Bias in the Courts: Stories and Statistics, 45 Stan. L. Rev. 2187 (1993) (detailing the interaction between quantitative and qualitative reports).

The economic literature explores what it terms "preferences," assumed to have utility-maximizing capacities; the difficulties of identifying and measuring preferences, let alone of making interpersonal comparisons, are also a subject of much discussion. See Sunstein, supra note 243, at 793-812.

[292] A Florida bar rule, recently upheld by the United States Supreme Court, is another example of the assumption that tort victims know of their injury before contacting lawyers. See Florida Bar v. Went for It, Inc., 115 S. Ct. 2371 (1995), upholding, over First Amendment objections, Florida Bar's prohibition on mail solicitations by attorneys of the families of tort victims; the bar's view was that such mailings, intrusive on families coping with painful losses, reflected poorly on lawyers. Id. at 2380. The four dissenting justices argued that the measure was designed to protect lawyers' reputations rather than litigants' interests, and that unsophisticated victims would be particularly disserved. Id. at 2384-85 (Kennedy, J., dissenting).

[293] Insofar as we are aware, and despite Judge Weinstein's recommendation, Weinstein, Ethical Dilemmas, supra note 134, at 472, no such research has yet explained whether and how the existence of the aggregate litigation affects litigants' perceptions.

enlist mostly students, present them with hypothetical problems, and then observe their responses. The strength of the experimental method is that it allows researchers to vary systematically the characteristics of a situation (here, procedures for dispute resolution) and to analyze if and how individual behavior is affected; weaknesses of this approach stem from its very artificiality and the degree to which the simulation mimics real-world attributes of the procedures studied.

Beginning in the 1970s, John Thibaut and Laurens Walker initiated a series of such experiments,[294] spawning the procedural justice literature that subsequently moved those efforts from modeling to the "real" world.[295] Thibaut and Walker focused their inquiry on what "procedures are most likely to contain features that are responsive to the particular concerns and values of disputants in various social settings."[296] Attempting to isolate aspects of adversarial and inquisitorial systems,[297] Thibaut and Walker identified discrete elements of procedure (such as the degree to which a third party or the disputants had "control") and attributes of disputants (such as the degree of contentiousness), tested various scenarios on participants, and concluded both that participants distinguished between outcome and process and that different forms of process yielded varying levels of participant satisfaction and perceptions of fairness.

Researchers, such as those at RAND's Institute for Civil Justice, have subsequently sought to understand what actual litigants—both plaintiffs and defendants—want in litigation and their perceptions of it. As noted at the outset, in a study of court-annexed arbitration, the most "frequently cited objective of lay litigants [both plaintiffs and defendants] in adjudicatory proceedings was to 'tell my side of the story.'"[298] In decreasing order, one-half of the plaintiffs wanted to

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294 John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis 10-13, 18-19, 30-32, 42-44, 55-57, 68-72, 85-87, 99-100 (1975).

295 See, e.g., E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988).

296 Thibaut & Walker, supra note 294, at 3.

297 How successful they were is a subject of debate. See, e.g, Mirjan Damaska, Presentation of Evidence and Factfinding Precision, 123 U. Pa. L. Rev. 1083, 1095-1100 (1975) (questioning whether some of the experiments of Thibaut and Walker actually simulated distinctions between adversarial and inquisitorial systems).

298 Hensler, Myths and Realities, supra note 1, at 99 (sixty-two percent of plaintiffs and 63% of defendants answered thus (citing data from MacCoun et. al, supra note 256)). Between one-third and one-quarter also wanted to "prove [the] other side [was] not telling [the] truth." Id.; see also E. Allan Lind, Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court 44-53 (RAND No. R-3809-ICJ 1990) (considering litigants' views of arbitration and noting that whether individual or business entity, whether one time or repeat player, fairness ratings of process were comparable; that litigants' favorable reactions to arbitration hearings appear to be related to the "greater opportunity for some form of adjudication" than cases resolved with less process;

"collect" what they "deserve[d]," and thirty percent wanted "a neutral opinion on what [the] case [was] worth."[299] About one-quarter of the plaintiffs and almost one-half of the defendants wanted to "put an end to the dispute."[300]

As Deborah Hensler has summarized another study of tort litigants, "objective case outcomes, costs of litigation and time to disposition contribute less to plaintiffs' satisfaction with the litigation process than perceived fairness of the process."[301] That study compared litigants who had their cases decided by trial, arbitration, bilateral negotiation between lawyers, or by court-supervised (litigant absent) settlement conferences. Litigants whose cases were decided by trial or arbitration found those experiences more fair, dignified, and careful than did those whose cases ended by negotiations with or without a judge.[302] In short, these empirical studies conclude that, for litigants in individual cases, process matters; both plaintiffs and defendants describe themselves as caring about it, independent and distinct from the outcome.

B. Effectuating Outcomes

An alternative focus—closer in many respects to the doctrine on attorneys' fees and to some aspects of due process law analyzed above—conceives of courts as one means by which to obtain compliance with legal norms. Echoing (or generating) the utilitarian approach found in Justice Powell's *Mathews v. Eldridge* calculus,[303] much of this literature considers the role of litigation in terms of the costs, accuracy, and utility of outcomes; economic models are the touchstone. The constant concern is that either the direct costs of litigation or the social costs (which include erroneous decisions in all directions, uncertainty, and investment of public funds to administer the system) outweigh the benefits gained.[304] Assuming investment suffi-

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also noting that corporate litigants valued formality of process more than did individual litigants).

299 Hensler, Myths and Realities, supra note 1, at 99.

300 Id. at 99 tbl. 6 (describing "litigants' objectives in arbitration").

301 Hensler, The Real World, supra note 40, at 4 (discussing Lind et al., Tort Litigants' Evaluations of Their Experiences, supra note 239); cf. Rosenberg, Causal Connection, supra note 41, at 913 (assuming litigants would trade loss of "personal choice" for a "substantial increase in compensation").

302 Lind et al., Tort Litigants' Evaluations of Their Experiences, supra note 239, at 967-68.

303 424 U.S. 319, 326-32 (1976).

304 Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973), provides the classic analysis.

cient to result in court decisions, "two distinct products" result: "dispute resolution and rule making."[305]

Theories of litigation have developed not only for the individual case but for group litigation as well. In both individual and group situations, the presumptive purpose of litigation is some kind of "expected relief . . . either an amount of money or one of a series of injunctive decrees," and litigants are assumed to have "preferences" that some believe can be "imputed to them with some degree of confidence."[306] Commentators also consider how the existence of a group may affect the value of individual claims, potentially diminishing some claims and enhancing others.[307] Such theorists are acutely aware that, once a group is assembled, the largest stakeholders may be the lawyers who represent that aggregate.

In contrast to some legal and political theorists who aspire to a morality and politics of process independent of the lawyers who appear on behalf of litigants, economic theories of litigation—like the litigants who have themselves written about their experiences in law and the empiricists who have quantified those experiences—often put lawyers into the underlying analysis.[308] Moreover, economists are in the forefront of considering aggregate litigation, in which the prominence of lawyers' economic stakes gives rise to concern about lawyers' relationships to both courts and their clients.[309]

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305 Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. Econ. Literature 1067, 1070 (1989). In the context of shareholder derivative suits, Roberta Romano considers benefits beyond the settlement value of litigation to include monitoring and enhancing the alignment of director and shareholder incentives. See Romano, supra note 25, at 70-85 (concluding that such litigation is a "weak . . . instrument of corporate governance" and leaving to further study the issue of whether litigation's production of legal rules creates sufficient benefits to outweigh the costs). Another function of litigation noted in some of the economic literature is its informational value—that it provides a mechanism of informing people about risks of products. See, e.g., Paul H. Rubin, Tort Reform by Contract 19-28 (1993); Jennifer H. Arlen, Compensation Systems and Efficient Deterrence, 52 Md. L. Rev. 1093, 1120-26 (1993); see also Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate a Coasean Trade, 104 Yale L.J. 1027, 1038 (1995).

306 Lewis A. Kornhauser, Control of Conflict of Interest in Class-Action Suits, 41 Pub. Choice 145, 147 (1983) (discussing class action litigants).

307 See, e.g., Coffee, Entrepreneurial Litigation, supra note 24, at 907-15.

308 See, e.g., Cooter & Rubinfeld, supra note 305, at 1069 (for a "rationally self-interested person" to make decisions about pursuit of a claim, he or she needs to weigh "immediate costs (hiring a lawyer, filing the claim) against benefits expected in the future (the proceeds from settlement or victory at trial . . .)"). Cf. Gilson & Mnookin, Disputing Through Agents, supra note 79, at 510 (arguing that economic models of litigation ignore the role of agents). As noted above, a few political theorists focus on lawyers as well; for example, Bourdieu examines the role of legal professionals in the production of the power of law. See supra notes 250-54 and accompanying text.

309 Kornhauser, supra note 306; Romano, supra note 25.

Economic models generally conceive of the attorney-client relationship in terms of principal and agent in which the lawyer-agent is delegated to provide a set of "services" that require decisionmaking.[310] These agents in turn require "monitoring," "bonding" (in the sense of modes of ensuring loyalty[311] rather than in the psychological sense of developing a personal relationship), and incentives to ensure that the agent pursues the principal's charge faithfully.[312] Focusing on large-scale cases, economists posit that client-principals have difficulty monitoring their attorney-agents for a number of reasons. Because individual injuries may be small, the law complex and technical, and the lawyers distant and relatively invisible, the costs of client monitoring are prohibitively high.[313] Remote clients in turn undermine constraints that the normal means of bonding (rules of ethics, reputation[314]) provide to ensure lawyer fidelity. The incentives (as in financial investments or awards) of neither the principal nor the agent provide sufficient insurance of faithful discharge of tasks.[315]

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310 See Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 12-13 (reviewing the literature).

311 See, e.g., Principals and Agents: The Structure of Business 4 (John W. Pratt & Richard J. Zeckhauser eds., 1985) [hereinafter Principals and Agents] ("[B]usinesses, workers, consumers, and indeed all participants in society at large regularly struggle to deal with the intractable problems that arise in agency relationships. . . . Although we must expect waste, slothfulness, and even dishonesty to be with us always, the question is whether we can keep them to manageable proportions."); see also Kenneth S. Arrow, The Economics of Agency, in Principals and Agents, supra, at 37, 50 (noting noneconomic modes of monitoring, including ethics, education, and social systems, not captured in much of the modeling as of the mid-1980s); Steven Shavell, Risk Sharing and Incentives in the Principal and Agent Relationship, 10 Bell J. Econ. 55, 57 (1979) (considering the utility functions of the principal to be wealth and those of the agent to be both wealth and effort).

