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FROM JUSTICE TO GLOBAL PEACE: A (BRIEF) GENEALOGY OF THE CLASS ACTION CRISIS

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"The apple doesn't fall far from the tree . . . ."[1]

I. INTRODUCTION

Not that long ago, class actions were hailed as a "powerful and versatile tool" for expanding access to justice, especially in the areas of consumer and civil rights.[2] The class action device was "versatile" in expanding access because, through the aggregation of individual claims, it became economically efficient to bring litigation that would have been too expensive for individuals to pursue on their own. And class actions were "powerful" because of the impact that aggregating claims had on defendants.[3]

Today, however, the conventional wisdom is that there is a class action "crisis."[4] A fair amount of the critique has been heaped on the

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1. Ancient proverb.

2. Darren Carter, *Notice and the Protection of Class Members' Interests*, 69 S. CAL. L. REV. 1121, 1121 (1996).

3. *Id.*

4. *See, e.g.*, Center for Individual Freedom, State Class Action Crisis Continues with Microsoft, http:/www.cfif.org/htdocs/legal_issues/archive/legal_updates_microsoft.htm (last visited Nov. 28, 2005); *see also* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 49–51 (2000); Helen Dewar, *Senate Republicans Seek to Limit Class-Action Suits*, WASH. POST, July 6, 2004, at A2 (quoting Senator Charles E. Grassley, "The reality is that the class action system is broken and we should do something about it."); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343 (2005); Charles W. Wolfram, *Mass Torts-Messy Ethics*, 80 CORNELL L. REV. 1228 (1995).

plaintiffs' lawyers who bring class action lawsuits,[5] but plenty of blame has been laid on the courts as well.[6] At the heart of the perceived "crisis" is a sense that class action litigation enriches lawyers without providing any real benefit to society.[7] Perhaps because of this perception, there have been policy prescriptives for the "crisis." These include proposals to place caps on the fees awarded to plaintiff's class counsel, and to limit class actions to cases in which a judge determines that the overall benefit of the litigation to the class outweighs the cost of the litigation.[8]

The aim of this Article is not to debate the merits of the recent class action legislation, nor to argue for or against the various other proposals that are now pending. Instead, I intend to explore a different question—how a procedural device that, at one time, was praised widely for its efficiency in increasing access to justice for those whose claims would otherwise go unheard has more recently become the focal point of an apparent legal "crisis."

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5. *See, e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77 (2003); Wolfram, *supra* note 4, at 1231.

6. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (responding to concerns about class actions in state courts by moving many state court class actions into federal court). For a summary of the new law, see Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 CONSUMER FIN. L. Q. REP. 11 (2005).

7. *See* 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); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000).

8. In 1996, for example, a group of business leaders proposed changes to the Federal Rules Committee that would have allowed a judge to refuse to certify a class action if the judge determined that the probable relief to individual class members did not justify the costs and burdens of class litigation. *See, e.g.*, H. Thomas Wells, Jr., *Fine-Tuning Class Action Roles: The Anatomy of a Change in Procedure*, BUS. L. TODAY, May–June 1998, at 40; Letter from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Honorable Alicemarie H. Stotler, Chair, Standing Committee on Civil Rules of Prac. & Proc. (Dec. 8, 1997) (on file with Loyola of Los Angeles Law Review); *see also* TEX. CIV. PRAC. & REM. CODE § 26.003(b) (Vernon 2005) (requiring attorneys in so-called "coupon" settlements to be paid in the same form as their clients).

How did we get from there to here? And why has this transformation proved to be so unsatisfactory? I will argue that to understand the roots of today's "crisis" in class action law, we must explore its genealogy. Put differently, we must trace the transition of the class action device from its heyday in the late 1960s and 1970s, when it was used primarily for the resolution of civil rights and other small consumer claims, to its current incarnation as a vehicle for a wide variety of mass settlements, including, most problematically, personal injury claims.

A genealogy, rather than a simple history, is useful for understanding the "crisis" because, in contrast to a more conventional historical analysis, genealogy emphasizes transition and the points at which key transitions occur.[9] Indeed, genealogies are particularly useful for understanding transformations in cultural narratives and for tracking changes in the relationships of power that both emanate from, and give rise to, new cultural understandings.[10] A complete genealogy of the class action "crisis" would, of course, take up several volumes. While a worthwhile endeavor, the focus here will be on the *Agent Orange* litigation, a series of cases viewed by many as a turning point in class action law.[11]

In 1984, Judge Jack Weinstein made class action history when he used class action law to resolve the personal injury claims of tens of thousands of veterans who were exposed to Agent Orange during their service in Vietnam.[12] Under the terms of the settlement, all veterans who had been exposed to Agent Orange, including so-called "future" victims who did not yet know that they were injured, were included in a class-wide resolution of the case.[13] The result was that

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9. *See Genealogy*, *in* THE COLUMBIA DICTIONARY OF MODERN LITERARY AND CULTURAL CRITICISM 122, 122 (Joseph Childers & Gary Hentzi eds., 1995) (distinguishing history from genealogy on the ground that the latter focuses more on "ruptures" and moments of "discontinuity" rather than a continuing pattern of development).

10. *See, e.g.*, Michael McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113 (2002).

11. *See generally* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1987) (examining the legal strategies involved in the Agent Orange cases and their effect on the development of the mass toxic tort).

12. *In re* "Agent Orange" Prod. Liab. Litig. (*Agent Orange I*), 611 F. Supp. 1396 (E.D.N.Y. 1985).

