

MATURE AGGREGATION AND ANGST: REFRAMING COMPLEX LITIGATION BY ECHOING FRANCIS MCGOVERN'S EARLY INSIGHTS INTO REMEDIAL INNOVATION

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I

FIGHTING OVER FISHING

My introduction to Francis McGovern came in the fall of 1985, when the Yale Law School hosted a “National Conference on Litigation Management.”¹ There, federal district judge Richard Enslen, who sat in the Western District of Michigan, talked about his experiences dealing with a volatile lawsuit involving fishing rights in the Great Lakes. An 1836 treaty entered into between the United States and the Ottawa and Chippewa peoples reserved fishing rights (of some kind) to the tribes and was supposed to keep the State of Michigan at bay.² In the 1970s, the United States, which was acting in its fiduciary role on behalf of Indian tribes, and Michigan disagreed about the respective roles of federal regulation and state authority. That dispute resulted in a lawsuit, *United States v. Michigan*, which produced a series of decisions, including recognition of tribal rights.³

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* Arthur Liman Professor of Law, Yale Law School. All rights reserved. May 2021. Many thanks to Lynn Baker for her thoughtful suggestions, to the other editors of this volume, to William Rastetter for information on the Michigan Fishing litigation, to Adela Lilollari and Urja Mittal for insightful assistance in research (current and past), to Bonnie Posick for expert editorial assistance and poignantly, to Francis McGovern, from whom I learned a great deal. This essay builds on my discussions of related issues, as cited. Like many who write about these issues, I am also episodically a participant in cases, either in a role created by a court or as a lawyer for a party.

1. See Symposium, *Litigation Management*, 53 U. CHI. L. REV. 305 (1986). Sponsors included the Yale Civil Liability Program chaired by George Priest, an entity called the Center for Public Resources, and the ABA Section on Litigation. *Id.* The Center for Public Resources is not, to my knowledge, ongoing; it was an organization whose funders included insurance companies and was guided at the time by Judith Pendell.

2. Treaty of Washington art. 3, March 28, 1836, 7 Stat. 491 (1836). The text stated that the tribes retained the fishing grounds in front of such reservations assigned to them.

3. *United States v. Michigan*, 471 F. Supp. 192 (D. Mich. 1979), *remanded*, 623 F.2d 448 (6th Cir. 1980), *modified*, 653 F.2d 277 (6th Cir. 1981).

By 1981, the Department of the Interior had let lapse its regulations on fishing in the Great Lakes, and conflicts intensified.⁴ For some tribes, fishing was part of their identity and unrestricted access to the Great Lakes was both their legal right and essential to their livelihood. Economic concerns also animated non-tribal members in Michigan's commercial fishing industry. For others, fishing was a sport about which they were passionate. In 1984, three tribes—the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, and the Grand Traverse Band of Ottawa-Chippewa Indians—returned to federal court to enforce what they understood to be their legally-recognized right to take fish in an amount necessary to “maintain reasonable tribal living standards.”⁵ In response, Michigan argued that equitable allocations required considering other fishers' economic needs. Sports fishers argued they had distinct interests, a claim that affected Michigan as well in that it garnered revenues and reputational benefits from being a destination for tourists.

Judge Enslin told the group assembled in 1985 in New Haven that he had been involved in many cases with challenging and hotly-disputed issues. Yet, Judge Enslin said, the fishing rights case was the one in which he feared that litigants would resort to violence against each other. Those concerns were notable, given that little in Judge Enslin's background suggested that he could be easily daunted. Two decades earlier, in the 1960s, Enslin had gone to Mississippi to volunteer in voter registration in the Freedom Summer of 1964. He was there when James Chaney, Andrew Goodman, and Mickey Schwerner were murdered.⁶ Enslin later served in the Peace Corps and headed one of its offices. When practicing law, Enslin served as lead counsel for the NAACP in a 1971 desegregation lawsuit against the Board of Kalamazoo Public Schools.⁷ After his appointment in 1979 by President Jimmy Carter, Enslin presided on several high-profile cases, including a class action challenging conditions at prisons run by the

4. As McGovern explained in discussing the case, the interactions about treaty rights were complex. Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 456–57, nn.91–92 (1986) [hereinafter McGovern, *Managing Complex Litigation*].

5. *Id.* at 457.

6. See *Richard Enslin Life Story/Obituary*, BETZLER LIFE STORY FUNERAL HOMES, <https://betzlerlifestory.com/obituaries/richard-enslin.105829> [<https://perma.cc/PJ6J-B9VB>]; MICH. DIST. JUDGES ASS'N, *CELEBRATING FIFTY YEARS 33* (2018), https://courts.michigan.gov/Courts/trialcourts/Documents/mdja_anniversary_booklet_3.pdf [<https://perma.cc/4MYB-WNF6>]; Julie Mack, *Federal Judge Richard Enslin Remembered for Impact on Title IX, Desegregation, and Prison Rights*, KALAMAZOO GAZETTE (Jan. 20, 2019), https://www.mlive.com/news/kalamazoo/2015/02/federal_judge_richard_enslin_r.html [<https://perma.cc/HJS6-DNNE>]; *Freedom Summer Volunteers*, DIGIT. STUDENT NONVIOLENT COORDINATING COMM. (SNCC) GATEWAY, <https://snccdigital.org/freedom-summer-volunteers/> [<https://perma.cc/X6UT-N5RS>]; see also *Murder in Mississippi*, P.B.S., <https://www.pbs.org/wgbh/americanexperience/features/freedomsummer-murder/> [<https://perma.cc/95EU-LC4X>].

7. *Oliver v. Kalamazoo Bd. of Ed.*, 346 F. Supp. 766 (D. Mich.), *aff'd sub nom. Oliver v. Sch. Dist. of City of Kalamazoo*, 448 F.2d 635 (6th Cir. 1971); *Richard Enslin Life Story/Obituary*, *supra* note 6; MICH. DIST. JUDGES ASS'N, *supra* note 6, at 33; Mack, *supra* note 6. An abbreviated biographical sketch may be found at *Richard Alan Enslin*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/enslin-richard-alan> [<https://perma.cc/S2VX-75LU>].

Michigan Department of Corrections.⁸ Yet, Judge Enslin reported, he was worried about the Great Lakes fishing litigation as a source of interpersonal violence.