312 John W. Pratt & Richard J. Zeckhauser, Principals and Agents: An Overview, in Principals and Agents, supra note 311, at 1, 13-18.

313 Coffee, Entrepreneurial Litigation, supra note 24, at 884-85; see also Coffee, The Plaintiff's Attorney, supra note 71, at 679-80 (discussing small-stake plaintiffs). Some of the discussion also assumes "a large number of individuals . . . represented by a single individual," and a class in which individuals' only interests are in "maximizing the remedy personal to" themselves. Kornhauser, supra note 306, at 150, 171 (noting that his model is a "simple model of conflicts of interests").

314 Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 14-17.

315 See, e.g., Coffee, Rescuing the Private Attorney General, supra note 162, at 243 (discussing how incentives he terms perverse may prompt plaintiffs' lawyers to agree to nonpecuniary settlements and describing how adversaries may, in essence, collude); John C. Coffee, Jr., The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, Law & Contemp. Probs., Summer 1985, at 5 [hereinafter Coffee, The Unfaithful Champion] (conceptualizing plaintiffs' attorneys as "risk taking entrepreneurs" who cannot be constrained by clients); Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 22-27 (discussing the divergences between plaintiffs and their attorneys); see also Kornhauser, supra note 306, at 146 (describing class actions as one example of the "multiparty principal/agent relations" problem). In her empirical study of shareholder deriva-

While some commentators believe that increased judicial monitoring would be ameliorative[316] (the judge as surrogate client or as surrogate fiduciary?), others have advocated that the principal-agent problem could be avoided if the principal-agent were collapsed into a single actor.[317] The academic proposal is an auction aimed at transferring ownership of a case, either to the defendant(s) who would settle for a sum equal to its value or to others who would litigate when necessary. The theory is that such a transfer would best align the incentives of principals and agents, would rationalize the investment of transaction costs to achieve a particular outcome and would conserve judicial resources spent in attempting to monitor or alter incentives.[318] If successful, the result would be an efficient investment of resources for an outcome—the speedy transfer of funds to those who have suffered the harm[319]—which in turn would enable effective private enforcement of the law.[320]

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tive actions, Romano found that "awards are paid to attorneys far more frequently than to shareholders." Romano, supra note 25, at 61.

316 See, e.g., Weinstein, Individual Justice, supra note 21, at 63; Coffee, Rescuing the Private Attorney General, supra note 162, at 277-79, 286-87 (advocating judicial control over selection of plaintiffs' counsel but that plaintiffs' attorneys should then be permitted to distribute fees among their ad hoc law firm as they desire); Kane, supra note 26, at 390-93; Weinstein, Ethical Dilemmas, supra note 134, at 505-06. Not explored are the problems of the judicial agendas, some aspects of which—such as docket management—may well pose conflicts with plaintiffs' interests.

317 See Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 6, 106-16. Bidders include defendants. Jonathan R. Macey & Geoffrey P. Miller, A Market Approach to Tort Reform via Rule 23, 80 Cornell L. Rev. 909, 913 (1995) [hereinafter Macey & Miller, Tort Reform]. When the auction cannot transfer the entire claim, the alternative is a "sale of lead counsel rights." Id. at 914.

318 Macey & Miller, Auctioning Class Action and Derivative Suits, supra note 25; Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 108-10. In his essay The Unfaithful Champion, Coffee also explored but rejected the auction option based on his view that it did not respond sufficiently to the regulatory needs in such litigations. Coffee, The Unfaithful Champion, supra note 315, at 77-79; see also Thomas & Hansen, supra note 25, at 436-53 (considering complexity of judges as auctioneers and undesirability of permitting defendants to bid).

John Coffee has recently argued that in some class actions, a "reverse auction" occurs, by which the defendant negotiates prefiling with plaintiffs' lawyers who then file a settlement class action. See Coffee, Class Wars, supra note 48, at 1370.

319 See Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 108 (contemplating that nonlawyers—including defendant companies—might be bidders and that in such instances the money paid would be transferred directly to the corporation, in a derivative action, or distributed to shareholders); see also Thomas & Hansen, supra note 25, at 448-49.

320 See Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 110 ("Potential defendants could be expected to adjust their primary conduct accordingly in order to equilibrate their marginal costs of expected litigation losses with their marginal costs of complying with the law."). Cf. Elliot J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2105-09 (1995) (describing an empirical analysis of large inves-

Proponents of auctions such as Professors Jonathan Macey and Geoffrey Miller initially acknowledged the limits of their model, developed in the context of derivative and shareholder litigation. They noted that auctions might be inappropriate when "important individualized issues . . . would require extensive participation by class members."[321] Further, when discussing civil rights and other cases in which injunctive relief is sought, they state that an "auction approach may simply be infeasible in injunctive cases where ideology is a major factor."[322] In a subsequent article, however, they urged expansion to the mass tort arena.[323]

While economists bring lawyers into the picture, little of the economic theorizing of litigation focuses on process. Similarly missing in the analyses of principal and agent is the idea of a *relationship* between principal and agent: the existence of the principal-agent unit does not only entail the discharge of some task with its delegated decisionmaking but also the activity of having the relationship itself.[324] Some form of relatedness might be relevant to many principal-agent agreements.[325] But when the principal and agent are client and lawyer, the relationship also has a social and political valence, with the lawyer functioning as a conduit for the client to have relationships with courts, opponents, and co-claimants.[326] Further, the principal-

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tors' stakes in securities litigation and arguing for legal rules to permit such investors to take more central roles). A key distinction between mass tort and securities aggregates is that in many securities cases, at issue is the transfer of wealth—with attendant transaction costs—from one group of stakeholders to another, while in mass torts, the plaintiffs have no stake, ex ante, in the defendant corporation(s).

321 Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 106; see also Macey & Miller, Auctioning Class Action and Derivative Suits, supra note 25, at 461 (describing cases not eligible for auctions as those that include "important individualized issues not held in common by the class"). However, their auction proposal is framed for "large scale, small-claims cases," Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 4, that could include tort litigants. The initial essays on auctions do not address whether commercial litigants may be in search of vindication. Morawetz, Bargaining, supra note 26, at 15.

322 Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 116.

323 Macey & Miller, Tort Reform, supra note 317, at 915-17 (noting problems such as choice of law, plaintiff-witness cooperation, and the need for some pretrial discovery to establish value, but arguing that such difficulties are likely surmountable).

324 Gilson and Mnookin do address issues of relationships, but their focus is on the relationships between opposing counsel. Gilson & Mnookin, Disputing Through Agents, supra note 79, at 534-50. They argue that development of "credible reputations for cooperation"—developed in the context of opposing counsel—can alter the incentive structures of conflicts and "facilitate dispute resolution." Id. at 564.

325 In other words, one might not map all of the principal-agent relationship by assuming that an agent is either self-regarding or other-regarding; at points the two postures could intersect.

326 See, e.g., Gilbert, Wrongful Death, supra note 259 (recounting her experiences, infused with lawyer failures to respond to her personhood). Even those commentators who

agent relationship as discussed in the context of auctions in large-scale litigation misses the multiplicity of clients and lawyers in some aggregates, as well as what much of the literature on lawyering posits that lawyers do. It is to the role of lawyers in either enacting rights or effectuating outcomes that we turn next.

C. *The Role of Lawyers*

Those who theorize about the work of lawyers base their analyses on an amalgam of doctrine, legal ethics, individual narratives, and occasionally larger empirical projects to identify purposes for lawyers and what they accomplish. One aspect of this literature (termed by William Simon the "professional vision"[327]) assumes the lawyer depicted in the codes of conduct. This is the loyal advocate, the client-focused agent, working diligently within the constraints of law on behalf of and at the behest of a client,[328] to facilitate dispute resolution and consensual agreements. A related "ideal" is that which Anthony Kronman terms the "lawyer-statesman," who possesses the "virtue of practical wisdom" that affects not only individual lawyer-client relationships but also public policy.[329]

A lawyer's relationship with his or her client is the centerpiece of a good deal of the commentary. The assumption is that a lawyer's role requires a form of relationship with and responsibilities to clients that may be in conflict with ordinary ideas about how people interact. Charles Fried offers the model of the "legal friend," a role that can justify behavior that would be inappropriate (and even immoral) for

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distinguish among kinds of claims in classes, and who may recognize the potential for individual client control in mass tort aggregates, do not focus on this aspect of lawyering. For instance, Coffee distinguishes among "Type A class actions," in which an individual claim is marketable, that is, the stakes are sufficiently high as to attract an attorney and some "client control is possible"; "Type B class actions" in which claims have no independent market value; and "Type C class actions," in which a mix of such claims is present; he argues that Type C claims exemplify most mass torts—with substantial variance in the degree of injury. See Coffee, Entrepreneurial Litigation, supra note 24, at 904-07.

327 William H. Simon, Visions of Practice in Legal Thought, 36 Stan. L. Rev. 469, 469 (1984) [hereinafter Simon, Visions of Practice].

328 William Simon calls this a "libertarian approach," in which a lawyer has the authority to "pursue any goal of the client through any arguably legal course of action." William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1085 (1988) [hereinafter Simon, Ethical Discretion in Lawyering].

329 Kronman, supra note 137, at 51; see also Sol M. Linowitz with Martin Mayer, The Betrayed Profession: Lawyering at the End of the Twentieth Century 244-45 (1994) (similarly invoking the history of the legal profession as imbued with traditions of professional independence and public service, and calling for renewed commitment to "civic leadership" by lawyers).

an ordinary citizen or political coventurer.[330] Responding to the concern that the lawyer-client relationship is impersonal and "paternalistic," Richard Wasserstrom argues that the "relationship of inequality" is intrinsic in professionalism; one can attempt self-conscious efforts to diminish the demeaning treatment of clients that results.[331]

Objecting to a role morality that differs from common morality, David Luban proposes an ideal of the "morally activist lawyer [who] shares . . . with her clients responsibility for the ends she is promoting in her representation [but who] also cares more about the means used than the bare fact that they are legal."[332] Deborah Rhode argues that feminists are suspicious of the traditional hierarchy of lawyers over clients and that feminism can infuse the role with more collegial relations as well as reframe the structure of the workplaces of lawyers.[333] William Simon advocates the "discretionary lawyer" whose responsibilities include not only the client and the legal system but also third parties who could be hurt by singleminded advocacy; a discretionary lawyer's responsibility is to achieve justice in a given situation.[334] Gilson and Mnookin propose a generative role for lawyers to play in facilitating dispute resolution and in enhancing cooperative exchanges.[335]

Turning to the context of group litigation, commentators aware of the limits of lawyering nonetheless voice aspirational themes of lawyers attending to clients. Nancy Morawetz argues for an independent lawyer role in evaluating settlements to ensure distributional fairness.[336] Deborah Rhode calls for acknowledgment of both conflicts among clients within groups and obligations to facilitate client input and evaluation.[337] Lawrence Grosberg aspires to "client-centered norms"[338] in which an ethic of respect for the individual client animates efforts to mediate conflicts among them.[339] Despite such aspi-

330 Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060 passim (1976).