13. *Id.*

the veterans forfeited their right to sue as individuals in exchange for compensation from a private claims processing system administered by the defendants.[14]

Weinstein's move represents an important transition point in class action law. Specifically, in subsequent years, many creative lawyers and judges facing overcrowded courts followed *Agent Orange* and used the class action device to funnel mass tort cases into private claims processing systems.[15] These developments, I will argue, changed how we think about class actions in fundamental ways that contributed to the current perception of a "crisis" in class action law.

What follows is divided into four parts. Part I introduces the notion of genealogy as a method. Part II provides a brief genealogy of the class action "crisis" by describing the *Agent Orange* litigation, and its progeny, in the context of class action law developments. Part III draws on this brief genealogy to argue that this branch of the class action family tree has emphasized economics over access, with problematic results. Instead of ensuring increased access to justice for undercompensated victims, class actions are now viewed primarily in terms of their ability to resolve large numbers of claims quickly and cheaply. This shift, in turn, has fueled the current "crisis" in class action law.

Finally, Part IV concludes that to reclaim the historic role of class actions as a vehicle for justice, we must place more emphasis on access and less on judicial economy and "global peace." This can be achieved in a variety of ways, but especially by protecting the rights of both future and present victims to have their day in court.

II. GENEALOGY AS METHOD

This Article proposes to conduct a partial genealogy of the apparent "crisis" in class action law. Why genealogy? What does it

14. *Id.* at 1417.

15. *See, e.g.*, *In re* A. H. Robins Co., 880 F.2d 709 (4th Cir. 1989) (Dalkon Shield); Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995) (asbestos), *In re* Copley Pharm. Inc., 161 F.R.D. 456 (D. Wyo. 1995) (albuterol); Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995) (tobacco); *In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *1 (N.D. Ala. 1994) (breast implants); Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (asbestos).

offer that a simple historical or doctrinal analysis does not? Genealogy as a method was first practiced by Nietzsche, whose *Genealogy of Morals* sought to understand the conditions under which we construct our judgments about good and evil.[16] More recently, Michel Foucault adopted many of Nietzsche's methods in his explorations of madness, sexuality and punishment.[17] Foucault explained genealogy as a form of historical analysis that approaches history with an emphasis on discontinuities and chance happenings rather than an inevitable march (or linear succession) toward a particular end or "origin."[18]

One of the key advantages of genealogy as a method is that it considers the complexity of the broad social and political context in which ideas and concepts become more widely accepted.[19] Put differently, genealogy aims to expose certain aspects of history such as particular social interactions or political agendas that have been obscured or neglected. For example, a genealogical approach to the history of reason, Foucault suggests, would reveal that it arose from a variety of factors including personal conflicts among scholars and a "spirit of competition."[20] In a similar way, a genealogy of the class action "crisis" necessarily takes into account the broader social and political context in which the reconfiguration of class actions is taking place.

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16. FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS 151 (Francis Golffing trans., 1956).

17. *See* MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON, (Richard Howard trans., 1965); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION (Robert Hurley trans., 1978) [hereinafter FOUCAULT, HISTORY OF SEXUALITY]; MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Pantheon Books 1977).

18. *See generally* Michel Foucault, *Nietzsche, Genealogy, History*, *in* THE FOUCAULT READER 76, 76–100 (Paul Rabinow ed., Pantheon Books 1984) [hereinafter Foucault, *Genealogy*].

19. As Wendy Brown explained, "genealogy permits an examination of our condition that calls into question the very terms of its construction." WENDY BROWN, POLITICS OUT OF HISTORY 95 (2001).

20. Foucault, *Genealogy*, *supra* note 18, at 78 (noting that "devotion to truth and the precision of scientific methods arose from the passion of scholars, their reciprocal hatred, their fanatical and unending discussions, and their spirit of competition—the personal conflicts that slowly forged the weapons of reason").

Finally, genealogy is attentive to relationships of power and, in particular, to the ways in which power is dispersed. For Foucault, power is "not something that is acquired, seized, or shared," nor is it embodied in particular institutions or structures.[21] Instead, power is best understood as something that is "exercised from innumerable points" and deeply implicated with social relationships of all kinds.[22] It is precisely because of this that a genealogy, which pays close attention to discontinuities in cultural understandings and relationships, is helpful to understanding how we came to view class actions as posing a "crisis" in the legal system. Put differently, genealogy does not simply tell a story. Rather, it tries to get at the story behind the story, in ways that a simple historical or doctrinal analysis cannot.[23]

III. A BRIEF GENEALOGY OF THE CLASS ACTION CRISIS

"Genealogy is gray, meticulous, and patiently documentary."[24]

The class action is a procedural device that permits the aggregation of individual claims under certain conditions. Before it made its way into the Federal Rules of Civil Procedure, it was an "invention of equity" that responded to the concern that "mere

21. FOUCAULT, HISTORY OF SEXUALITY, *supra* note 17, at 93–94.

22. *Id.* at 94.

23. The class action crisis might also be analyzed in narrative terms. *See generally* GERARD GENETTE, NARRATIVE DISCOURSE: AN ESSAY IN METHOD (Jane E. Lewin trans., 1980) (explaining that the common use of the term "narrative" connotes three different meanings and must be distinguished. Genette proposes the use of different labels: "story" to describe the narrative content; "narrative" to refer to the statement, discourse or narrative text itself, and "narrating" for the narrative action and real or fictional situation in which that action takes place. Genette argues that only analysis of the "narrative" informs us of both the events that it recounts and the activity that supposedly gave birth to it.). According to this type of analysis, we might view the class action crisis as emerging from a number of counter-narratives at odds with the original vision of the class action device as a tool for expanding access to justice. *Id.* If that were the case, however, then it would be important to know how and why certain narratives became dominant and others did not. Narrative analysis is less useful for answering this question because it all but removes the subject from the analysis. Genealogy, in contrast, allows us to consider the actions of various subjects (albeit with limited subjectivities) such as powerful lobbies which played a role in the reconfiguration of class action narratives.