Enter Francis McGovern, appointed by Judge Enslin as a special master. Judge Enslin recounted that, within six months of McGovern's arrival, a settlement had been forged among the three tribes—the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, and the Grand Traverse Band of Ottawa-Chippewa Indians; Michigan's Department of Natural Resources; the U.S. Fish and Wildlife Service; the Michigan United Conservation Club; the Grand Traverse Area Sport Fishing Association; the Michigan Steelhead and Salmon Fishermen's Association, and the Michigan Charter Boat Association.⁹ Enslin provided a detailed account of the agreement, which included provisions for allotting fish, zones for fishing, and parameters for the gear to use for catching whitefish, lake trout, walleye, perch, salmon, and chub. Under McGovern's guidance, that accord was commemorated with a lakeside ceremony at which participants passed a peace pipe.¹⁰

More about McGovern's work in this lawsuit comes from his 1986 article, *Toward a Functional Approach for Managing Complex Litigation*.¹¹ As McGovern explained, the law governing the dispute was mushy (my word): the concepts of “reasonable living standards,” “subsistence,” “maximizing value,” and “equal distribution” were not readily defined.¹² Moreover, the parties needed to coexist, then and in the future. McGovern also described the intense political investment of the parties, and that the tribes and the state saw the implications for their sovereignty, autonomy, and identity. Framing the interactions, as McGovern recounted, were the tribes' long experiences of exploitation-through-negotiation (again, my term) which made them leery of entering into discussions with their opponents.¹³

McGovern's “prescription” for resolution was to use the short time-frame (four months) before a scheduled trial to develop information and a method (“a scorable game”) for each party to assess its own interests and priorities as well as to sharpen parties' focus on negotiating to differentiate concerns so as to maximize what was most valued.¹⁴ Two innovations can be gleaned from his

8. The prison litigation began in 1974, and Judge Enslin's major decision concluding that prison conditions were unconstitutional on a variety of dimensions was *Knop v. Johnson*, 667 F. Supp. 467, 469 (D. Mich. 1987), affirmed in part and reversed in part in a consolidated decision by *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992).

9. Consent Order, *United States v. Michigan*, No. M26-73 CA (W.D. Mich. Apr. 10, 1985) [hereinafter 1985 Michigan Consent Order]; see *United States v. Michigan*, 12 Indian L. Rep. 3079 (abridged text) (W.D. Mich. 1985) [hereinafter Bay Mills 1985 Allocation Trial].

10. The first consent decree ended in 2000. See 1985 Michigan Consent Order, *supra* note 9, ¶ 53.

11. McGovern, *Managing Complex Litigation*, *supra* note 4, at 456-68. That symposium resulted in a volume of published essays. See, e.g., Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

12. McGovern, *Managing Complex Litigation*, *supra* note 4, at 459.

13. *Id.* at 460.

14. *Id.* at 460-63.

account: he changed the party configuration by insisting on the inclusion of more disputants (potentially expanding the conflict), and he helped steer the group into arriving at a settlement that had appeal because it was time-limited. Unlike the 1836 Treaty, the settlement was initially for fifteen years, with a provision for the court's jurisdiction to continue "thereafter."¹⁵

McGovern's methods aimed to delineate the distinctive and the overlapping interests of an array of participants. As Judge Enslin detailed in a 1985 opinion, the sport fishing groups and others had moved to intervene. After McGovern became involved, the court deemed the group "litigating amici."¹⁶ Under that umbrella came the Michigan United Conservation Clubs, the Grand Travers Area Sport Fishing Association, the Michigan Steelhead and Salmon Association, the Michigan Charter Boat Association, and other individual licensed commercial fishers,¹⁷ all of whom McGovern drew into discussions.

As to the formal parties, McGovern helped to distinguish the varied views of the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, and the Grand Traverse Band of Ottawa-Chippewa Indians, which he learned had different relationships to fishing in the Great Lakes. As he put it, one tribe sought to preserve its culture; another was focused on the economic benefit; and the third, more open to compromise, sought to find accommodations.¹⁸

McGovern also disaggregated "the State of Michigan," which itself was not univocal but included a range of concerns. State officials had to attend to an array of interests that included tourism and sports fishing, respect for all of its citizens, some of whom were members of Indian tribes and others who were not, and the economic needs of its commercial fishing industry. McGovern understood that the state leadership was not necessarily cohesive. Therefore, he met separately with the Governor, the Attorney General, and the head of the state's Department of Natural Resources.¹⁹ The details in his article are vintage McGovern, as he enlarged the circle of conflict by welcoming the many people affected (albeit not all as full litigating parties with veto power) to be present in some of the negotiations.

McGovern identified what he termed the "five major variables: species of fish, quantity of fish, fishing gear, geography, and time."²⁰ He convinced the participants to pool expert data from biologists and to listen to litigants involved in fishing conflicts in other states so as to learn about the different methods of allocating rights and the various responses of other judges. Demonstrating that he was ahead of the curve, McGovern innovated by using computer models to

15. 1985 Michigan Consent Order, *supra* note 9, ¶ 53.

16. McGovern, *Managing Complex Litigation*, *supra* note 4, at 463 n.108.

17. *Id.*

18. *Id.* at 462–63.

19. *Id.* at 463.

20. *Id.* at 463.

develop game theory-based models of outcomes.²¹ McGovern thus shaped parameters for negotiation and promoted enough of a willingness to compromise that an agreement was made, provisional on approval by each party.²² A disagreement about the authority of the designated representative of the Bay Mills Tribe brought the lawsuit back to Judge Enslen, who held a trial on the Bay Mills' proposed 50-50 allocation and (unsurprisingly) concluded that, instead, the negotiated plan was the right result on the merits.²³

By recording the strife that had preceded the settlement, Judge Enslen's May 31, 1985 decision documented McGovern's achievements. After the 1979 district court ruling recognizing tribal fishing rights, there had been years of "hard feelings, social discord, occasional violence, stipulated court-ordered closures of large portions of the three affected Great Lakes, political posturing, protraction of the instant litigation, some outward manifestations of racism, and concern about the future of Michigan's greatest resources, her people and her natural bounty."²⁴ In contrast, the settlement set up zones for fishing, allocation rules, a series of governing structures (a Joint Enforcement Committee, a Technical Fishery Review Committee, an Information and Education Committee, and an Executive Council), a mechanism for data collection, and a way to gather funds for implementation from both the state and federal governments.²⁵

What Judge Enslen's opinion also detailed were the complexities and the long-term uncertainties about fishing stock, their habitat, and pollution. Amidst those variables and unknowns, the 15-year agreement provided a reasonably predictable management plan that avoided "racehorse fishing" — getting as much as possible to meet a fixed allotment—and helped to make sustainable the resource, at least for a time.²⁶ Zooming out to think about the result in terms of contemporary debates about the remedial powers of the federal courts, the fishing agreement is one of many examples of results not readily boxed in the legal categories of law and equity. Even as the relief sounded in equity and fishing allocations were not directly monetized, streams of income were centrally affected.