331 Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1, 16, 19, 23-24 (1975).

332 David Luban, Lawyers and Justice: An Ethical Study at xxii (1988).

333 Deborah L. Rhode, Gender and Professional Roles, 63 Fordham L. Rev. 39, 49-53, 57-72 (1994).

334 Simon, Ethical Discretion in Lawyering, supra note 328, at 1083-85; see also William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 30.

335 Gilson & Mnookin, Disputing Through Agents, supra note 79, at 510-13.

336 Morawetz, Bargaining, supra note 26, at 32.

337 See Rhode, Class Conflicts, supra note 26, at 1185.

338 Lawrence M. Grosberg, Class Actions and Client-Centered Decisionmaking, 40 Syracuse L. Rev. 709, 713 (1989).

339 See id. at 714-15. Grosberg justified this approach by resort to morality (the idea of integrity of the individual) as well as to efficiency (in that the client knows more than do

rations, the little empiricism that exists about lawyers for groups concludes that neither those lawyers characterized as social advocates nor those characterized as economically motivated describe themselves as organizing "class members to participate in the suit or to engage in other activities complementary to the suit."[340]

Another strand, emerging out of the critical legal studies tradition, offers a less determinate picture of the world and a less cheerful version of lawyering. The predicates are that the world is organized around relations of power, that neither clients' interests nor legal rules are determinate, and that lawyers and clients construct meaning and knowledge through interactions in which the lawyer is the dominant actor.[341] Rather than a lawyer giving voice to or "translating" for a client, telling stories and empowering, the lawyer is often seen as unable to hear a client's needs or to respond appropriately.[342]

Depicted sometimes poignantly as people speaking past each other,[343] sometimes oppressively as lawyers who silence and subordinate clients,[344] sometimes in shifting modes in which much but not all of the time lawyers' powers dominate,[345] the picture presented is that attorneys do not offer much connection and comfort to the individual clients with whom they work.[346] The professional posture of lawyers is seen as intrinsically more oppressive than empowering. Some of the criticism is about structures of power in which lawyers

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individual lawyers). Id. at 719-22. To that end, he proposed that lawyers in class actions be required, as a matter of ethical rules, to sample clients and to reach out to them. Id. at 778. Like the other theorists here, no discussion addresses the IRPAs within the group, and the model remains focused on one lawyer who has many clients.

340 Garth et al., supra note 40, at 381.

341 See Simon, Visions of Practice, supra note 327, at 469-72.

342 See Clark D. Cunningham, The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse, 77 Cornell L. Rev. 1298, 1300-01 (1992).

343 See, e.g., White, Notes On the Hearing, supra note 73.

344 Anthony V. Alfieri, Disabled Clients, Disabling Lawyers, 43 Hastings L.J. 769, 778-79, 811-28 (1992) [hereinafter Alfieri, Disabled Clients] (discussing the "victimization strategy of disability advocacy" which "reproduces images of . . . dependence, incompetence, and deviance" and "inhibits . . . narratives of . . . autonomy and community"); Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107, 2131 (1991) [hereinafter Alfieri, Reconstructive Poverty Law Practice] (arguing that poverty lawyers' reliance on their own "narratives to define the client's story . . . silence and displace client narratives"). White argues that, "[b]ecause advocacy is a practice of speaking for [the client] . . . the advocate . . . inevitably replays the drama of subordination." Lucie E. White, *Goldberg v. Kelly* on the Paradox of Lawyering for the Poor, 56 Brook. L. Rev. 861, 861 (1990) [hereinafter White, Lawyering for the Poor].

345 See William L.F. Felstiner & Austin Sarat, Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions, 77 Cornell L. Rev. 1447 (1992) [hereinafter Felstiner & Sarat, Enactments of Power] (arguing that an attorney's power is not a constant but varies with the context of law, the kind of client, and the relationships developed).

346 Sandra Gilbert's book is bleak testimony of this view. See supra notes 260-64.

collaborate,[347] while other commentary focuses on the impoverished vision lawyers bring to the practice.[348]

Not utterly depressed, many critical and progressive scholars include hope for lawyer reorientation toward an explanatory and participatory mode. Clark Cunningham argues for lawyers to see themselves literally as both translators and in need of translation, that they must learn from as well as provide bridges for clients.[349] William Felstiner and Austin Sarat underscore that clients retain power—of payment and of settlement or discord—and that mutual interdependencies of lawyers and clients create sufficiently complex relationships as to enable the shifting of power between participants.[350] Lucie White reminds us of "elusive moments of human connection as well as the endless currents of contest."[351] She hopes for a "practice of lawyering that would continually cede to 'clients' the power to speak for themselves."[352] Anthony Alfieri calls for "commitment to client narratives";[353] Gerald López argues for "rebellious idea of lawyering"[354] that rejects the model of lawyers (acting alone or with other lawyers) as the best problem solvers and that shifts the focus to the interactive dynamics of client, lawyer, and professional and lay allies, apprecia-

347 Anthony V. Alfieri, The Ethics of Violence: Necessity, Excess, and Opposition, 94 Colum. L. Rev. 1721 (1994) (reviewing Law's Violence (Austin Sarat & Thomas R. Kearns eds., 1992)).

348 In a recent essay, civil rights litigator Herbert Eastman criticized himself and his colleagues for failing to convey clients' injuries in an expressive form. Herbert A. Eastman, Speaking Truth to Power: The Language of Civil Rights Litigators, 104 Yale L.J. 763 (1995). He compared the richness of historical and journalistic accounts to lawyers' "sterile recitations of dates and events" that educated neither judges, far removed from worlds in which injuries occurred, nor the media and the larger community. Id. at 766-71. Eastman commented: "Perhaps we write like lawyers to avoid responding as people." Id. at 801.

349 See Cunningham, supra note 342, at 1357-82 ("[B]y being trapped in my assurance as a lawyer and professor that I knew the answers, I could not be a student, could not learn.").

350 Felstiner & Sarat, Enactments of Power, supra note 345, at 1497-98.

351 Lucie E. White, Seeking ". . . The Faces of Otherness . . .": A Response to Professors Sarat, Felstiner, and Cahn, 77 Cornell L. Rev. 1499, 1507 (1992); see also White, Lawyering for the Poor, supra note 344, at 887 (urging lawyers to listen, as "learners and as friends" to clients, when considering how to frame their work).

352 White, Lawyering for the Poor, supra note 344, at 863, 886 (urging lawyers for the poor to enact in their own attorney-client relationships the transfer of power to the poor).

353 Alfieri, Reconstructive Poverty Law Practice, supra note 344, at 2146; see also Alfieri, Disabled Clients, supra note 344, at 835-40 (exploring "structure-transforming practices").

354 Gerald P. López, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 1603, 1608 (1989) [hereinafter López, Reconceiving Civil Rights Practice]; see also López, Rebellious Lawyering, supra note 137, at 5-10.

tion for the partial knowledge of all, and increased collaboration to alter practices and enhance resources.[355]

Whether liberal, critical, or traditional, theorists of lawyers portray the work of lawyering as a *social* enterprise, with the potential for being interpersonally enriching. Lawyers are in conversation and joint ventures with clients, and sometimes are potential adversaries of their clients. From these perspectives, lawyers' goals include more than the economic benefits derived from employment by a principal,[356] so that focusing exclusively on problems of monitoring, bonding, and loyalty misses the interpersonal collaboration and exchange, as well as the political purposes, that lawyers and clients may share.

V
RESHAPING AGGREGATION

A. The Predicate Assumptions: Paying for More than Outcomes, Anxiety About Lawyers, and Attending to Individuals

Political theorists of litigation tend to ignore the mediating and sometimes debilitating roles that lawyers play in process; economic modeling assumes some set of cases without ideological content and hence proposes reforms to diminish transaction costs by minimizing litigant participation.[357] If judges and lawyers are rational actors, however, they have strong incentives to conceive of litigation as multipurposed, to believe that some fundamental form of governance is enacted by adjudicatory modes of dispute resolution, and therefore to be wary of principal-agent analogies that are not enriched with relationship, voice, expression, and human dignity.[358] If courts are about

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355 López, Reconceiving Civil Rights Practice, supra note 354, at 1608-09. William Simon criticizes these models, arguing that effective lawyering always entails lawyers' imposition of value judgments. See William H. Simon, The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era, 48 U. Miami L. Rev. 1099, 1102-03 (1994), in which Simon comments that such scholarship tends to "sentimentalize poor clients" and their communities, underestimating the complexity and conflict of collective action. Id. at 1114.

356 Indeed, Mary Ann Glendon's recent book, A Nation Under Lawyers 20-32 (1994) recalls the days (only decades ago) when discussing salaries was considered a topic to be avoided when applicants interviewed with large firm lawyers, who valued their independence and provided for their members and associates. Her plea to lawyers and legal educators is to regain some sense of law as engaged with reason and embedded in practice. Id. at 246-94.

357 See Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 117-18.

358 Here again, Bourdieu's discussion is apt; he wrote of how ritualized events support invisible power, legitimated by shared foundations of belief:

> The symbolic efficacy of words is exercised only in so far as the person subjected to it recognizes the person who exercises it as authorized to do so, or, what amounts to the same thing, only in so far as he fails to realize that, in

no more than norm enforcement by means of monetary transfers and coercive orders, their transaction costs and inefficiencies (as compared to other means of regulating or effecting monetary transfers) mark them as headed for either extinction or the periphery.

What courts offer—better than insurance companies and administrative regulation—are opportunities for public participation, for transformative exchanges about, as well as reaffirmation of, social and moral values. Note the baseline: we are not arguing that courts offer generous opportunities for participation,[359] only that courts offer more when contrasted with other modes of transferring funds and regulating behavior, and further, that courts attain legitimacy in part because they offer such participatory, expressive, ideological moments.