24. Foucault, *Genealogy*, *supra* note 18, at 76.

numbers" would preclude the workings of justice.[25] When the Federal Rules were adopted in 1938, the availability of the class action was extended to all actions.[26] It was not until 1966, however, when the federal class action rule was amended extensively, that class actions became an important procedure that significantly expanded access to justice for claims that might otherwise have gone unheard.[27]

Among other things, the amendments allowed class actions to be brought for injunctive and declaratory relief and for damages when "questions of law or fact" predominated over individual considerations.[28] The Advisory Committee for the Federal Rules of Civil Procedure described the changes as motivated by two concerns. The first had to do with increasing judicial economy by reducing the number of unnecessarily duplicative actions.[29] The second involved a desire to "provide [a] means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[30] In other words, the aim of the Committee was to expand access to justice "even at the expense of increasing litigation."[31]

By the mid-1970s, class actions had become much more commonplace. Some commentators began to herald the development of "public law litigation"[32] in which class actions played a prominent role in the enforcement of consumer and civil rights-based claims. The vast majority of these cases relied almost exclusively on the provisions of class action law that permitted class

25. Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

26. *See* Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 132 (2003).

27. *See generally id.* at 133–39 (noting that 1966 amendments "provide means for vindicating the rights of people who individually lack effective strength to bring their opponents into court").

28. FED. R. CIV. P. 23(b)(2)–(3).

29. *See* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1968–1969).

30. *Id.*

31. *Id.*

32. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

actions to be brought for injunctive and declaratory relief.[33] Moreover, during these years it was widely assumed that the class action device would be inappropriate for most cases involving damage claims, such as personal injury litigation.[34]

In the mid-1980s, however, all this began to change and by 2003, a very large percentage of class actions involved damage claims.[35] Even more surprising, many of these class actions involved personal injury claims which had previously been considered unsuitable for class action treatment.[36] Some commentators have argued that this change was a result of a variety of cultural and social factors including developments in the mass media, lawyer advertising, and changes in the structure of the plaintiff's bar.[37] There is a little doubt, however, that one of the key "ruptures"[38] in this historical timeline was the *Agent Orange* litigation.

A. The Agent Orange Story

Agent Orange is a powerful weed killer that was used by U.S. troops during the Vietnam War to destroy crops and jungle which provided cover for the Vietcong. Many varieties of weed killer were used in Vietnam but Agent Orange was used the most.[39] By 1971, when it was no longer used, Agent Orange had been sprayed over as much as one-tenth of South Vietnam and in parts of Cambodia.[40] Today, some thirty-five years later, the ground in Vietnam remains contaminated with Agent Orange residue.[41]

As early as 1952, the manufacturers of Agent Orange and U.S.

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33. *See* FED. R. CIV. P. 23(b)(2)–(3); *id.* at 1292.

34. *See generally* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344–53 (1995)(describing the evolution of mass tort class action usage).

35. Sherman, *supra* note 26, at 134–35.

36. *See* Coffee, Jr., *supra* note 34.

37. *See, e.g.*, Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1013 (1993).

38. *See* MICHEL FOUCALT, THE ARCHAEOLOGY OF KNOWLEDGE 4 (A.M. Sheridan Smith trans., Pantheon Books 1972) (1969).

39. SCHUCK, *supra* note 11, at 17 (noting that Agent Orange amounted to 60% of all herbicides used in South Vietnam).

40. *The Legacy of Agent Orange*, BBC NEWS, Apr. 29, 2005, http://news.bbc.co.uk/2/hi/asia-pacific/4494347.stm.

41. *Id.*

army officials became aware that Agent Orange was contaminated with dioxin, a toxic substance associated with chloracne (a severe but treatable skin condition), respiratory irritation, cancer and other adverse health effects.[42] Since that time, the particular dioxin found in Agent Orange has been described as "perhaps the most toxic molecule ever synthesized by man."[43] In fact, a disproportionately large number of Vietnamese children born where spraying occurred are born with mental and physical defects.[44] A Japanese study found that children were three times more likely to be born with cleft palates or extra fingers and toes.[45] These children are also highly susceptible to cancer and disease.[46]

To date, no successful litigation has been brought on behalf of the Vietnamese and Cambodians.[47] In 1984, however, in response to litigation that was brought in state and federal courts across the country, chemical companies paid $180 million into a fund for U.S. veterans and some civilians.[48] The settlement represented resolution of the claims of some 2.4 million veterans and their families from the U.S., Australia and New Zealand, and a relatively smaller number of civilians.[49] As such, it is one of the largest mass torts to have faced American courts (dwarfed only by the asbestos litigation), and the settlement was the largest tort settlement in history at that time.[50]

The *Agent Orange* litigation began as individual litigation based on the health problems traceable to Agent Orange exposure brought on behalf of a number of veterans and their families. One of these cases was brought on behalf of the family of Paul Reutershan, who had worked on a resupply helicopter in Vietnam and had flown

42. SCHUCK, *supra* note 11, at 17.
43. *Id.* at 18.
44. *The Legacy of Agent Orange*, *supra* note 40.
45. *Id.*
46. *Id.*
47. In 2005, a U.S. federal judge dismissed a case brought on behalf of the Vietnamese because the use of Agent Orange at the time did not violate international law. The case has been appealed. *In re* "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005); *Agent Orange Legal Case Dismissed*, BBC NEWS, Mar. 10, 2005, http://news.bbc.co.uk/2/hi/americas/4336941.stm.
48. *The Legacy of Agent Orange*, *supra* note 40.
49. SCHUCK, *supra* note 11, at 4–5.
50. *Id.* at 5.