In short, McGovern helped to bring about an outcome because he changed the stakes through excavating the lines of conflict, configuring the disputed issues, adding participants, pressing the parties to distinguish their own interests and decide on priorities, and altering the longevity of the deal. Instead of seeking what today is often called "global peace," McGovern aimed for a consent decree

21. *Id.* at 462. More recent examples of innovative use of technology come from Elizabeth J. Cabreser and Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017).

22. McGovern, *Managing Complex Litigation*, *supra* note 4, at 464–65.

23. *Id.* at 465–66; *see also* Bay Mills 1985 Allocation Trial, *supra* note 9.

24. Bay Mills 1985 Allocation Trial, *supra* note 9.

25. 1985 Michigan Consent Order, *supra* note 9, ¶¶ 31–44.

26. Bay Mills 1985 Allocation Trial, *supra* note 9, at 3082–87.

that was renewable but initially limited to fifteen years.²⁷ By making a multi-party case more multi-party and by asking participants not to bind themselves and their successors to a world they could not foresee, McGovern found enough common ground that the parties agreed to learn how they could manage under a settlement that could sunset within two decades. (My account is not rosy-eyed; as discussed below, conflicts emerged within that time and, thereafter, a revised agreement, with many modifications and an appendix of 28 pages of graphics, was put into place until 2020 and then extended for some months thereafter.²⁸)

A few years after the Michigan fishing litigation settlement, McGovern wrote an article that he entitled *Resolving Mature Mass Tort Litigation*.²⁹ That 1989 analysis coined the phrase “mature tort” to capture McGovern’s argument that aggregation ought only to occur after many individual cases had been filed and litigated. McGovern worried that if “too early”—a metric much debated thereafter—aggregation could abort the unearthing of information requisite to a fair outcome and an understanding of the legal issues raised. As the title of this essay reflects, I have applied his term to him. Early on, McGovern was the “mature” person who focused on how to generate remedies that would be workable, even if not enduring forever. He aimed to help disputants in the here and now.

II

TEMPORIZING IN A VARIEGATED AND VULNERABLE LITIGATION LANDSCAPE

Thirty years after McGovern’s analysis about the mature mass tort, aggregation itself has gained a maturity that merits reconsidering its forms and practices. Above, I revisited some of the lessons from McGovern’s work in the 1980s. I did so both as a tribute to him and to learn more from what he did when, in the fishing litigation, he reconfigured the party structure and moved the disputants—and the court—away from a quest for global peace.

Here, I build on the fishing conflict and McGovern’s other work to bring to the fore examples of coordination that alter the composition of disputants, including by crossing the formal jurisdictional boundaries with this federation. I do so to provide more reasons why aspiring for a “partial peace”—as McGovern

27. 1985 Michigan Consent Order, *supra* note 9, ¶¶ 53–55; *Fishing Rights Update Due Today*, INDIANZ (July 5, 2000), <https://www.indianz.com/News/show.asp?ID=law/752000-1> [<https://perma.cc/M7FH-B7SK>].

28. See Consent Decree, *United States v. Michigan*, No. 2:73-CV-000260 (W.D. Mich. Aug. 8, 2000), ECF No. 1458, Page ID 3216; *Fishing Rights Update Due Today*, *supra* note 27; Jim Malewitz, *All Eyes on Grand Traverse Bay as Deadline Looms for Tribal Fishing Decree*, BRIDGE MICH. (Aug. 22, 2019), <https://www.bridgemi.com/michigan-environment-watch/all-eyes-grand-traverse-bay-deadline-looms-tribal-fishing-decree> [<https://perma.cc/BMJ3-RPZC>]. The consent decree entered on August 8, 2000 was to expire on August 8, 2020. However, because of ongoing negotiations and Covid-19, the Honorable Paul L. Maloney extended the consent decree to December 31, 2020 and then to June 30, 2021. See Order Extending the Expiration of the 2000 Great Lakes Fishing Decree, *United States v. Michigan*, No. 2:73-CV-000260 (W.D. Mich. Dec. 8, 2020), ECF No. 1903.

29. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

taught the parties to do in Michigan—is preferable to thinking that one is wrapping a problem up for good. What is needed, whether the remedies sought are equitable, legal, or an amalgam thereof, are more ceremonies of celebration marking that lawyers and judges have helped people immediately and acknowledging that the results are partial, with the potential for related conflicts to emerge or continue. As I argue below, aggregate resolutions can, in various situations, be temporizing in that a delineated resolution can provide a time-frame in which (one hopes) disputants can learn to accommodate, live within its parameters as information develops and stakes can change, and if needed, revisit aspects of the agreement thereafter.

To recognize that these resolutions are temporizing, aggregate settlements need to articulate ongoing roles for courts, lawyers, and affiliated actors during the post-settlement life of complex lawsuits. Even as such a process entails time and resources, it can be generative for the parties as they work out whatever interactions remain in the wake of their dispute. Moreover, building out this third phase is generative for courts and the body politic. When judges shoulder the obligations of overseeing the implementation of remedies and engage on the record with the disputants, third parties have opportunities to understand what has transpired and to see the normative utility and procedural integrity entailed in trying to make material the outcomes of judicially-sanctioned resolutions.

Before sketching a few facets of how to do so, I need to outline how litigation has changed in the decades since the 1980s. In addition to knowing a lot more about how aggregate litigation functions, we also know that the work of the federal courts has shifted. The animating assumptions that brought a group to New Haven in 1985 to talk about “litigation management” were that litigation was booming, that the federal courts had too many cases, that more were coming down the pike, and that changes were needed to handle that volume. Indeed, that conference was funded in part by entities often associated with, or named as, defendants. The problems from the vantage point of some speakers were the overuse of courts and the need to curb their authority. For McGovern, litigation had to be managed to help craft solutions; for others, management was aimed at shifting away from adjudication and, in some instances, limiting opportunities to file claims.

Since then, the political and legal efforts to circumscribe the use of courts have succeeded in reshaping the federal courts’ docket. Even before the Trump Administration had its impact on the federal bench, the number of federal filings had flattened.³⁰ The trend has continued. By 2020—and holding aside the more than 200,000 cases wrapped into a new, massive multidistrict litigation (MDL) involving allegedly faulty earplugs for members of the armed services—filings fell by about ten percent.³¹ Moreover, the Court has imposed barriers to access

30. Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1900 (2017).

31. In 2020, 470,581 civil cases were filed, of which 202,814 were part of *in re 3M Combat Arms Earplug Product Liability Litigation*, MDL No. 2885 (N.D. Fla.). See JOHN G. ROBERTS, SUP. CT. OF THE

through narrow constructions of standing.³² The assault on class actions is well underway.³³ Caps on damages have been put in place in many states. The Supreme Court has cut off the use of implied statutory causes of action, and two members of the Court have argued to end constitutional implied causes of action.³⁴ In addition, millions of consumers and employees had been closed out of courts and left to proceed, if at all, single-file into closed arbitrations run by providers selected by the entities whose actions they contest.³⁵ The economics of litigation pose yet other barriers, as during these decades, the fees charged by some lawyers, the costs of retaining experts, and the assessments imposed by courts have all increased.