Moreover, even if judges and lawyers no longer have such aspirations for adjudicatory processes, the United States political system has imbued some segment of the population with expectations that courts are about more than outcomes; legal consciousness and rights-seeking abound. Given political and legal theories of process and litigants' goals and needs (as they express them and empiricists document them), some form of participation (be it representative or personal) and some kinds of ideology[360] are always present—from the vantage point of either the justice system or litigants. In short, we assume that litigation does more than produce outcomes.

We also assume that both economic and political structures create incentives for lawyers and clients to diverge, and that difficult monitoring problems inhere in large-scale litigation. Not only do we agree with legal economists that problems of lawyering are central, we believe also that, while the difficulties may manifest themselves somewhat differently in civil rights and tort aggregate litigation than in commercial litigation, the underlying concerns are the same. In all instances, because the agents' knowledge is far superior to that of the principals, the magnitude of the scale increases the problems of what Kenneth Arrow terms "hidden action."[361] Attorneys' incentives may vary when lawyers have large sums of money to gain, as contrasted with when lawyers are litigating structural injunctions for which they gain less directly in economic terms. Let us not, however, assume that

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submitting to it, he himself has contributed, through his recognition, to its establishment.

Bourdieu, Language and Symbolic Power, supra note 225, at 116.

359 See Gilbert, Wrongful Death, supra note 259, at 310-11; Hicks, supra note 56, at 96-100; Hensler, Myths and Realities, supra note 1, at 97-100; see also Robert G. Bone, Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity, 46 Vand. L. Rev. 561, 619-20 (1993).

360 See Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 116.

361 Arrow, supra note 311, at 38.

these are fundamentally different problems. Remember that institutional litigators also fear bargains that pit their clients' injunctive remedies against the legal right of the public interest law firms that employ them to recover fees.[362] Further, ideological agendas may divide lawyer and client,[363] and the clients themselves may have diverse views on the wisdom of particular "reforms."[364] Tort litigation offers yet another variation of agent-principal conflicts, in that personal wealth as well as reputations of individual lawyers are at stake, as contrasted with the interests of the institutions that employ public interest lawyers and enable their representation of present and future clients.

Another framing assumption is that within aggregate litigation, individuals will continue to need attention and that their perceptions of the process are a social and political concern. We began this essay with the history of the rise of aggregate litigation that, by definition, dampens down client participation, if defined as individual control or authority to direct a litigation.[365] But aggregation also enables participation, if conceived broadly as access to redress.

The questions are whether the conception of participation can be richer, and what kinds of intermediate solutions (between equating individual participation with strategic independence and litigating autonomy,[366] on the one hand, and equating participation with access and asking for nothing more, on the other) rulemakers might craft. Short of individual, independent cases, law could provide moments of individual attention to litigants within an aggregated whole, could attend to varying and potentially incommensurate valuations across a range of litigants within an aggregate, could deploy more effectively

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362 In Evans v. Jeff D., 475 U.S. 717 (1986), the Supreme Court upheld defendants' ability to offer settlements expressly rejecting lawyers' fees when bargaining with civil rights plaintiffs entitled to statutory fee shifts. Id. at 729. We are told that many civil rights lawyers respond with retainer agreements that authorize them to refuse such bargains.

363 See Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 471 (1976) (analyzing conflicts between civil rights lawyers' goals and educational needs of clients); see also Rhode, Class Conflicts, supra note 26, at 1211-12 (discussing a dispute among parents of children institutionalized for severe mental disabilities about the desirability of institutionalization); cf. Nathaniel R. Jones, Correspondence, School Segregation, 86 Yale L.J. 378, 379-80 (1976) (responding to Bell and arguing that attorneys' goals and clients' needs were congruent).

364 See Hicks, supra note 56, at 88-96 (discussing divisions among claimants' organizations in Dalkon Shield litigation); Rhode, Class Conflicts, supra note 26, at 1203 (arguing that named plaintiffs may be poorly situated to monitor on behalf of class and may instead press their own remedial preferences); see also Stephen C. Yeazell, Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case, 25 UCLA L. Rev. 244, 258-60 (1977) (discussing the intervention during the remedial phase by an organization, "Bustop," which opposed the school district's desegregation plan).

365 Bone, Rethinking the "Day in Court" Ideal, supra note 226, at 198.

366 See id. at 269-79.

the many lawyers within the aggregate, and could obtain information derived from that engagement with individuals so as to affect the whole.[367] Rules of aggregation could focus on process values, individual litigants' experiences, and the financial incentives affected by those rules.

We turn therefore in conclusion to general suggestions about how to translate these concerns into practice. Of course we cannot "propose a . . . model that fully and adequately accounts"[368] for problems solved imperfectly by economists and ethicists, judges and lawyers, social scientists and lay participants; we offer instead the issues that rulemaking and aggregate proposals must confront.

B. Restructuring the Whole with the Process, Individuals, Lawyers, and Fees in Mind

1. The Many Questions When Structuring Fee Payments

Several issues need to be confronted when fee payments are made. To date, the principal academic suggestion is that a judicial auction of representation rights to competing attorneys serves best to align the interests of litigants and lawyers.[369] We do not object to competitive bids among lawyers but also do not believe that an auction provides much by way of response to the problems of fees and representation in tort aggregation as we have elaborated them. In some ways, focusing on an auction could distract, rather than sharpen, the discussion because of the conflation of several distinct questions.[370]

A first is about value—*what* one is paying lawyers for: outcomes, services, third-party benefits, personal attention, legal education, or some amalgam thereof? While the auction proposal assumed the answer to be solely the economic value of a cause of action, proponents of an auction might respond that the commodity on the auction block

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[367] We understand that this aspiration is optimistic; that some degree of political dispossession flows from the delegation requisite in the fact of representation, see Bourdieu, Language and Symbolic Power, supra note 225, at 171-228, and that our hopes for court-based dialogic exchanges to "encompass in a single whole both the community and the individual, the state and the citizen," see Paul W. Kahn, Community in Contemporary Constitutional Theory, 99 Yale L.J. 1, 82 (1989), reflect centuries of constitutional aspirations not yet fulfilled.

[368] Charles W. Wolfram, The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline, Law & Contemp. Probs., Winter 1984, at 293, 319.

[369] Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 108-09, discussed supra notes 317-23 and accompanying text.

[370] Compare our questions with those in the exchange between Macey and Miller in Macey & Miller, Auctioning Class Action and Derivative Suits, supra note 25, and their critics, Thomas & Hansen, supra note 25.

could be not only a cause of action and its monetized value but also a set of services (e.g., education about legal rights, opportunities to "tell one's side of the story," and social interaction). One could alter the price to include vindication rights of litigants and procedural interests of the judicial system and of diverse communities. If these services have value, someone will buy them. Indeed, there already is such a market, called "private judging," in which those with resources purchase "trial time" from individuals whom purchasers authorize to decide their disputes.

Thus far, the academic auction proposal has not specified the sets of goods and services (other than the cause of action) it purports to offer for sale, has not considered how to price mixed goods, has not explained how to deal with commensurability problems (such as whether to permit menus of goods so that sellers and buyers can offer and select personally tailored packages), and has not considered whether sets of goods and services are unvaried across kinds of cases, sellers, or potential purchasers.[371] For example, tort aggregates offer an example of cases in which some participants might value relationships (both that of the agent-principal and of the court-litigant) and procedural legitimacy along with the production of damage awards, injunctive relief, and information.[372] Alternatively, if the lawsuit one has in mind is a derivative action, one does not immediately imagine a corporation (however much a company may have a legal persona) as in need of a relationship with lawyer or court. Even there, however, the didactic aspect of legal regulation of the corporate persona within the litigation context may have public effects.

A second problem with the auction as a solution is that it fails to specify *how* one will price or pay for the services provided and *how* one would choose among competing packages. Auctions could be understood as simply one way for lawyers or others to make price proposals; the bids submitted—via auction or some other method—could offer percentage of funds recovered, hourly fees, hybrid methods, or something else. Auctions also do not clarify a third issue: *who* makes the bid, a question that is distinct from the mode of payment. For example, if one were persuaded by Gilson's and Mnookin's thesis

371 See Macey & Miller, Tort Reform, supra note 317, at 915-17 (arguing for use of an auction in mass tort cases and noting potential difficulties only in obtaining cooperation of witnesses who have sold their claim, appraising claims, and establishing facilities for administrating future claims).

372 As Judge Weinstein puts it, "every lawsuit implicates the public interest. . . . What renders a mass tort case different is the degree to which all participants—judges, lawyers, and litigants—must deal with the case as an institutional problem with sociopolitical implications extending far beyond the narrow confines of the courtroom." Weinstein, Individual Justice, supra note 21, at 45.

about the desirability of lawyers engaging in cooperative behavior with adversaries and if one believed that law firms could obtain and maintain reputations for such cooperation,[373] one might want to discourage the formation of ad hoc firms and permit representation of aggregates only by preexisting firms. Alternatively, if one believed that some of these cases pose unique problems for which current legal practice is ill-adapted, one might be enthusiastic about selection of a range of lawyers, otherwise unaffiliated, who could share in the work and offer together a composite of skills not found in a single ongoing firm.[374] Further, one might well want other professionals (social scientists, social services) or co-claimants to provide services and therefore to make bids.

Yet another question is the *method of selection* of those to be hired, which in turn is tied to the question of *who selects* representatives. Who are the imagined purchasers for the multipurposed process in the large-scale litigation auction? An assumption animating the original auction proposal is that litigants lack the wherewithal to bid but that they are the relevant principals and that the judge acts on their behalf.[375] If one believes that the litigation serves more than claimants' interests, they may not be the only relevant principals. Moreover, regardless of one's aspirations for litigation, several potential agents for claimant-principals are on the aggregate scene. Should IRPAs choose among bidders on behalf of their clients? Should lawyers who have served on PSCs before be empowered to decide which bid to accept? Could judges select lawyers, and both legitimate those lawyers in the eyes of clients and also obtain legitimacy from those lawyers during the course of the proceedings? What about judges' distinctive interests, as managers of dockets? Would judges shop effectively for lawyers to maximize clients' process and substantive interests, or would they prefer lawyers who promise prompt resolutions? What about relying on opponents to select claimants' lawyers?[376] Or an unregulated market? Could claimants participate in choosing group representatives? Could they be organized in advance and select lawyers directly, or educate judges or other client-delegates about their needs? Do those needs exist, ex ante?