through clouds of Agent Orange during spraying.[51] In 1978, Reutershan died of cancer, which he and his family attributed to his exposure to Agent Orange.[52] Reutershan's family helped form a nonprofit organization called Agent Orange Victims International (AOVI).[53] AOVI recruited an attorney named Victor Yannacone to not only help litigate Reutershan's case, but also to expand the scope of the litigation.[54]

Yannacone agreed to try and convert the case into a class action on behalf of all veterans who had been exposed to Agent Orange.[55] The hope was that, by doing so, AOVI would be able to bring much more attention to the issue.[56] The tactic worked. From the moment the class action was filed, the media began to cover the case quite closely.[57] The lawsuit named Dow and Monsanto (manufacturers of Agent Orange) and several other chemical manufacturers as defendants.[58] In the original complaint, Yannacone defined the class as "all those so unfortunate as to have been and now to be situated at risk, not only during this generation but during generations to come."[59]

Although the U.S. government had clearly been involved in the spraying of Agent Orange in Vietnam, it was not named as a defendant for both legal and political reasons. The legal reason for leaving the U.S. out of the case can be attributed to the doctrine of sovereign immunity, which very likely protected the government from liability for the veterans' injuries.[60] The political reason stemmed from the patriotism of AOVI members who were reluctant to sue the government for which they had risked their lives.[61]

After the class action was filed, the Judicial Multidistrict

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51. *Id.* at 37.
52. *Id.*
53. *Id.* at 38.
54. *Id.* at 42–44.
55. *Id.*
56. *Id.*
57. *Id.* at 45.
58. *Id.*
59. *Id.*
60. Under the doctrine of sovereign immunity, the government usually cannot be sued without its consent. *Id.* at 58. Further, under the *Feres* doctrine, this immunity extends to all injuries which arise out of military service. Feres v. U.S., 340 U.S. 135, 146 (1950).
61. SCHUCK, *supra* note 11, at 59–60.

Litigation panel consolidated all Agent Orange cases across the country and removed them to a federal court in Uniondale, New York, where Yannacone was named lead counsel for the plaintiffs.[62]

The case posed enormous legal challenges. For instance, the plaintiffs needed to prove that Agent Orange had actually caused the injuries experienced by the veterans and their families. In addition, exposure took place during wartime. Although the manufacturers of Agent Orange were not directly immune from suit under the doctrine of sovereign immunity, they argued they were not liable because they had manufactured Agent Orange at the direction of the federal government for its use during war.

A different sort of problem was posed by the fact that the class action included cases brought on behalf of veterans who lived all over the country. These cases were arguably subject to the laws of the different states, in which the plaintiffs lived, thereby making any attempt to actually try the Agent Orange class action an unwieldy litigation nightmare.

Because the immunity of the manufacturers turned on several factual questions, the district court delayed ruling on that issue.[63] Early in the case, however, the court solved the question of whether the laws of all fifty states should apply to the class action by ruling that federal common law applied to the case.[64] Because this made the case much easier to try, it was widely viewed as a major victory for the plaintiffs. The Second Circuit, however, reversed this point, declaring that federal common law could not be applied to the case.[65]

Meanwhile, discovery proceeded, and the parties moved slowly toward trial, even as other attorneys filed hundreds of cases on behalf of Agent Orange victims across the country.[66] As the number of clients retained by these other attorneys grew, Yannacone's position as lead counsel became more and more threatened as these attorneys also demanded a greater role in the class action litigation.[67]

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62. *Id.* at 49.

63. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 796 (E.D.N.Y. 1980).

64. SCHUCK, *supra* note 11, at 57.

65. *In re* "Agent Orange" Prod. Liab. Litig. (*Agent Orange II*), 635 F.2d 987, 995 (2d Cir. 1980).

66. *See* SCHUCK, *supra* note 11, at 71–73.

67. *Id.* at 108.

Additionally, in October 1983, a few months before trial, Judge George Pratt was removed from the case to take on new responsibilities as a judge on the Second Circuit Court of Appeals.[68] A few days later, Judge Jack B. Weinstein, one of the most outspoken and "unconventional" federal judges in the country, took over the case.[69]

In contrast to Judge Pratt, Judge Weinstein adopted an aggressive "hands-on" posture toward the case.[70] Although the parties were clearly unprepared, he immediately set a trial date for less than six months away.[71] He also announced his strong interest in seeing the case settle.[72] To that end, Weinstein took the extraordinary step of assigning three special masters whose primary responsibility was to move settlement discussions forward.[73] Weinstein also freely offered his own views on the strengths and weaknesses of the case, and he named the United States government as a defendant.[74] Although Weinstein was ultimately unsuccessful with this maneuver,[75] it demonstrates how he influenced the plaintiffs to name the government as a defendant even though they were prepared to release it from the case.

Weinstein effectively maneuvered around the Second Circuit's ruling that federal common law did not apply through procedural and other technical arguments. He did so primarily by announcing a new legal doctrine that he referred to as "national consensus law," which effectively merged the laws of the various states.[76] Weinstein also stymied the efforts of the United States to appeal his refusal to dismiss them from the case.[77] In his rulings on these and various other legal issues, Weinstein showed little regard for precedent and a strong interest in doing what was necessary to achieve an efficient resolution of the parties' claims.