Reflecting these reconfigurations, many of the litigants who *do* enter the federal courts have limited resources. One window comes from tracking filings by people who are self-represented. Of some 260,000 civil cases filed annually, about twenty-five percent are brought by people without lawyers, and more than

U.S., 2020 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (Dec. 31, 2020), <https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf> [<https://perma.cc/5LS5-99HC>] (“New filings in district courts were nominally greater, but excluding filings connected to a single multidistrict litigation, they were also lower than the prior year.”); *see also id.* at 6 (“Civil case filings in the U.S. district courts increased 58 percent, from 297,877 to 470,581, mostly attributable to an earplug products liability multidistrict litigation (MDL) centralized in the Northern District of Florida, which consolidated 202,814 filings. Excluding that MDL, civil cases filings fell ten percent.”).

32. *See* Thole v U.S. Bank N.A., 140 S. Ct. 1615, 1619 (2020). An exception—whose implications are not clear—is the 2021 decision of *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).

33. *See e.g.*, Stephen B. Burbank & Sean Farhang, *Class Action and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495 (2017). As I write, the Court is considering yet further cutbacks, as it agreed to hear *Ramirez v. TransUnion, LLC*, a consumer class action that had alleged that TransUnion, a credit reporting agency, violated the Fair Credit Reporting Act by failing to have “reasonable procedures” to ensure accurate information on consumers and of failing to provide adequate information to consumers. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), *cert. granted in part sub nom. TransUnion, LLC v. Ramirez*, No. 20-297, 2020 WL 7366280 (U.S. Dec. 16, 2020) (mem). The claim entailed incorrectly placed “terrorist alerts” on the front page of the consumers’ credit reports that identified individuals whose names matched “specially designated nationals,” potentially engaged in illegal behavior. *Id.* at 1016–17. TransUnion had relied on a “name-only matching protocol,” which the jury concluded did not meet the statutory requirements. *Id.* at 1019. The jury awarded \$60 million in statutory and punitive damages. *Id.* at 1017. The Ninth Circuit affirmed, over a dissent concerned that the trial had proceeded without sufficient evidence of the range of people who had been wrongly labeled by the “name-only” matching system. *See id.*

As framed by the defendant company, the question to be addressed is “Whether Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered.” Petition for Writ of Certiorari at 4–5, *TransUnion, LLC*, No. 20-297. The goal of the petitioners appears to be to return to the ruling in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), which did not rule out standing for the plaintiff; that decision has become vulnerable in light of the change in the Court’s membership. Of course, at issue is not only how to define “injury” but also the authority of Congress to create remedies and the role played by class actions in making lawyers available by representing aggregates.

34. *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (Thomas, J., concurring, joined by Gorsuch, J).

35. Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611 (2020); *see also* Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605 (2018); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

half the cases before the federal appellate courts are brought by self-represented parties.³⁶ In contrast, between thirty and forty percent of pending civil cases are part of multidistrict litigation,³⁷ a kind of lawsuit tracked by the Administrative Office of the U.S. Courts (AO). Some MDLs include class actions, about which we have more limited data, as the AO does not routinely gather information on the number of class actions filed. The bipolar distribution—many lawyerless-litigants and the volume in MDLs—makes plain the centrality of aggregation and federal judges’ dependency on it. As Ben Kaplan—central to revising the federal class action rule in 1966—explained, aggregate litigation is a key mechanism for subsidizing litigants who would otherwise have no effective way to come to court.³⁸

Below, I pull a few examples from the 1980s and 1990s of innovations—often involving McGovern. Yet, I am keenly aware that in 2021, the question is whether opportunities to use large-scale litigation to enable remedies for a variety of individuals will exist. My excavation of these past efforts and my commentary on the need to reframe practices and expectations in aggregate cases is based on the hopes for a future in which such configurations are welcomed, even as today, a generative, remedial role for the federal bench remains uncertain.

36. See *Judicial Business, tbl. B-19, U.S. Courts of Appeals—Pro Se Cases Filed, By Source—in the Administrative Office of the U.S. Court’s Judicial Reports (1996-2019)*, U.S. CTS., <https://www.uscourts.gov/report-names/judicial-business?tn=B-19&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=> [<https://perma.cc/RHP7-QA8R>]; *Judicial Business, tbl. C-13, U.S. District Courts—Civil Pro Se and Non-Pro Se Filings, by District—in the Administrative Office of the U.S. Court’s Judicial Reports (2004-2019)*, U.S. CTS., <https://www.uscourts.gov/report-names/judicial-business?tn=B-19&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=> [<https://perma.cc/JP3V-HFZZ>]. I provide more discussion of changes in the federal courts’ docket in my article *Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1913–14 (2016).

37. See Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 470–71 (2020). Depending on who is counting, the numbers are variously reported and ranged from about 30 to 50 percent in 2019. *Id.* at 470 n.1. As of 2020, and including in *re 3M Combat Arms Earplug Liability Litigation*, about sixty percent of the federal docket was in an MDL. That data was reported by the Chief Justice in his end of 2020 report. See ROBERTS, *supra* note 31.

38. Benjamin Kaplan, *A Preparatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969); see also Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 5; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744–49 (1997).

III

JURISDICTIONAL REDUNDANCY, COMPLEX COORDINATION, DE-ESSENTIALIZING STATE, TRIBAL, AND FEDERAL INTERESTS, AND PUBLIC ACCOUNTABILITY

As I have sketched in other essays,³⁹ the jurisdictional redundancy within the United States' form of federalism is a resource that interacts with McGovern's insights about the need to welcome diverse participants and to try to lower the stakes through narrowing the time horizon of remedies. Large-scale litigation often spills across the formal borders of states, Indian tribes, and the federal system. Hence, today's aggregates could seek to use extant networks that are border-crossing and that reflect cross-border-connections. For a period of time in the 1980s and 1990s, judges in state and federal courts aimed (often guided by Francis McGovern) to coordinate their work on parallel mass tort actions. For example, a consortium of state court judges called themselves the Mass Tort Litigating Committee (MTLC).⁴⁰ An explanation comes from the Honorable Helen E. Freedman of New York State's Supreme (trial-level) Court, describing what she termed *Coordination of Litigation Within New York and Between Federal and State Courts*.⁴¹ She credited Francis McGovern for finding a way to sustain that effort:

After six prior applications had been rejected to coordinate the asbestos litigation for cases filed in federal courts, a number of state judges, correctly anticipating that most new asbestos cases would then be brought in state courts, established a state Mass Tort Litigation Committee (MTLC) under the aegis of the Conference of Chief Justices to discuss techniques for managing asbestos cases. Using the good offices of Professor Francis E. McGovern, MTLC obtained funding that would last for about five years from the State Justice Institute. The National Center for State Courts administered the State Justice Institute grant and handled logistical arrangements enabling the judges to meet with each other periodically in different cities. Although it was originally an asbestos litigation committee, the Committee's functions expanded to include other mass torts.⁴²

While not often invoked in the law review literature, another inter-jurisdictional initiative was the drafting of *The Manual for Cooperation Between State and Federal Courts*, sponsored by the Federal Judicial Center, the National Center for State Courts, and the State Justice Institute. The monograph set out

39. See Judith Resnik, *Partial "Global Peace": Federalism and the Long Tail of Remedies in Opioid Litigation*, 70 DEPAUL L. REV. (forthcoming 2021); Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017 (2017) [hereinafter Resnik, *Reorienting the Process Due*]. Recognizing the importance of scaling back expectations is not to ignore the complexity of doing so when both money and equitable relief are sought. See Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943 (2017).

40. See Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1863–64 (1997); see also Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1879, 1894 (2000).

41. Helen E. Freedman & Joseph J. Maltese, *Inter-state Coordination*, in ROBERT L. HAIG, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 18:25 (5th ed. 2020).

42. *Id.*

methods of coordination that the authors thought was the way of the future.⁴³ They explained that, as “these parallel efforts have been increasingly formalized in the respective judicial systems, state and federal courts are now advancing to the next logical stage of state–federal coordination of multijurisdictional litigation: the development of formal intersystem coordination.”⁴⁴ But rather than moving in that direction, litigation’s opponents have succeeded in damping down filings in state and federal courts. For example, Congress enacted the Multiparty, Multiforum Jurisdiction Act of 2002, which authorizes defendants in large-scale state torts to remove cases to the federal courts; proponents of that legislation assumed that federal judges would be less hospitable to class actions than many state court judges.⁴⁵

During the past decades when entry to courts was more viable than it appears to be now, some federal and state judges worked directly together and, at times, sat together in the same courtroom, albeit legally in two different jurisdictions. Illustrative is the *Brooklyn Navy Yard Asbestos Litigation*, in which the Honorable Jack Weinstein of the Eastern District of New York and Justice Helen Freedman in New York State’s Supreme Court issued a 1990 co-authored opinion with two captions—one for each of their jurisdictions; their ruling was docketed independently in both.⁴⁶ In another case, two judges sat together to work on a settlement stemming from the collapse of a hotel skywalk in Connecticut; Judge Zampano of the U.S. District Court for Connecticut and Judge Frank Meadow of Connecticut’s Superior Court helped lawyers to shape an agreement embracing cases in state and federal court.⁴⁷

43. JAMES G. APPLE, PAULA L. HANNAFORD & G. THOMAS MUNSTERMAN, FED. JUD. CTR., MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS 31 (1997). As they explained:

The Mass Tort Litigation Committee (MTLC), a standing subcommittee of the Conference of Chief Justices, serves as the state counterpart to the federal JPML. Although it lacks the authority to command state courts to engage in coordinated pretrial activities, the MTLC accomplishes some of the same tasks as the JPML by facilitating voluntary cooperation among state courts. In addition to active involvement in ongoing cases (e.g., coordinating discovery and trial schedules), the MTLC acts as a communication and information network, developing performance standards and standardized procedures for managing complex litigation. It also advises state and federal organizations—e.g., the U.S. Congress and the Conference of Chief Justices—about the jurisdictional issues implicated by complex litigation.

Id.

44. *Id.*; see also NAT’L JUD. COLLEGE, RESOURCE GUIDE FOR MANAGING COMPLEX LITIGATION (2010); NAT’L CTR. FOR STATE CTS., FED. JUD. CTR., COORDINATING MULTIJURISDICTION LITIGATION: A POCKET GUIDE FOR JUDGES (2013) [hereinafter COORDINATING MULTIJURISDICTION LITIGATION].

45. Multiparty, Multiforum Jurisdiction Act of 2002, 28 U.S.C § 1369.

46. See *In re N.Y.C. Asbestos Litig.*, 123 B.R. 7 (E.D.N.Y. & S.D.N.Y. 1990). For discussion, see William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1705 (1992); *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Prop. and Judicial Admin. of H. Comm. on the Judiciary*, 102nd Cong. 53–54 (1992) (statement of Helen Freedman, J., N.Y. App. Div.).

47. Sam Howe Verhovek, *Pact Reached in Collapse of Building*, N.Y. TIMES (Nov. 16, 1988), <https://www.nytimes.com/1988/11/16/nyregion/pact-reached-in-collapse-of-building.html> [https://perma.cc/9UET-39F7].

Another example of border-connections comes from the Honorable Sam Pointer, who was the judge for *In re Silicone Gel Breast Implant Products Liability Litigation*.⁴⁸ Sitting in the federal court in Alabama, Judge Pointer interacted on a regular basis with more than two dozen state court judges. They held a joint *Daubert* hearing as well as regular conferences.⁴⁹ Judge Pointer also pioneered efforts to impose control over the MDL attorneys; he required contributions to what was termed the “common benefit fund” to fund joint discovery and to support the structure for proceeding on behalf of the group in the MDL.⁵⁰

All of the initiatives—like the Michigan fishing settlement’s governance structures—take money. France McGovern was able to secure government resources for MTLC. Yet federal funds for such efforts are sparse. In 2020, the State Justice Institute’s budget of \$6.6 million was far from adequate for the needs.⁵¹ While state courts deal with more than ninety percent of the country’s litigation, Congress has provided much more funding for administrative and educational support for the federal court system. In 2020, the budget for the AO was \$94.3 million, and Congress provided an additional \$30.4 million for the Federal Judicial Center. Absent significant new allocations from Congress for state court initiatives or success by the National Center for State Courts in attracting grants for such work, contemporary efforts at coordination across borders will likely be based in the federal courts.⁵²

The idea of more joint judicial work comes from people at the trial level who see litigants’ needs for responsiveness in courts. But such coordination is complex and raises serious legal questions that merit more than this brief essay can sketch. Judges talking with each other about parallel cases may well need rules, including that parties have access to information exchanged outside their presence among the judges. Further, issues of hierarchy lurk, as a federal court can have disproportionate informal authority over cases that are not “in” its jurisdiction. Thus, I flag only some of the many logistical, legal, economic, and political hurdles. These problems need to be addressed in an era of mature aggregation, just as we should explore more of federalism’s options and think about how

48. MDL No. 926 (N.D. Ala.).

49. *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 887 F. Supp. 1463 (N.D. Ala. 1995); COORDINATING MULTIJURISDICTION LITIGATION, *supra* note 44, at 10, for a discussion of joint *Daubert* hearings in federal and state court; APPLE, HANNAFORD & MUNSTERMAN *supra* note 43, at 128 for a sample comprehensive case-management order for consolidated cases.