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373 See Gilson & Mnookin, Disputing Through Agents, supra note 79, at 516-20, 530-34.

374 Cf. In re Wells Fargo Sec. Litig., 156 F.R.D. 223, 226 (N.D. Cal. 1994) (rejecting a proposed "joint bid" by two law firms because, while joint ventures were common in business, permitting law firms to make such proposals would "substantially lessen competition").

375 Macey & Miller, The Plaintiffs' Attorney's Role, supra note 25, at 106-08.

376 This is Coffee's claim, that in some cases, via a "reverse auction," defendants pick lawyers for the plaintiff class by identifying lawyers in one jurisdiction who will settle the case and preclude other claimants. See Coffee, Class Wars, supra note 48, at 1371-73.

Of course, the pool of imaginable selectors is shaped by the *timing* of the selection, which is yet another issue. One could have someone make preliminary decisions, subject to revision (indeed, making that a part of the auction package), or one could attempt to take into account changing information and the evolving size and structure of a litigation and build in a series of decision points and different decisionmakers.[377] Further, under the rubric of timing comes not only the issue of selection but also, again, the question of payment. One could fix a method of payment beforehand, without room for revision, or one could structure a series of hearings that permit changing decisions about who is paid and for what.[378]

Yet other issues revolve around discretion, context, and rulemaking: should this series of questions be asked afresh, at the micro level, at the commencement, and in the context of each new aggregate? Or should these issues be fixed, by rules or statutes, and specified across or by categories of cases? Because we share with legal economists concerns about principal-agent problems and agree that those concerns cannot be limited to the large-scale, small-dollar claim context, we are leery of totally discretionary systems in which clients, lawyers, or judges have unfettered discretion to respond to the series of issues we have set forth.[379]

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377 Macey and Miller note the possibility of auctioning part, rather than all, of a claim. See Macey & Miller, Auctioning Class Action and Derivative Suits, supra note 25, at 461. They also suggest that auctions occur after initial discovery and perhaps with the assistance of a special master to develop information. Id. at 467.

378 The theoretical model on which the auction rests might be elaborated to take some of these issues into account, although building such models would be difficult. For example, as our economist colleagues have explained it to us, lawyer services might be understood as the quality aspect of the product, while the outcome might be equated with its price. Bidding simultaneously for these two kinds of goods is difficult, since the pressure may be on minimizing service to lower the price. Different "customers"—assume here litigants—might want various components of the product, and the tradeoffs entailed make the auction model complex, although "mechanism design" might be a means by which to respond. See Eric L. Talley, Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule, 46 Stan. L. Rev. 1195, 1220-24 (1994).

379 Yet another problem with an auction is the question of the sale itself, with its resulting commodification of the values of process. One might argue that the judge as auctioneer and the substitution of monetary amounts for rights enactment are at odds with the political and social claims made on behalf of process and with the social and psychological needs fulfilled by litigation, that it is noxious to assume that litigation is comparable to "antiques, horses, houses, and corporations, for starters." Macey & Miller, Auctioning Class Action and Derivative Suits, supra note 25, at 468. Recall Hicks' argument that some segment of the Dalkon Shield claimants sought social justice, not money. Hicks, supra note 56, at 100. As our colleagues Peggy Radin and Nomi Stolzenberg have discussed, inalienability has a long tradition within property theory, and the kinds of exchanges within litigation conceived here as socially and politically generative could fall within those categories. See generally Margaret Jane Radin, Market Inalienability, 100 Harv. L. Rev. 1849 (1987); Nomi Stolzenberg, Restraining Inalienability (forthcoming); see also Viviana A.

Our hesitancies about the viability of the academic version of the auction are illustrated in some respects by the experiences of a creative federal district judge who has endeavored to require attorneys to bid, competitively, for the rights to represent plaintiffs in securities class actions.[380] Believing that competitive bidding in advance of representation best approximates the ways in which clients make decisions,[381] Judge Vaughn Walker has attempted to require bids from lawyers seeking class certification and status as lead counsel. What his experience reveals is an amalgam of problems. First, there is some evidence that lawyers are hesitant to compete in the judicial forum; the judge has commented on the relatively few bids submitted.[382] Second, the problem of timing of appointment is genuine. For example, in one lawsuit, one set of plaintiffs' attorneys had negotiated with defendants before filing the lawsuit; other lawyers were understandably reluctant to compete for appointment as lead counsel.[383] Moreover, appraising the qualities of bids requires sophistication; Judge Walker has sought not only information about proposals for billing fees and costs; he has also asked for information on malpractice insurance and completion bonds.[384] The packages proposed by different lawyers vary, and selections require tradeoffs that in turn demand value-laden evaluations. In one lawsuit, Judge Walker rejected all attorneys' bids and instead turned to a plaintiff who was an institutional investor with

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Zelizer, Morals and Markets: The Development of Life Insurance in the United States (1979); Richard Titmus, The Gift Relationship: From Human Blood to Social Policy (1971).

We do not make this objection because we think commodification inevitable, as is court superintendence, if not creation, of at least some lawyer-client relationships within aggregates.

380 See In re Oracle Sec. Litig., 131 F.R.D. 688, 697 (N.D. Cal. 1990); In re Oracle Sec. Litig., 132 F.R.D. 538, 542-48 (N.D. Cal. 1990) (awarding rights to lead lawyers based on bids presented for fees and costs constituting a percentage of the recovery in a securities class action); In re Wells Fargo Sec. Litig., 156 F.R.D. 223 (N.D. Cal. 1994); In re Wells Fargo Sec. Litig., 157 F.R.D. 467 (N.D. Cal. 1994) (same); In re Cal. Micro Devices Sec. Litig., No. C-94-2817-VRW, 1995 U.S. Dist. LEXIS 11587 (N.D. Cal. Aug. 4, 1995); In re Cal. Micro Devices Sec. Litig., No. C-94-2817-VRW, 1996 U.S. Dist. LEXIS 1361 (N.D. Cal. Feb. 2, 1996) (attempting a bidding procedure but ultimately abandoning it); see also discussion infra notes 381-85 and accompanying text.

381 *Oracle Sec. Litig.*, 131 F.R.D. at 690-92.

382 See *Cal. Micro Devices*, 1995 U.S. Dist. LEXIS 11587, at *10 (of 12 plaintiff firms that were involved, only two submitted bids).

383 Id. at *4; see also Howard Mintz, Judge Levels Collusion Charge at Class Counsel, The Recorder, Aug. 8, 1995, at 1, available in LEXIS, Nexis Library, The Recorder File (describing the submission of two bids and Judge Walker's view that plaintiffs' attorneys had attempted to circumvent bidding process "by acting like a cartel").

384 *Wells Fargo Sec. Litig.*, 157 F.R.D. at 472-73. Judge Walker also rejected the proposal that lawyers from different firms form an ad hoc litigating unit. *Wells Fargo Sec. Litig.*, 156 F.R.D. at 226.

a substantial economic stake to whom he ceded the choice of lead counsel.[385]

In short, when courts create aggregates, it is impossible to simulate real clients' experiences. Judges are not surrogate clients, and the clients within many aggregates are not themselves an undifferentiated whole. Rather, courts create relationships among lawyers and among groups of litigants. Whether setting fees and costs ex ante or ex post, judges have a host of difficult regulatory choices to make. No mechanism exists that reduces the task to a simple equation, and simplifying techniques always entail value judgments.

2. *Some Regulation: The Melding of Procedural and Ethical Rules*

What is needed then is an amalgam of either statutes or rules, to constrain discretion to a degree and yet to permit discretion to respond to the variability in litigating arrangements that even this lengthy essay does not address. The need for regulation comes from our view of the source of some of the problems: On judges' and lawyers' watch, the scale of litigation has increased, and with it the amount of capital (both symbolic, in Bourdieu's sense,[386] and economic) at stake. Acknowledgement of the need to police those conglomerates should be expressly made by the rulemakers who create aggregates.

For example, not only should more informal guides, like the *Manual for Complex Litigation*, offer instruction; rulemaking itself should articulate that in some class actions, class representatives will have to fashion means to ensure the delivery of legal services and procedural opportunities for individual clients.[387] Similarly, statutes or other rules that create provisions for aggregation should acknowledge the existence of variation among claimants within an aggregate.[388] Be-

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385 In re Cal. Micro Devices Sec. Litig., No. C-94-2817-VRW, 1996 U.S. Dist. LEXIS 1361, at *60 (N.D. Cal. Feb. 2, 1996) (ruling that plaintiff may "choose class counsel and proceed with the litigation as it sees fit").

386 See supra note 253.

387 Judge Schwarzer's suggestion of the expansion of mandates to the trial judge, considering settlements under Fed. R. Civ. P. 23(e), offers some examples of issues, including distribution among claimants, that a judge might consider. See William W Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Cornell L. Rev. 837, 843-44 (1995).

388 See Robert G. Bone, Rule 23 Redux: Empowering the Federal Class Action, 14 Rev. Litig. 79, 105-06 (1994) (commenting on proposed revisions to Rule 23 and arguing that, while reliance on judicial discretion is appropriate to some extent, the rule should include guidance about how much judges should value litigant autonomy and process values). But see Weinstein, Individual Justice, supra note 21, at 3 ("A personal approach in individual cases cannot be readily reproduced, codified, or institutionalized by rule or statute.").

cause mechanisms for achieving some recognition of these interests have to evolve, be tested, and be revised, the charge at the level of statute or rule should be somewhat general: take individualization and delivery of legal services into account, understand the diversity of interests, and conceive of the common benefits of aggregate litigation as embracing the process by which outcomes are derived as well as the outcomes themselves.[389]

Regulation should not only provide a generic admonition; it should also authorize judges to police those procedures by warning lawyers that failure to meet these obligations could be grounds for disaggregation and could be relevant to the payment of both costs and fees.[390] Here our concerns exemplify the point about the convergence of rules of procedure and rules of ethics. By organizing aggregates as we suggest, judges will also be structuring rules of practice, just as they currently do under the rubric of managing the pretrial process and discovery. Appellate courts, in turn, should require trial judges who make rulings on these issues to support their decisions with factfinding; appellate courts will need to provide oversight to buffer understandably pressured trial judges' potential to sweep too broadly. Comparable mandates would be needed to fill the gaps in current eth-

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389 As we have been in the process of writing this essay, judges have raised concerns about conflicts within aggregates and about the inadequacies of the current framework. For example, in March 1996, the bankruptcy judge who presides over a part of the Dow Corning Corporation bankruptcy, stemming from the breast implant litigation, dismissed the creditors' committee that had been formed. That committee had included eight lawyers, all of whom had been active in the tort litigation about implants, as well as Sybil Goldrich, who was a breast implant recipient and a cofounder of a support group for women with implants. The bankruptcy judge concluded that none were "creditors holding unsecured claims" as required by federal bankruptcy law and that the attorneys had many possible conflicts stemming from their representation of women with a diversity of claims and interests; the court also determined that the physician claimants were not adequately represented and that a committee representing them needed to be formed as well. See In re Dow Corning Corp., No. 95-20512, 1996 WL 127968, at *25 (Bankr. E.D. Mich. Mar. 21, 1996) (Order Regarding Various Motions for Orders to Appoint Additional Committees or To Modify the Composition of Existing Committees) [hereinafter *Dow Corning Committee Order*]; see also Thomas M. Burton, Judge Reinstates Plaintiffs' Committee in Dow Corning Corp. Bankruptcy Case, Wall St. J., Apr. 8, 1996, at B2; Tamar Lewin, Judge in Dow Implant Bankruptcy Ousts Lawyers on Panel, N.Y. Times, Mar. 23, 1996, at A7; discussion supra note 266.