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68. *Id.* at 110.
69. *See id.*
70. *Id.* at 111–13, 117–18.
71. *Id.* at 113.
72. *Id.* at 115.
73. *Id.* at 144–47.
74. *Id.* at 134–36.
75. *Id.* at 137.
76. *Id.* at 130.
77. *Id.* at 130–31.

Weinstein also played an extremely active role in the settlement negotiations by monitoring the parties' and special masters' activities closely and by providing direction on both the substance and the amount of the settlement.[78] This involvement was so intense that Weinstein reportedly rejected a settlement amount the two parties had agreed upon.[79] He regarded it as excessive and directed the special masters to discourage the parties from settling for that amount.[80]

Weinstein also reportedly issued subtle "threats" to the parties about the consequences of their failure to settle. For example, according to one of the plaintiffs' lawyers, Weinstein hinted strongly that he had "carried" the plaintiffs' case for them up to that point, but that he would no longer be such a strong advocate at trial if they failed to settle.[81]

On the eve of trial, five years after the case was originally filed, Weinstein achieved his goal and the parties settled the case.[82] Under the settlement terms, the defendant chemical manufacturers agreed to pay the class $180 million as final settlement of all claims of "anyone" who suffered injury "as a result of exposure to Agent Orange in Vietnam."[83] This included all claims that existed at the time of the settlement, and all claims that would arise "in the future."[84] Indeed, the settlement agreement expressly stated, "The class includes persons who have not yet manifested injury."[85]

Under the terms of the settlement, individuals manifesting symptoms before December 31, 1994, were entitled to a cash

78. *Id.* at 160–65.
79. *Id.* at 159–61.
80. *Id.*
81. *Id.* at 160.
82. *Id.* at 164–66.
83. *In re* "Agent Orange" Prod. Liab. Litig. (*Agent Orange III*), 818 F.2d 145, 169 (2d Cir. 1987). Although the settlement purported to resolve the claims of "anyone" who suffered injury, it was never understood to include the claims of Vietnamese and Cambodian citizens. *See In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y. 1983) (certifying the class as including only "those persons who were in the United States, New Zealand or Australian Armed Forces" and their "spouses, parents, and children").
84. Ryan v. Dow Chem. Co., 781 F. Supp. 902, 908 (E.D.N.Y. 1991).
85. *Id.* (citing *In re* "Agent Orange" Prod. Liab. Litig. (*Agent Orange IV*), 597 F. Supp. 740, 865 (E.D.N.Y. 1984)).

payment.[86] In exchange, veterans and their families who were included in the class action could not bring separate suits apart from the settlement.[87] Moreover, the settlement terms dictated that the court oversee administration and distribution of the $180 million fund.[88] Judge Weinstein also retained jurisdiction over the claims of all the individuals who had "opted out" of the litigation and elected to proceed on their own.[89]

In accordance with the Federal Rules of Civil Procedure, which require a judge to hold hearings evaluating the fairness of the settlement,[90] Weinstein held eleven days of hearings across the country in which class members testified.[91] As author Peter H. Schuck noted, many of these witnesses

> seemed to have a distinctive, almost religiously reverential conception of the role of courts in American society. For them, the Agent Orange case was a kind of elaborate morality play staged by the judicial system, a highly stylized contest between good and evil in which witnesses would step forward to tell their tragic stories, and the judge and jury, a modern Greek chorus, would certify the truth.[92]

Indeed, "many of the veterans testifying at the fairness hearings became so engrossed in their own stories that they never got around to discussing the [actual terms of the] settlement . . . ."[93] When they did get around to discussing the settlement terms, the overwhelming majority were opposed.[94] Despite these reservations, Weinstein granted final approval of the settlement in June of 1985, and the Second Circuit affirmed his ruling a few years later.[95]

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86. *Ryan*, 781 F. Supp. at 910.
87. *Agent Orange IV*, 597 F. Supp. at 864.
88. *Id.*
89. *See* SCHUCK, *supra* note 11, at 182.
90. FED. R. CIV. P. 23(e).
91. *Agent Orange IV*, 597 F. Supp. at 866.
92. SCHUCK, *supra* note 11, at 176.
93. *Id.* at 177.
94. *Id.* at 174–75 ("[N]early every witness, including those who supported the settlement, agreed that the amount was very inadequate . . . . "[N]umerous witnesses . . . [also] emphasized that they lacked sufficient information about the settlement and about the claims of medical problems associated with Agent Orange exposure to evaluate the fairness of the settlement.").
95. *Agent Orange III*, 818 F.2d 145, 151 (2d Cir. 1987).

Approval of the settlement, however, was in many ways only a beginning. This was largely because the preliminary settlement had no specific provisions indicating how the fund would be distributed.[96] Weinstein held further hearings because the court retained jurisdiction for purposes of fund administration and distribution.[97] During these post-settlement hearings, he routinely publicly disparaged the plaintiffs' causation case.[98] Weinstein also "advantaged class action claims over otherwise identical opt-out claims, apparently in the hope that this might encourage the latter to return to the class."[99] In the end, Weinstein dismissed the claims of every opt-out plaintiff who chose not to return to the class on the grounds that they could not prove their injuries were caused by exposure to Agent Orange.[100]

In 1988, Weinstein announced the distribution plan. By that point the fund had grown with interest to approximately $240 million.[101] Of that amount, $13 million was for attorneys' fees, $5 million was reserved for veterans from Australia and New Zealand, $10 million was set aside for the indemnification of claims brought in state courts outside the class action, $170 million was allocated to injured veterans and their family members, and $42 million was placed into the "Agent Orange Class Assistance Program," which distributed money to organizations providing services to children born with birth defects and to veterans who were not otherwise eligible for compensation.[102] Finally, under an important limitation of the distribution plan, only individuals manifesting symptoms before December 31, 1994 were entitled to a cash payment.[103]