50. Notice No. 27, Notice of Rights under Breast Implant Litigation, *In re Silicone Gel Breast Implants*, 887 F. Supp. 1463.

51. Budget data for 2020 comes from CONG. RSCH. SERV., R45702, OVERVIEW OF FY2020 APPROPRIATIONS FOR COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES (CJS) 16 (2020), <https://fas.org/sgp/crs/misc/R45702.pdf> [<https://perma.cc/2PCV-ZL5G>]. Budget data for 2019 comes from CONG. RSCH. SERV., R45237, OVERVIEW OF FY2019 APPROPRIATIONS FOR COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES (CJS) 17 (2019), <https://fas.org/sgp/crs/misc/R45237.pdf> [<https://perma.cc/U5Q5-7QUW>].

52. CONG. RSCH. SERV., R45964, JUDICIARY APPROPRIATIONS, FY2020 11 (2020), <https://fas.org/sgp/crs/misc/R45965.pdf> [<https://perma.cc/6Q35-NJK8>].

federal MDLs, bankruptcy, and litigation in state courts (in and outside of state MDLs) can intersect productively so that judges and lawyers, including state attorneys general, can collaborate.⁵³

The Great Lakes fishing litigation underscores another facet of federalism, which is the need to probe the constructs of “state” and “Indian tribe” to identify distinct interests within each. McGovern learned that neither the tribes nor Michigan had singular concerns, nor were they fixed. Preferences are not exogenous nor static, but formed through multifaceted exchanges.⁵⁴ Moreover, to conceptualize states, cities, Indian tribes, and other subunits as discrete actors is to miss that many of their activities are embedded in and related to translocal and transnational social movements and organizations.

The Michigan fishing litigation involved that state, three Indian tribes, the federal government, and several private parties. Another example of a configuration crossing sovereign lines comes from the problems of acid rain affecting the Great Lakes, subunits of the United States and of Canada; coordination among those entities illustrates that acid rain, pollution, and wildlife do not stop at jurisdictional borders.⁵⁵ Moreover, dozens of cross-border, translocal organizations play roles in shaping national and local agendas. I have already mentioned the National Center for State Courts, a private entity supporting the work of state judiciaries. Parallels include the U.S. Conference of Mayors, the National League of Cities, the National Association of Attorneys General, and many more. These translocal organizations of governmental actors (TOGAs is my shorthand) gain power because their members hold particular public positions.⁵⁶ I have elsewhere detailed the roles played by TOGAs as norm entrepreneurs and information distributors.⁵⁷ Looking to enlist TOGAs to contribute to aggregations would be one way to help bring a range of concerns to bear on problems that span the country.

Reconfiguring expectations about resolutions is the other lesson to emphasize here, again drawing on McGovern’s work on the fishing conflicts in Michigan. He focused on achieving a fifteen-year agreement rather than trying to gain assent to an agreement governing a longer period. Doing so was plainly pragmatic, as the parties may well have refused to commit to more. A time frame was (and can

53. See Zachary D. Clopton & D. Theodore Rave, *Opioid Cases and State MDLS*, Clifford Symposium DePaul (forthcoming 2021); see also Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. (forthcoming 2021); D. Theodore Rave & Zachary D. Clopton, *Texas MDL*, 24 LEWIS & CLARK L. REV. 367 (2020). Exploration of judicial innovation in MDL can be found in Abbe Gluck and Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021).

54. See Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s)*, 17 JUS POLITICUM 209 (2017).

55. Great Lakes Water Quality Agreement of 1972, Can.-U.S., Apr. 15, 1972, 23 U.S.T. 301; Great Lakes Water Quality Agreement of 1978, Can.-U.S., Nov. 22, 1978, 30 U.S.T. 1383.

56. I discuss these organizations and their agendas in Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008).

57. *Id.*

often be) useful because it built in a way to respond to changing needs. And indeed, even within those fifteen years, conflicts emerged.

About half way into the fifteen-year term, Michigan returned to court and argued that the Grand Traverse Band of Ottawa and Chippewa Indians had breached their obligation not to use gill nets; the tribes countered that the state had breached its obligation to provide alternatives.⁵⁸ Judge Enslen agreed in part with both sides; he ordered an end to gill net fishing and that the state help develop an alternative.⁵⁹ According to one account, four years thereafter, no viable alternative had come into being.⁶⁰ The discord was one of several, including conflicts over salmon fishing rights.⁶¹ Nonetheless, and in part through what had been put into place in 1985, the parties entered into another agreement in 2000 that had a twenty-year time span. (As of this writing, the court had authorized more time for negotiations.⁶²)

The Great Lakes fishing accord (and its discord) underscored that shaping workable agreements is hard and that quests for global and even partial peace may miss both immediate needs and the difficulties of foreseeing shifts in those needs. One way to respond is to rethink the federal procedural rules governing aggregation. As I argued in an essay commemorating the fiftieth anniversary of the 1966 Rule 23 class action, the contours of Rule 23 should be reconsidered. The 1960s drafters could not know what we, who have worked in their wake, have come to understand. The Rule's template of a two-step process—certify and settle—misses that large-scale litigation (whether via class actions, multi-district litigation, or other modes of aggregation) often entails three steps, with a third phase after whatever resolutions are forged.⁶³ Even as the Great Lakes fishing litigation built in reconsideration, issues arose along the way. That case is but one example of many instances in which facets of an agreement are revisited after a settlement is entered.

When drafting Rule 23 in the 1960s, rule makers assumed a unity of interest within a plaintiff class. Worried about the legitimacy of representative actions, the drafters took solace in their confidence that judges could identify a group in

58. Order No. M 26-73, *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich., Oct. 19, 1992), discussed in Karen Ferguson, *Indian Fishing Rights: Aftermath of the Fox Decision and the Year 2000*, 23 AM. INDIAN L. REV. 97, 134–35 (1998).

59. Order No. M 26-73, *supra* note 58; *see also* William Rastetter, *The Grand Traverse Band of Ottawa and Chippewa Indians Our Opinion*, TRAVERSE CITY RECORD EAGLE, Sept. 28 1997 at E11 (quoting the court's 1990 transcript ruling). On October 19, 1992 and June 26, 1992, the Court prohibited gill net fishing. The June 26, 1992 ruling also ordered that the Grand Traverse Band, in lieu of gill net fishing, shall "participate with the State of Michigan in a project to determine the feasibility of small-boat impoundment fishing." Order, *United States v. Michigan*, No. 2:73-cv-00026-PLM (W.D. Mich. Jun 26, 1992), ECF No. 1092; *see also* Order, *United States v. Michigan*, No. 2:73-cv-00026-PLM (W.D. Michigan, Oct. 19, 1992), ECF No. 1109. A series of reports (from the years 1992, 1993, and 1995) detailed these experiments.