390 While the process was ongoing of determining whether the initial "global" settlement offer in the Silicone Gel Breast Implant Litigation would cover all eligible claims, Sybil Goldrich suggested a "ratcheting down" of lawyers' fees if claimants' payments had to be limited. Conversation with Sybil Goldrich, cofounder of the Command Trust Network, group providing information to women with breast implants (Spring 1995).

ical rules.[391] Of course, all will fall short of responding fully to the role ambiguity that exists for lawyers in large-scale cases.[392]

3. *Multiple Agents*

In a world of multiple principals,[393] attention should be turned to multiple agents. Instead of going in the direction of collapsing agent and principal or centralizing lawyering in the hands of a very few, we urge consideration of expanding and differentiating roles among the many agents that the economic value of some large-scale litigations can support. Given that the principals have both commonalities and divergences of interest, disaggregation of the agency role offers opportunities. In addition to the deployment of special masters or court-appointed guardians ad litem, obvious candidates for some agents' jobs are the lawyers that some litigants bring with them to the aggregate. Judges have already transformed some lawyers into agents for the whole by naming them members of PSC, liaison counsel, and the like; we think it time to expand on the concept of *common benefit tasks*.

For example, as judges assemble the "players," they could consider enlarging both the set and the number of actors who have court-conferred stature. It has become customary for judges to choose lawyers to serve on PSCs, whom we conceive of as the "lawsuit's lawyers." Judges might also designate other groups of representatives or call for lawyers, claimants, or others to constitute such groups. Judges could select a "clients' committee" comprised of both individual lawyers and clients as well as other professionals—social workers, community organizers, social scientists, health professionals, lay advocates, or financial experts—as is appropriate under the circumstances.[394] These assignments could be to facilitate client-attorney

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391 See Weinstein, Individual Justice, supra note 21, at 53-84.

392 See Twitchell, supra note 26, at 709-14; cf. Geoffrey C. Hazard, Jr., Reflections on Judge Weinstein's Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U. L. Rev. 569, 578 (1994) (questioning whether legal ethics are the model here or whether, given what he perceives to be interest representation, the "norms governing those who wield authority in legislatures and city councils or in corporations and labor unions" should be sources instead).

393 Compare Arrow's discussion, Arrow, supra note 311, at 42, 46 (discussing single principal/multiple agents and risk averse agents and/or principals).

394 See, e.g., Mullenix, Mass Tort as Public Law Litigation, supra note 133, at 587-88 (arguing that current legal education is not much designed to enhance lawyers' abilities to be good communicators with clients); see also Weinstein, Ethical Dilemmas, supra note 134, at 544 (arguing that a "client-court relationship" could enable a sense of participation and respond to complaints about lawyers' disinterest in playing such a role). For insistence on the ability of claimants to participate, see *Dow Corning Committee Order*, No. 95-20512, 1996 WL 127968, at *12 (Bankr. E.D. Mich. Mar. 21, 1996) ("In a patronizing and

communication and to ensure client knowledge about the litigation.[395] Alternatively, others within the aggregate—claimants or IRPAs—could propose or create structures that focus on such needs.

Whether by such a committee or not, judges could order lawyers to communicate with all or a sample of clients directly, so as to enhance claimant input.[396] Given the data that individual attorneys spend modest numbers of hours in ordinary litigation,[397] such communications could inform clients of the resources that lawyers could provide and inform individual lawyers that someone other than the client might learn of their limited or faulty performance.[398] In this respect, a "clients' committee" or other court-created entities provide some of the "bonding" functions that large-scale litigation undermines.[399] Fur-

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almost sexist way, the United States trustee made the startling assertion that among the hundreds of thousands of women who claim injury or illness arising from the Debtor's [breast implants], he could not find the minimal requisite of three to sit on a committee in this [bankruptcy] case.").

395 Given the disheartening literature on clients' experiences with lawyers, IRPAs might need training and/or monitoring to take on the positive aspects of this role, especially if these roles are conceived to include the kind of ceding of authority from lawyer to client to which critical theorists aspire. See, e.g., López, Rebellious Lawyering, supra note 137, at 44-56; Cunningham, supra note 342, at 1357; White, Lawyering for the Poor, supra note 344, at 863.

396 For example, when assessing a proposed settlement in a class action securities litigation, Judge Walker required a survey of some plaintiffs with significant claims to learn whether a proposed settlement and attorney-fee award "enjoyed affirmative support of the purported class." In re Cal. Micro Devices Sec. Litig., No. C-94-2817-VRW, 1996 U.S. Dist. LEXIS 1361, at *3 (N.D. Cal. Feb. 2, 1996). The Claims Facility created pursuant to the first proposed settlement in the Silicone Gel Breast Implant Litigation took on some of these tasks; our call here is for formalizing the need for such activities and considering whether to develop categories of cases in which court or administrative-based institutions are presumptively preferable and others in which the lawyer-client unit should be the basis for disseminating information. Compare Weinstein, Individual Justice, supra note 21, at 96-98 (discussing the court's "direct relationship" with claimants) with Thomas W. Henderson & Tybe A. Brett, A Trial Lawyer's Commentary on One Jurist's Musing of the Legal Occult: A Response to Judge Weinstein, 88 Nw. U. L. Rev. 592, 594-96 (1993) (arguing for a more limited role for courts). Technology (i.e., computer networks and videotapes) enables some alternatives and might also suggest which institutions are best situated to generate such networks.

397 See, e.g., Herbert M. Kritzer, William L.F. Felstiner, Austin Sarat & David M. Trubek, The Impact of Fee Arrangement on Lawyer Effort, 19 Law & Soc'y Rev. 251, 266-67, 267 fig. 2 (1985) (examining data on differential modes of payment and concluding that, whether paid by contingency or hourly rates, attorneys averaged 45-50 hours on cases in which the stakes were under $10,000); see also MacCoun et al., supra note 256 (reporting that median billable hours of personal injury lawyers in a sample of cases involving automobiles was 20).

398 See David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799, 873 (1992) (arguing for multiple modes of enforcing lawyers' obligations and a "multi-door enforcement strategy").

399 Bankruptcy law requires committees of creditors and their composition varies depending on the kind of stake held. See 11 U.S.C. § 1102 (1994). However, when tort litigation has been subsumed in bankruptcy, some judges have not attempted to differentiate

ther, given judicial oversight of fees, if lawyers in the litigation understand that their contingency fees may be at risk of reduction, their interest in client services should increase.

This kind of oversight need not only be threatening to lawyers; it could also be generative, augmenting their ability to represent individual clients.[400] Moreover, in some instances, communications from this court-authorized committee could validate individual lawyers' communications with clients that little or nothing can be done on the individual level at a particular time in a lawsuit. Court attention to the provision of individual services might also be somewhat responsive to the "glitz factor," that the high visibility roles of PSC members make the work of ordinary lawyering appear "mundane," worthy of neither attention nor financial incentives.

In particular cases, additional committees might be designated for particular phases.[401] Perhaps another group or committee could take on the function of designing procedures in claims facilities; its members might have special expertise, both in terms of processes that could be afforded and in terms of the kinds of proof that would be requisite to receiving compensation.[402] Another group might have the function of monitoring costs and be charged with having or gaining sufficient knowledge about the PSC's conduct of the litigation as a whole to be a sophisticated appraiser of the quality and quantity of the PSC's work.[403] Because IRPAs are contractually bound to become sufficiently expert so as to represent individual clients and because their own economic interests are also at stake, IRPAs might function as monitors of the progress of the litigation and the expendi-

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among the former tort plaintiffs/now creditors to assess the individual values of their claims and arrange them on different committees accordingly. See, e.g., Kane v. Johns-Manville Corp., 843 F.2d 636, 646-48 (2d Cir. 1988) (finding no prejudice by the assignment of "one dollar value to each claim"). Compare *Dow Corning Committee Order*, No. 95-20512, 1996 WL 127968, at *3-*4, *12-*13, *25 (Bankr. E.D. Mich. Mar. 21, 1996) (detailing the differences among claimants and disbanding a Tort Claimants Committee comprised primarily of plaintiffs' lawyers).

400 See, e.g., Rheingold, supra note 102, at 6-8 (detailing activities of lawyers for group litigants, including developing studies of products, employing mock jurors, holding schools for lawyers, preparing model trial notebooks, creating data bases, commissioning biostatisticians, and arguing for regulatory changes).

401 See, e.g., Susan P. Sturm, The Promise of Participation, 78 Iowa L. Rev. 981, 983 (1993) (arguing that at the remedial stage of structural litigation, a "distinct normative theory of participation" is needed from that deployed during the liability phase). We are less clear than Sturm about the independence of liability and remedy.

402 For example, such a group could require firms to provide uniform billing forms or set up a data base to make information readily compared.