Although Weinstein's settlement was widely praised as an innovative solution to a challenging social problem, the settlement was also heavily criticized on both public policy and legal grounds.[104] From a public policy perspective, the harshest critics were the veterans, many of whom felt the settlement had deprived

96. SCHUCK, *supra* note 11, at 172.
97. *Id.* at 173.
98. *Id.*
99. *Id.* at 183.
100. Ryan v. Dow Chem. Co., 781 F. Supp. 902, 909 (E.D.N.Y. 1991).
101. *Id.*
102. *Id.* at 909–10.
103. *Id.* at 910.
104. *See* SCHUCK, *supra* note 11, at 175.

them of their day in court.[105] Many of the legal critiques also stem from this fundamental complaint.[106]

Before *Agent Orange*, mass torts were not normally viewed as suitable for class action treatment because the individualized nature of the plaintiffs' injuries made it difficult for the class to share sufficiently common interests.[107] In *Agent Orange*, Judge Weinstein certified the case as a class action on the somewhat unusual grounds that the class action device was, in his view, the "best vehicle to achieve a fair result."[108] More specifically, the court noted:

> A single class-wide determination on the issue of causation will focus the attention of Congress, the Executive branch and the Veterans Administration on their responsibility, if any, in this case. By contrast, possibly conflicting determinations made over many years by different juries make it less likely that appropriate authorities and the parties will arrive at a fair allocation of the financial burden, if any.[109]

In other words, Weinstein's primary justification was not legal—it was political. Specifically, Weinstein emphasized to federal authorities the impact class certification might have and urged them to pay closer attention to *Agent Orange* issues.[110] He also noted that class certification would lead to a more efficient resolution of the case by "mak[ing] settlement more likely,"[111] as the defendants were probably unwilling to face a jury with so much on the line. Weinstein cited a few legal reasons for certification, noting issues of causation and certain defenses that were common to the class,[112] but these were secondary to the political and practical rationales.

In sum, the usual legal protections afforded to class members (the right of each individual to have his or her own day in court)

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105. *See id.* at 176–77.
106. *See id.* at 176.
107. *See id.* at 7.
108. *Agent Orange IV*, 597 F. Supp. 740, 755 (E.D.N.Y. 1984).
109. *Id.* (quoting *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 721 (E.D.N.Y. 1983)).
110. *See id.*
111. *Id.* (quoting *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. at 723).
112. *Id.*

were largely ignored by Weinstein in the *Agent Orange* litigation.[113] This in turn posed a number of problems when class members later sought to remove themselves from the class settlement.

Many commentators have also expressed concern that Weinstein's intense involvement in the settlement crossed lines of judicial propriety. For instance, critics have argued that at the very least, Weinstein should have recused himself from the fairness hearings where he essentially ruled on the fairness of a settlement that he played a heavy hand in crafting.[114] As Schuck noted, the settlement was "Weinstein's own creation in every sense of the word."[115] Because of this, Weinstein "should have left the Rule 23(e) [or fairness] evaluation of the settlement to another, more detached judge."[116] Weinstein's failure to do so "was a serious error in judgment."[117]

B. Agent Orange's Progeny

Judge Weinstein's approval of the class action settlement in *Agent Orange* was a historic ruling. As John C. Coffee, Jr. noted, "[w]ell into the 1980s, federal courts uniformly resisted attempts to certify such mass tort class actions."[118] The *Agent Orange* litigation marked a turning point in favor of certifying mass torts as class actions. After Judge Weinstein certified and approved the class settlement in *Agent Orange*, federal judges across the country began certifying and approving class action settlements in several other mass torts contexts.

For example, shortly after the Second Circuit affirmed Judge Weinstein's approval of the *Agent Orange* settlement, the Fourth Circuit approved a class action settlement of the tort claims of all Dalkon Shield victims.[119] Many other mass torts followed,[120]

113. *See* SCHUCK, *supra* note 11, at 176–77.
114. *See id.* at 178–79.
115. *Id.* at 178.
116. *Id.* at 179.
117. *Id.*
118. Coffee, Jr., *supra* note 34, at 1344.
119. *In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989).
120. *E.g.*, Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995) (asbestos); *In re* Copley Pharm. Inc., 161 F.R.D. 456 (D. Wyo. 1995) (albuterol); Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995) (tobacco); *In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-

including two unsuccessful attempts to settle asbestos claims on a global scale.[121] Because these two cases received tremendous attention in the plaintiff's bar and resulted in important Supreme Court rulings, they are worthy of some discussion.

The first case, *Amchem Products Inc. v. Windsor*[122], attempted to settle the claims of both present and future victims with an opt-out class action that allowed those plaintiffs who did not wish to be part of the class to exclude themselves.[123] As in *Agent Orange*, many class members had no way of knowing they were members of the class since they had yet to experience an asbestos-related injury.[124] Although the lower court approved the settlement in *Amchem*, the U.S. Supreme Court overturned both the class certification and the settlement in the case.[125]

Despite the lower court's approval of the settlement, both academics and many lawyers in the plaintiff's bar harshly criticized *Amchem*. Many of these criticisms focused on the enormous attorneys' fees in the case and the potential for collusion between and among plaintiff and defense counsel.[126] Many plaintiffs' lawyers were also dismayed by the fact that "global peace" in the asbestos context meant the end of their practices as they knew it. Perhaps because of this, attorneys with a substantial asbestos practice who were not a party to the class settlement heavily invested in objecting to the settlement.[127]

The Supreme Court's reversal of *Amchem* did not address the ethical concerns raised by the settlement, nor did it address the economic impact of the litigation on the plaintiff's bar. Instead, the Court's reasoning relied primarily on the requirements of Federal

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10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. 1994) (breast implants); Georgine v. Amchem Prods. Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (asbestos).

121. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997).

122. 521 U.S. at 606.

123. *Id.*

124. *Id.* at 628.

125. *Id.* at 597.

126. *See, e.g.*, Coffee, Jr., *supra* note 34, at 1376; Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products Inc., 80 CORNELL L. REV. 1045 (1995).

127. Among other things, these attorneys hired Professor Laurence Tribe, perhaps the nation's foremost Supreme Court litigator, to argue their case to the Supreme Court. *Amchem*, 521 U.S. at 596.

Rule 23, although it did recognize that constitutional considerations might also be at stake.[128] According to Federal Rule 23(a)(4), the class representative must "fairly and adequately protect the interests of the class."[129] The drafters of the modern class action rule regarded this requirement as an important safeguard for the due process rights of class members.[130] In *Amchem*, the Court overturned the settlement based on its conclusion that intra-class conflicts between present and future victims rendered the named plaintiffs incapable of representing the class.[131]

Although the Court's holding in *Amchem* turned on its conclusions about the inadequacy of representation, the Court also discussed the "highly problematic" impediments to adequate notice.[132] Moreover, *Amchem* echoed the observations of lower courts that many future victims in the class may not know of their asbestos exposure or realize the extent of harm that might occur.[133] The Court also "recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."[134]

Ortiz v. Fibreboard Corp.[135] was the second asbestos-related class action settlement overturned by the U.S. Supreme Court.[136] Like *Amchem*, it also attempted to resolve the claims of both present and future asbestos victims.[137] Unlike *Amchem* and *Agent Orange*, however, the parties in *Ortiz* sought class certification settlement approval under the no opt-out rules.[138] In other words, *Ortiz* was a

128. *See id.* at 625–28.
129. FED. R. CIV. P. 23(a)(4).
130. *See* 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1765 (3d ed. 2005); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (noting "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members").
131. *See* 521 U.S. at 625–27.
132. *See id.* at 628; *see also* Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 944 (3rd Cir. 1985) (noting that adequacy of notice to potential future asbestos-injury claimants would, at the least, raise "thorny constitutional issues").
133. 521 U.S. at 628.
134. *Id.*
135. 527 U.S. 815 (1999).
136. *Id.*
137. *Id.* at 825–26.
138. *Id.* at 825.

mandatory class action, and class members could not elect to remove themselves from litigation and pursue their claims individually.[139] The one exception involved claimants who filed their claims prior to August 27, 1993, the date the settlement was filed with the Court.[140] For these individuals, the class was not mandatory, and they were permitted to proceed with litigation on their own.[141]

In an ordinary class action suit involving damages, mandatory class certification is impermissible as class members must be afforded a full and unfettered right to exclude themselves from the class.[142] The justification for proceeding as a mandatory class in *Ortiz* stemmed from the financial problems of defendant Fibreboard Corporation. Fibreboard faced asbestos claims well in excess of its assets and was engaged in a lengthy coverage dispute with its insurers.[143] The settling parties reasoned that because all present and future asbestos victims with claims against Fibreboard faced a risk that it would soon be insolvent there were no intra-class conflicts.[144] Moreover, it was appropriate to make the class mandatory and prohibit individual claimants from proceeding on their own since individual claims might significantly reduce the amount of assets available for other claimants.[145]

The settlement reached in *Ortiz* essentially involved the creation of a private claims processing system.[146] Under the settlement terms, Fibreboard and its insurers contributed $1.535 billion to a settlement fund from which class members could seek compensation.[147] Under the system, class members would receive offers to settle their claims based in large part on the severity of their injuries.[148] If class members did not accept the amount offered, they could go through mediation and, after that, arbitration.[149] If still unsatisfied, they

139. *Id.* at 825–26 & 826 n.5.
140. *Id.* at 826 n.5.
141. *See id.*
142. *See* FED. R. CIV. P. 23(b)(3), (c)(2); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985).
143. *See Ortiz*, 527 U.S. at 821–22.
144. *See id.* at 839–40.
145. *See id.*
146. *See id.* at 824–25, 827.
147. *Id.*
148. *Id.* at 827.
149. *Id.*

could file a tort suit subject to an overall limitation of $500,000 in compensatory damages, although punitive damages were not recoverable.[150]

Significantly, present and future victims were treated identically under the *Ortiz* settlement, a fact which the settling parties hoped would obviate concerns about adequacy of representation.[151] Nevertheless, the Supreme Court again rejected the settlement on adequacy of representation grounds, primarily because the present and future victims had not been divided into separate subclasses with separate representation.[152] In the Court's words:

> [I]t is obvious . . . that a class divided between holders of present and future claims (some of the latter involving no physical injury . . .) requires division into homogenous subclasses under Rule 23 (c)(4)(B), with separate representation to eliminate conflicting interests of counsel.[153]

Like *Amchem*, the settlement in *Ortiz* would likely have wiped out significant segments of asbestos litigation practice in the plaintiff's bar.[154] Consequently, the plaintiff's bar invested heavily in objecting to the settlement.[155] Academic criticism of the settlement was less vocal, perhaps because on its terms the *Ortiz* settlement seemed significantly fairer than the *Amchem* settlement, and there were also fewer indications of possible collusion.[156]