60. Ferguson, *supra* note 58, at 136–37.

61. *Id.* at 137–42.

62. Details of the conflicts after the settlement in the mid-1980s and of the renegotiation underway, as of this writing, are in note 28, *supra*.

63. Resnik, *Reorienting the Process Due*, *supra* note 39, at 1018.

which a “homogeneity of interests” existed.⁶⁴ Their examples included customers overcharged by a utility and children in segregated schools. Assuming the ability of federal courts to perceive when interests were sufficiently aligned to permit group-based litigation, the drafters outlined how judges ought to assess requests for certification at the outset and then again when a case ended, so as to reaffirm the propriety of class treatment.

That two-step process recognized in part that the interests of groups dealt with in the aggregate were not necessarily fixed over the lifespan of a litigation and that lawyers for the class needed oversight. The 1966 Rule 23 therefore required judges to interrogate the homogeneity of interests at the time of certification and then to return to that question at settlement. Amendments in 2003 expanded the role of courts at certification and at settlement by charging judges with appointing counsel for the class, by outlining rules for the award of attorneys’ fees, and by enlarging the possibilities for interlocutory appeals.⁶⁵ Amendments in 2018 again wrote more detail into the contours of oversight at settlement.⁶⁶ Yet thereafter, Rule 23 (originally in 1966 and in subsequent amendments) falls silent; it puts no obligations on judges—or lawyers—to continue working to oversee the remedies provided through settlements, to deal with disputes that may arise, or to require public accountings for what transpires.⁶⁷

Given that litigants and that courts depend on aggregation, revisions of Rule 23 are needed to reconfigure the expectations of courts and parties about what “resolution” means. A few judges have exercised authority that ought to be spelled out in rules—that jurisdiction must continue to ensure remedial efficacy and to take into account the possibility of some forms of reconsideration.⁶⁸ Doing so is not exotic, but a part of the federal common and statutory law of preclusion in a variety of areas. Indeed, the potential to revisit outcomes of class action litigation was in discussion in the 1960s, when the drafters of Rule 23 debated

64. CONG. INFO. SERVS., MODIFICATIONS OF THE PROVISIONS FOR CLASS ACTIONS, APPENDED TO TENTATIVE PROPOSAL TO MODIFY PROVISIONS GOVERNING CLASS ACTIONS, RULE 23, at EE-11 n.5 (1962). This preliminary memorandum was referenced in a related memo, “Class Actions—Some Further Thoughts,” which has a handwritten note “August 1962,” at its top; the Further Thoughts memo noted that the Modifications memo had been provided in advance of the May 28-29, 1962 meeting of the Advisory Committee of Civil Rules, drafting Rule 23. *See* Class Actions—Some Further Thoughts 1 (Aug. 1962), from the papers of Professor Kaplan archived in the Historical and Special Collections of the Harvard Law Library, at Box 75, folder 5 in the Benjamin Kaplan Papers, 1939–2010, at the Historical and Special Collections of the Harvard Law Library.

65. *See* FED. R. CIV. P. 23(g), 23(h), 23(f), *reprinted in* 215 F.R.D. 158 (2003).

66. *See* FED. R. CIV. P. 23(e), as amended in 2018 to provide a list of factors to consider for evaluating settlements and including “the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.”

67. Some districts do make reference to these issues in their local rules. *See, e.g., Procedural Guidance for Class Action Settlements*, U.S. DIST. CT. N. DIST. OF CAL. (Dec. 5, 2018), <https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/> [<https://perma.cc/4X2A-Y55J>].

68. Putting these provisions into rules is especially important in light of a prevailing narrow interpretation of the equitable authority of judges under the rules. *See, e.g., United States v. Carlisle*, 517 U.S. 416 (1996); *see also In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020).

whether their rule should require or suggest that potential class members receive notice. The drafters puzzled about whether a class action rule could bind one side but not the other. Focused on misbehavior by defendants such as utility companies, the drafters considered whether only a defendant in a class action would be precluded from subsequently contesting the first ruling, while plaintiff class members might not be barred from bringing claims again.⁶⁹

Currently, several kinds of cases leave open the possibility for change. Decisions on child custody and on support routinely provide for reconsideration as children age and if family circumstances alter. On the criminal side, the writ of habeas corpus recognizes the potential (rare under current doctrine and statutes) that judges need to revisit convictions and sentences. Civil rights injunctions are another example, as the U.S. Supreme Court has crafted a distinctive approach licensing modification of some kinds of injunctions in light of events subsequent to their entry.⁷⁰ In the Prison Litigation Reform Act of 1996, Congress built in obligations to end or reconsider resolutions in lawsuits involving unconstitutional prison conditions.⁷¹ The long litigation related to the harms of Agent Orange provides another illustration, albeit one in which efforts to alter the agreement were rebuffed despite the emergence of new information about the harms of that poison.⁷² These examples reflect that the common law doctrine of preclusion has been and can be tempered in light of the needs of litigants in context-specific settings to enable judges to return to decisions or settlements.⁷³

Large-scale litigation has a long tail. We have learned from more than six decades of complex litigation like the Michigan fishing dispute and in a range of other aggregate proceedings that the conflicts among the parties and within classes or subgroups do not always stop when a settlement is achieved. Resolutions reflect that reality, as decisions and agreements often build in special masters and compliance monitors; in cases involving economic relief, a parallel set of auxiliary personnel oversee implementation. Disagreement about terms often arise, and plaintiffs and defendants may return to court to seek enforcement. Thus, for those focused on civil rights and prisoner class actions, this third phase of litigation, complete with public scrutiny of the decisions made, is familiar. Yet the incentives to return to court in cases resulting in large

69. I provide more analysis of that discussion in Judith Resnik, “*Vital State*” Interests, “*Vital*” State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts, 165 U. PA. L. REV. 1765, 1790–96 (2017).

70. See *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992); *Horne v. Flores*, 577 U.S. 433 (2009).

71. Prison Litigation Reform Act § 801, 42 U.S.C. § 1997e (2012).

72. See *Ivy v. Diamond Shamrock Chemicals Co.*, 510 U.S. 1140 (1994); *Hartman v. Diamond Shamrock Chemicals Co.*, 510 U.S. 1140 (1994); see also *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1430 (2d Cir. 1993); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 902, 912–14 (D.N.Y. 1991).