403 The costs of such monitoring should come from lawyers' fees so that the process of supervision would be paid by the lawyers, not the clients, thereby creating incentives to have billing and expense records readily accessible to third-party monitors.

tures made, and work either in lieu of or in conjunction with sophisticated clients.[404] As long as IRPAs' payments and the attorneys' fees as a whole are capped by the contingency-fee contracts signed or hypothesized or by a POF set at the outset,[405] and their additional work is also not billed as extra travel expenses or the like outside the fee arrangement, IRPAs could perform this function at no additional cost to the clients. IRPAs are thus unlike the addition of outside lawyers or guardians ad litem and intervenors that some commentators have suggested should become monitors for claimants' interests.[406]

Such involvement might enhance the quality of litigation[407] as well as possibly reduce costs of litigation to the client-principals.[408] IRPAs' assumption of this role would be responsive to the concern that, because clients have no options to shop for alternatives, no

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404 In the Silicone Gel Breast Implant Litigation, a claimant was included on the plaintiffs' committee. See Goldrich, Command Trust Materials, supra note 266, and discussion of the committees now formed in the related Dow Corning bankruptcy, *Dow Corning Committee Order*, No. 95-20512, 1996 WL 127968 (Bankr. E.D. Mich. Mar. 21, 1996), discussed supra note 389. IRPAs could also provide some of the functions that a variety of commentators call for by the creation of "class monitors." See, e.g., Burns, supra note 127, at 196 (arguing for abolition of the named representative of a class and calling for others to perform a supervisory role over lawyers); see also Christopher P. Lu, Procedural Solutions to the Attorney's Fee Problem in Complex Litigation, 26 U. Rich. L. Rev. 41, 63 (1991) (describing problems of policing lawyers applying for fees).

405 As noted, in disaster cases (fires, plane crashes, building collapses), most plaintiffs have signed contracts; in products cases (such as breast implant and Dalkon Shield), some plaintiffs have retained counsel, but others enter the litigation via notices of potential funds. In some cases, judges calculate the total attorneys' fees to be paid as the sum of all the individual contingency-fee contracts entered into or that would have been entered into had each plaintiff retained his or her own attorney.

406 Coffee rejects a role for intervening class counsel because of cost. See Coffee, Rescuing the Private Attorney General, supra note 162, at 263-67 (searching for a "more economical remedy" to protect class members' interests). Other proposals for judicial monitoring come from Weinstein, Individual Justice, supra note 21, at 98-99 (proposing judicial supervision of attorney-client contact); Kane, supra note 26, at 405-09 (calling for more cooperation and partnership between class action lawyers and presiding judges).

407 One researcher has reported that when individual clients are actively engaged, they receive better services. See Douglas E. Rosenthal, Lawyer and Client: Who's In Charge? 106 (1974) (concluding that clients who were more assertive obtained better legal services than did passive clients). Whether IRPAs' engagement can serve the same function as a client has not yet been addressed in the empirical literature.

408 In terms of costs of litigation, the reduction would occur if IRPAs' oversight itself costs less than the sums saved by such a review. That oversight could be less expensive if judges required that all expenses be entered into a computer data base that would be accessible to other plaintiffs' attorneys and their clients. In terms of attorneys' fees, this approach has advantages whether the method of calculation is by a percentage of the fund or a lodestar. If judges or litigants set a percentages of recovery for PSC members at the outset, IRPAs' policing could protect against underinvestment of time or potentially too eager interest in quick settlements. If a lodestar is to be calculated after the case concludes, then the IRPAs could obtain useful information about productivity, duplication, or waste.

mechanism exists to discipline PSC lawyers.[409] Active engagement of some IRPAs could offer a genuine possibility of substitution of counsel on PSCs if misbehavior can be detected as a litigation proceeds. This role might be viewed as particularly useful if one is troubled by the fictive nature of some of the valuations of claims en masse[410] or by the variation among claimants in terms of the value attached to the injury. Alternatively, if one perceived IRPAs as less able than the lawyers selected for the PSC, one would be concerned that IRPAs' participation could lead to lower overall valuation of the group's claim or to wide variation among similarly situated claimants. Perhaps judges or lawyers could designate yet a different group to assist in the creation of client networks, independent of lawyers or with lawyers in subsidiary roles.[411]

These groups are not subclasses; they are not conceived solely as representing interests that vary across the plaintiffs. These committees or groups would be, like a PSC, committees that function to serve the claimants as a whole—and whose creation recognizes that such service entails a range of concerns of which "global peace" is but one. While some of these committees should be created by judges as early as possible after aggregation,[412] others may be needed at subsequent phases of litigation.

We do not try to forecast all the iterations or forms but rather to suggest that judges, lawyers, and rulemakers should consider how to augment the structure that has developed thus far—with its singular focus on the lawyers for the group en masse, some of whom are picked for their ability to bankroll, some for management skills, some because of ties to particular judges or defendants, some for prior experience, and some because of a client and/or lawyer base of support. Given the well-documented disadvantages of both lodestar and per-

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409 See Coffee, Entrepreneurial Litigation, supra note 24, at 885-87. Coffee also argues that, to the extent control of PSCs is needed, steering committee members are better situated than a senior partner at a traditional firm to monitor the utility of the lawyers' work—to assess the contribution to the "team effort." Coffee, The Plaintiff's Attorney, supra note 71, at 708-09. Coffee does not address the need to monitor for attention to individual clients' needs.

410 See, for example, Schuck's description of the negotiations leading to the $180 million settlement in Schuck, Agent Orange, supra note 53, at 143-67.

411 Cf. Weinstein, Individual Justice, supra note 21, at 49 (describing his "impression that few of the groups of plaintiffs I have dealt with in the Agent Orange, asbestos, or DES cases were helped systematically or sympathetically as communities by lawyers handling their cases"); see also Goldrich, Command Trust Materials, supra note 266 (booklet that "does not contain legal advice," for "women with implants" to help them "ask questions and seek explanations").

412 They could, for example, be established in case management orders and/or in notices given pursuant to Rule 23.

centage of the fund methods of payment, we do not hinge suggestions of additional committees or of other mechanisms on or to a particular form of fee payment for common benefit lawyers. We worry about clients paying additional sums—in costs or attorney fees—for the fact of aggregation absent a showing of their benefit (broadly conceived) from that aggregation. The administrative structures we recommend should be paid, to the extent possible, from lawyers' fees or be supported by volunteer services.

4. *Multiple Fee and Cost Proceedings*

Turning to attorneys' fees, the poor fit between methods crafted with very different paradigms in mind demands revision of current practices in the context of mass torts. Large-scale litigation seeking monetary damages gives the aggregate of clients bargaining clout unavailable except to individual clients who are either very wealthy or have sufficient repeat business to attract dealmaking. The custom of a single attorney-fee proceeding at the conclusion of a lawsuit should be rejected, replaced at least by discussion, if not negotiation, at the beginning of the aggregation about costs and fees. Decisions made should be subjected thereafter to periodic review.

Groups of claimants could interview lawyers, review proposals for services, and serve either to select or to advise judges on selection. If judges continue to appoint lead counsel on behalf of these clients, judges could structure fee rules to emulate some aspects of today's marketplace—by refusing at the end of cases to function as insurance for lawyers who have spent more in time and resources than anticipated when they volunteered to participate as common benefit lawyers, by negotiating for rates for items ranging from photocopying and travel to associates' hours, and by seeking national uniformity on rates rather than idiosyncratic arrangements.[413] While inviting competitive bidding is one option, another is to have specific guidelines promulgated by a specially created commission of lawyers, judges, and litigants.[414] Absent such standards, at the inception of the aggregate, judges should oblige all lawyers to put their fee information on the record and set either a fixed percentage (subject to reconsideration periodically) or make plain the kinds of work that will be compensated on an hourly basis.

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[413] One model could be the United States Trustee Guidelines, supra note 84; another is the per diem rate provided for federal employees, judges included. See Administrative Office of the United States Courts, 3 Guide to Judiciary Policies and Procedures at 57, 57-97 ("New Per Diem Locality Rates") (Jan. 17, 1995) (on file with authors).

[414] As proposed by Bieder, supra note 84.

Judges can also ensure that litigants, the public, other lawyers, and themselves obtain the requisite information about costs and fees as the case progresses by requiring every lawyer in the litigation to keep track of their hours and by demanding such information on computer-based compatible billing systems rather than by the chronological list of activities, per lawyer, as is now commonplace.[415] Further, the current practice of great secrecy in fee applications should be replaced by open access, closed only upon a showing of strategic disability flowing from such disclosure.[416] Finally, rather than conceptualizing the fee hearing as a singular event, judges should anticipate that interim fee awards and multiple hearings might well be necessary, especially when the remedial phase of such litigation sometimes may last years if not decades.[417] Moreover, relevant participants in such proceedings are not only lawyers but also claimants, who could be queried about the quality of their experiences, about the information provided, and about the accessibility of their lawyers. Absent national standards, appellate review will be needed to oversee trial court pow-

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415 See, e.g., the Sample Order provided by Manual Third, supra note 11, § 41.32, in which lawyers are required to keep daily time and expense records.

416 See, e.g., Bowling Fee Hearing Transcript, Bowling v. Pfizer, Inc., No. C-1-91-256 (S.D. Ohio 1995) (debating whether information about fee agreements among class and other counsel should be disclosed); Manual Third, supra note 11, § 24.212 (noting that sealed information about fees may be appropriate during litigation to avoid revealing attorney work product). The 1995 securities legislation provides that settlement agreements "shall not be filed under seal" absent a motion and a showing of good cause, and that settlement agreements should include statements about attorneys' fees and costs. Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 77z-1(a)(5) (West Supp. 1996); see also E. & S.D.N.Y. Loc. R. 5(a) (requiring disclosure of fee-sharing agreements when attorneys request fees in "stockholder and class actions"), discussed supra note 78. As a means of checking plaintiff counsels' fee requests, some judges have required defense counsel to provide parallel information. Hirsch & Sheehey, supra note 83, at 105-06.

417 The Heart Valve Litigation is an example; a system is provided by which recipients of heart valves can obtain "explants"—removal and replacement of valves over a period of many years. See Bowling v. Pfizer, Inc. 143 F.R.D. 141, 148-50 (S.D. Ohio 1992) (also discussing the establishment of "patient benefit," "medical consultation," and "fracture compensation" funds). When awarding fees to the class attorneys, the district court rejected a request to provide a lump sum for fees for future services but provided what it termed a "novel" fee structure. Bowling v. Pfizer, Inc., No. C-1-91-256, slip op. at 58 (S.D. Ohio Mar. 1, 1996) (Memorandum and Order on Applications For Attorneys' Fees and Expenses) (on file with authors). Judge Nangle determined that "Class and Special Counsel" will be "entitled . . . to up to 10% of the defendants' [future] annual payments into the Patient Benefit Fund, plus expenses," id. at 57; counsel must annually apply and provide a statement of services to which opportunity for objections will be available; the fund's trustee will make recommendations and a report; and the district court will then determine the propriety of payment "at or near the time that [the] work is actually done and these benefits are actually conferred upon the Class." Id. at 57-58.

ers, and hence rules on appealability—already upon occasion made elastic because of these issues—will need to be adjusted.[418]

Will the proliferation of structures create wasteful investments of time? Who needs more lawyers in a world in which many fear overlawyering? Our interest here is not in increasing the number of lawyers engaged in the same tasks but rather to structure litigation so that more of the lawyers involved are given specific responsibilities for the varieties of work that such aggregates encompass. Obviously, whether staffed by lawyers or other personnel, such additional work might have to be paid for or provided on a volunteer basis.[419] Payment would be possible for lawyers as long as they were understood as conferring a "common benefit." If any lawyers worked as monitors, they might "pay their own way" by superintending costs charged to plaintiffs more closely than could a judge.[420] In contrast, the work of committees designated to consider the process or to focus on individual clients could not be readily monetized. Therefore, the legal rules on the value of common benefit lawyers would have to shift to incorporate the idea that litigants' experiences of the process have a value that redounds to the benefit of the group as a whole.[421] In terms of paying nonlawyers, here the Bankruptcy Act provides a model; its fee provisions expressly recognize the authority of courts to order payment for persons other than lawyers.[422] Other aggregate statutes could follow suit.[423]

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418 See, e.g., In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.—II, 953 F.2d 162, 164 (4th Cir. 1992) (finding appealable a pretrial assessment of expenses from plaintiffs' lawyers).

419 Some lawyers have served on PSCs without compensation beyond the fees paid to them by individual clients. See Notice to Plaintiffs' Attorneys in L-Tryptophan Cases, Section II (on file with authors) ("L-Tryptophan PSC has disclaimed any intent to apply for fees for time or services.").

420 See, e.g., United States v. Hardage, 985 F.2d 1427, 1437 n.8 (10th Cir. 1993) ("Even the best-run steering committees will necessarily involve some inefficiency and duplication of effort."). Under Oklahoma fee-shifting law, the court declined to require payment of assessments to a steering committee without an evaluation of the underlying legal expenses represented by such charges. Id. at 1437.

421 See, e.g., Schuck, Agent Orange, supra note 53, at 199 (reporting that Judge Weinstein did not compensate one lawyer, who had spent a good deal of time "organizing veterans," because of a view that the work did not benefit the class as a whole).

422 11 U.S.C. § 330(a)(1)(A) (1994) (authorization for payment for services rendered by trustees, examiners, "professional person[s]," or attorneys and their paraprofessional employees).

423 Federal procedural rules do not provide for fee shifting or fee awards, except as sanctions. See, e.g., Fed. R. Civ. P. 11 (pleadings); Fed. R. Civ. P. 16 (pretrial matters); Fed. R. Civ. P. 37 (discovery); Fed. R. Civ. P. 68 (settlement). The premise is that the Rules Enabling Act limits the power of rules to make such "substantive" decisions. See supra note 99. Nonetheless, federal judges in class actions superintend payments to lawyers, court-appointed experts, special masters, and administrators; judges could do the

5. *Insisting on Complexity*

We make these suggestions cognizant that some will object, arguing that what we are proposing is too complex. But it is not our suggestions that are complex, it is the underlying litigation that includes diverse interests brought together under the aegis of a single court proceeding. Others will argue that to include a variety of participants and to make plain the economics of the transactions will at a minimum slow down the process by putting too many players at the table and, more likely, undo the deal by shifting the focus from the whole to its parts. Here they may point to the recent history of the breast implant litigation, in which the clarity provided by a proposed settlement and the breadth of its notice brought in so many claimants that the economic value of the recovery dropped and the deal fell apart.[424]

We readily acknowledge that uncertainty may have positive effects on bargaining and that some deals may well be struck that, had disclosure been made, would fall apart. But while a given case may, in retrospect, be termed a success (or at least a resolved dispute), few commentators or participants close to the current mass tort aggregate process applaud it. This is not a thriving social system that candor might undermine[425] but one beset by problems that has drawn criticism from most if not all quarters. Aggregation has too often operated to submerge the interests and needs of participants[426] and to undermine the rationales for court decisionmaking. Some attention needs to be paid to the diverse clients; some form of what Deborah Rhode has termed a "pluralistic approach"[427] should inform the processing and outcomes of mass torts. Group litigation has basically belonged to judges, special masters, and lawyers—talking only with each other and making decisions about categories of claims. We think it time to change.

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same for the kinds of work we suggest they mandate—using their authority under Rule 23(a)(4) to ensure the "adequacy of representation" or receiving additional authorization by way of new rules or statutes.

424 Meier, supra note 44.

425 Cf. Scott Altman, Beyond Candor, 89 Mich. L. Rev. 296 (1990). Unlike Altman's analysis of judicial misconceptions about judging that may constrain judges in socially useful directions, the lack of candor here is not borne from lack of professional introspection about what is "really going on." In our experience, the insiders know full well what drives the bargaining system, and some of them are upset, disquieted, or outraged by the conduct they observe.

426 See also Douglas Laycock, Due Process in Trilateral Disputes, 78 Iowa L. Rev. 1011 (1993) (calling for representation in employment discrimination cases to include employees other than those alleging discrimination); cf. Fiss, Allure of Individualism, supra note 228 (arguing that representation of one's interests in litigation should suffice).

427 Rhode, Class Conflicts, supra note 26, at 1222 (proposing this approach in the context of structural reform litigation).

Of course, to empower lawyers, other professionals, and selected litigants is immediately to worry about their self-interests.[428] We recognize many questions that creation of structures other than a PSC will prompt. One set of problems relates to how additional lawyers will be chosen and what incentives will be created by the existence of these new roles.[429] A second set of concerns is about the strategic effects of diffusion and some forms of disaggregation.[430] Other issues relate to nonlawyer participants and which of them will come to the fore.[431] Yet another question is whether, as Peter Schuck argues, the intragroup conflicts among claimants, their genuine differences in injury and goals, and their geographic dispersion are hurdles too high for their functioning as a coherent organization.[432]

Other problems return us to the question of value. Will the costs of such new structures and procedures outweigh the marginal utility?[433] Will the social and public benefits be less than the individual benefits, or distributed unevenly among plaintiffs? How should/could judges respond to those claimants seeking large amounts of individual attention and those who find less sufficient? Should there be cross-

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[428] See, e.g., Yeazell, Collective Action, supra note 135, at 53 (discussing the "economic individualism" of plaintiffs' lawyers as animating their opposition to class action certification of the Dalkon Shield litigation).

[429] For example: How will lawyers get onto any of the proposed committees? For how long should they serve? Could they rotate on and off (term limits), thereby lessening their expertise but also weakening the potential for collusion? Will those involved on the client committees (or their equivalents) try to overindividualize, undermining the utilities of collectivization? Will lawyers on these committees gain too much clout, be seen as judges' emissaries to the public? Will they imagine themselves as repeat players, attending more to their lawyer colleagues and the judges than to a mass of clients who are unlikely to employ them again?

[430] For example, will fractionization result in these added committees strengthening defendants' powers to divide and conquer? That is, would opponents be able strategically to exploit the existence of these committees to the detriment of plaintiffs? See, e.g., Coffee, Entrepreneurial Litigation, supra note 24, at 915-16; Twitchell, supra note 26, at 738-43.

[431] Which clients and other professional or lay participants will be sufficiently visible to be selected? Who will be seen as "acceptable" to judges and lawyers and who deemed too "difficult" to work with? Further, does putting a client or lay person on a committee truly give that person voice, or will the professionals quiet lay participants' voices? Cf. Lauren K. Robel, Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990, 59 Brook. L. Rev. 879, 893-97 (1993) (discussing the nonlawyer members of the Advisory Groups created by the Civil Justice Reform Act and reporting little participation by those members).

[432] Peter Schuck, Mass Tort Litigation: An Institutional Evolutionist Perspective, 80 Cornell L. Rev. 941, 971 (1995).

[433] Or will it be possible that "divided ownership" will facilitate better outcomes, and those even more "efficient" than currently? See, e.g., Ayres & Talley, supra note 305, at 1029-30, 1036 (working in the context of "private information" about valuation of an "entitlement" and arguing that, in some contexts, "endowing" each of two claimants with a "partial claim . . . can reduce the incentive to behave strategically during bargaining, thereby enhancing economic efficiency").

subsidizations? Will judges and lawyers tolerate subsidizing organizations that have goals such as procedural fairness and litigants' experiences?

We think that it is worth the investment of resources in experimenting, worth the incursions on contingency-fee contracts of individual lawyers and clients to support such invention, worth the risk-taking by those who play roles on these committees that the funds recovered may be insufficient to reimburse them, and worth the possibilities of causing dissension in the ranks of claimants and their lawyers. If collectivization can provide the occasion for altering the measures of value and can create positive supervision of attorney-client relations, then by the fact of collectivity, it is possible that individual litigants could fare better than they do singly, not only in terms of outcomes but also in terms of the process provided to them by lawyers and by courts.[434]

Will anyone adopt these proposals? While the dynamics and incentives sketched so ably by a host of commentators, coupled with the concentrations of money and power validated under current aggregate structures and judicial and societal desires for speedy conclusions, might not inspire optimism, judicial decisions over the past year suggest that our concerns are increasingly known to and shared by some close to aggregate litigation.[435] Ignoring these issues inflicts serious costs, and we see the loss as both collective and individual.

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[434] Using, for example, Sandra Gilbert's account of her "own" case, supra note 259.

[435] See, e.g., *Dow Corning Committee Order*, No. 95-20512, 1996 WL 127968 (Bankr. E.D. Mich. Mar. 21, 1996); Bowling v. Pfizer, Inc., No. C-1-91-256 (S.D. Ohio Mar. 1, 1996) (Memorandum and Order on Applications for Attorneys' Fees and Expenses); In re Cal. Micro Devices Sec. Litig., No. C-94-2817-VRW, 1996 U.S. Dist. LEXIS 1361 (N.D. Cal. Feb. 2, 1996); In re Cal. Micro Devices Sec. Litig., No. C-94-2817-VRW, 1995 U.S. Dist. LEXIS 11587 (N.D. Cal. Aug. 4, 1995).