73. Preclusion also requires specific inquiries into what was and what was not litigated. See *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, 140 S. Ct. 1589 (2020)

monetary settlements are different. Defendants seeking economic closure have few incentives to raise questions about the distribution of remedies.⁷⁴

Nonetheless, some mass tort or economic injury cases have included ongoing remedies with post-settlement oversight in place. For a period of time, heart valve product defect lawsuits included medical monitoring remedies.⁷⁵ The Agent Orange settlement provided for social services for veterans.⁷⁶ More recently, Judge Vince Chhabria, sitting in the Northern District of California, has in a few cases structured an ongoing relationship of the litigants to the court. In a class action settlement brought by people working with Lyft and seeking monetary relief, Judge Chhabria conditioned his approval on a series of post-settlement accountings.⁷⁷ In one such order, plaintiffs' counsel was instructed to provide the judge with a "notice of completion of duties," to be filed after the final distribution of payments, and to include the total amount distributed, the number of class members to whom payments were sent, the amounts paid, the checks cashed, and discussion of the issues that had arisen.⁷⁸ In another, dealing with a class of potentially more than three million people, challenging the charges imposed for some fifteen years by Wells Fargo, Judge Chhabria issued what was styled an "order granting final approval, service awards, and attorneys' fees" approving the establishment of a \$142 million fund.⁷⁹ That order directed that, "[w]ithout affecting the finality of this Judgment, the Court reserves jurisdiction over the Class Representatives, the Settlement Class, and Defendants as to all matters concerning the administration, consummation, and enforcement of the Settlement Agreement."⁸⁰ Yet another example comes from pending litigation about the methodology used by CIGNA, found to have harmed employee pension plans, in its reformation of those plans; the plaintiff-class has called for a post-judgment accounting and court oversight.⁸¹

74. For a discussion of defendants' absence, see Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165 (2020).

75. See generally Kenneth S. Abraham, *Liability for Medical Monitoring and the Problem of Limits*, 88 VA. L. REV. 1975 (2002); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002).

76. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 851 (D.N.Y. 1984), *aff'd sub nom. In re Agent Orange Prod Liab. Litig.* MDL No. 381, 818 F.2d 145 (2d Cir. 1987).

77. See Order Requiring Notice of Completion of Duties, *Cotter v. Lyft*, 176 F.Supp.3d 930 (N.D. Cal. April 6, 2018).

78. *Id.*

79. *Jabbari v. Wells Fargo & Co.*, No. 15-CV-02159-VC, 2018 WL 11024841 (N.D. Cal. 2018); Revised Order Document 271 Granting Final Approval of Class Action Settlement, Approving Service Awards, and Awarding Attorneys' Fees and Expenses at 15, *Jabbari*, No. 15-CV-02159-VC (N.D. Cal. June 14, 2018).

80. *Id.*

81. See Order Denying 591 Motion for Accounting, *Amara v. CIGNA Corp.*, No. 3:01-cv-02361 (D. Conn. Aug. 6, 2020), Doc. No. 606; Order Denying 607 Motion for Clarification, *Amara*, No. 3:01-cv-02361 (D. Conn. Sep. 10, 2020), Doc. No. 609; Brief and Special Appendix of Plaintiffs-Appellants in No. 20-3219, *Amara v. Cigna Corp.*, No. 20-3219 (2d. Cir. Feb. 4, 2021).

In short, this third phase exists in some cases, and it needs to be institutionalized and regularized through rules that organize roles for the parties, the lawyers, and the judges. To sustain lawyers' involvement during this third phase entails shaping new incentives; to do so, judges are needed to oversee what Sam Issacharoff has called the "equitable administration of justice."⁸² For example, in some aggregations, a leadership team (the Plaintiff Steering Committee or other such appellations for these ad hoc law firms) is one part of a larger configuration, including individually-retained plaintiffs' attorneys filing the cases initially (IRPAs, as Denny Curtis, Deborah Hensler, and I once called them).⁸³ When IRPAs are involved and if individualized work is needed,⁸⁴ structured fee awards could link payments to IRPAs for client-centered work during this third phase when lawyers need to help clients receive relief within a settlement structure.⁸⁵ As I also noted, evidence of defendants' involvement in implementation in such cases is scarce. Indeed, defense lawyers often become invisible post-settlement. Yet implementation ought not be solely the province of plaintiffs' lawyers. Courts can fashion obligations for defendants to cooperate and, when possible, lower transaction costs of remedies. Approval of agreements could require joint work and post-settlement accountings from all lawyers of their efforts to implement remedies.

IV

GENERATING ONGOING RELATIONSHIPS AMONG LITIGANTS AND COURTS: A HOMAGE TO FRANCIS MCGOVERN

Return then to fishing in the Great Lakes, the 1980s and the decades thereafter. The 1985 *Michigan* consent agreement had a series of implementation provisions, and the 2000 successor agreement had yet more. With all the committees and structures, the parties nonetheless returned frequently to court. Rather than bemoan those interactions, they ought to be appreciated as exemplary of complex remedies for hard problems. Once an agreement has been reached, the parties and the courts should expect that implementation would generate new information and with it, that more disagreement can emerge. And,

82. Samuel Issacharoff, *Rule 23 and the Triumph of Experience*, 84 LAW & CONTEMP. PROBS., No. 2, 2021, at 161, 182.

83. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 300 (1996); see, e.g., *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605 (1st Cir. 1992); *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 300 (1st Cir. 1995).

84. See Order Denying Non-Class Counsel's Motions for Attorneys' Fees, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2017 WL 1474312, at *1 (N.D. Cal. Apr. 24, 2017). Judge Charles Breyer denied "244 motions for attorneys' fees and costs filed by attorneys who did not serve as Class Counsel . . . [b]ecause Volkswagen did not agree to pay these fees and costs as part of the Settlement, and because Non-Class Counsel have not offered evidence that their services benefited the *class*, as opposed to their individual clients." *Id.* Such lawyers could, of course, recoup fees from individual clients with whom they had retainers. *Id.*

85. See Baker and Herman, *supra* note 37.

whether discord emerges or not, and whatever forms remedies take, court oversight is needed to ensure distributional fairness and to facilitate public access to the processes and outcomes of these large-scale cases.

Francis McGovern wisely helped to shape a fifteen-year aspirational agreement that, even within that time, proved fraught with discord. What he brought into being was a partial peace that created a path to ongoing negotiations and less violent interactions among the various parties. His goals ought to be our goals: to ease the tensions and to find ways to respond to harms through legal structures that put people into ongoing relationships in which they work together. The many lawsuits that generate ongoing relationships among disputants under the umbrella of consent decrees with a range of remedies are marks of Francis McGovern's contributions.