Notably, both *Amchem* and *Ortiz* employed a novel class action technique—the so-called class action "for settlement purposes only."[157] This was one of the key changes in class action law that emerged from the application of class actions to personal injury law. It essentially involves filing and settling a class action complaint simultaneously, with no threat of trial.[158] One of the issues raised by

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150. *Id.*
151. *Id.* at 856–57 n.31.
152. *Id.* at 856–59.
153. *Id.* at 856.
154. *See* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 601 (1997).
155. *See* STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 84–85 (2005), http:/www.rand.org/pubs/monographs/2005/RAND_MG162.pdf.
156. *See* Coffee, Jr., *supra* note 34, at 1401 (noting that the *Ortiz* settlement "did not involve the same glaring disparities as in Georgine").
157. *See, e.g.*, Note, *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23*, 109 HARV. L. REV. 828, 829 (1996).
158. *Id.*

Amchem was whether class certification decisions were subject to the same level of scrutiny even if they were the product of a settlement.[159] *Amchem* held that they were.[160]

Like *Agent Orange*, *Amchem*, and *Ortiz*, other settlement class actions tend to be lawyer and/or judge driven. For example, in both *Amchem* and *Ortiz*, defense counsel approached plaintiff's counsel and asked them to reach a class-wide settlement that would provide the defendants with "global peace."[161] In *Ortiz*, the settlement negotiations featured the heavy involvement of federal Judge Robert Parker of the Eastern District of Texas, who has made something of a career in crafting creative resolutions for large numbers of asbestos claims.[162] There is little doubt that Judge Weinstein's intense involvement in the *Agent Orange* settlement served as a model for Judge Parker.

In contrast to *Amchem* and *Ortiz,* many of the recent class actions targeted for criticism were filed in state courts and feature significantly less cooperation from defense counsel. For example, a report by the industry-funded American Tort Reform Association complains about nine state courts they describe as "unfair" to defendants on class action issues.[163] Most of the examples rely on an increase in state court class action filings as evidence of unfairness.[164]

In contrast, class action filings in federal court seem to pose less concern for defendants, particularly when defense counsel essentially invited the litigation as a mechanism for obtaining "global peace" of

159. *Amchem*, 521 U.S. at 620.

160. *Id.*

161. See Koniak, *supra* note 126, for a full discussion of the conditions under which the settlement of *Amchem* took place.

162. *See generally* Coffee, Jr., *supra* note 34, at 1385–86 (discussing Judge Parker's innovations in the broader context of mass torts); *see also* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 383–384 (2005) (noting that Judges Parker and Weinstein were motivated by similar values, concerns and "moral intuitions" in applying class actions to mass torts).

163. *See, e.g.*, AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2004 (2004), http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf; *see also* John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, *in* 5 CIV. JUST. REP. (Manhattan Inst. for Policy Research, New York, N.Y., 2002), *available at* http://www.manhattan-institute.org/pdf/cjr_05.pdf (focusing largely on Madison County, Ill.).

164. *See* AM. TORT REFORM FOUND., *supra* note 163.

a mass tort.[165] In fact, the practice became so common and so attractive to the defense bar that one prominent scholar, Francis E. McGovern, wrote about the new trend in "defensive" class actions.[166] According to McGovern, class actions were attractive to the defense bar because they were "successful in obtaining finality, predictability, and a cessation of financial and public relations bleeding."[167]

From the perspective of many observers, however, the Supreme Court's rulings in *Amchem* and *Ortiz* put the settlement class action practice of purchasing "global peace" out of business, at least in federal court.[168] Perhaps as a result, class actions became less attractive to defendants as a means of obtaining "global peace." This became especially true after the latest round of the *Agent Orange* litigation described below.

C. *Agent Orange: The Next Generation*

Although the *Agent Orange* settlement purported to provide the defendants with "final peace," individual litigants who appeared to be members of the class attempted to sue the defendants independently. The first challenge came from two groups of veterans who developed injuries several years after the settlement approval.[169] These veterans claimed that since they did not even know they had been injured at the time of the settlement, they should not be bound by the settlement of a lawsuit which purported to include them.[170] The trial court dismissed the veterans' claims on the grounds that the doctrine of *res judicata* barred the action.[171] The Second Circuit affirmed, holding that the veterans were included in the class settlement even though they were unaware of any injury at the time of certification.[172]

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165. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 602 (1997).

166. *See id.*

167. *Id.* at 595.

168. *See* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475–76 (2005).

169. *See* Ryan v. Dow Chem Co., 781 F. Supp. 902 (E.D.N.Y. 1991).

170. *Id.* at 918–19.

171. *Id.* at 919.

172. *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1433–34 (2d Cir. 1993).

In recent years, a more successful challenge was brought by two veterans, Joe Isaacson and Daniel Stephenson.[173] In 1996 and 1998, these men developed cancers that experts linked to Agent Orange.[174] Both Stephenson and Isaacson claimed they were not aware of the *Agent Orange* class action or its settlement.[175] Moreover, they were not eligible for compensation under the class action settlement because their cancers did not develop until after the December 31, 1994 claims submission deadline.[176] Thus, the *Agent Orange* settlement effectively barred their claims and provided them with essentially no compensation.[177]

Perceiving this as a grave injustice, Stephenson and Isaacson's attorneys filed what is known among the class action bar as a "collateral attack" on the settlement.[178] In essence, a "collateral attack" is a belated challenge to the fairness of the settlement that seeks to overturn the settlement in whole or in part.[179] In Stephenson and Isaacson's cases, their attorneys argued that the class action did not bar their clients' claims because their clients, and all other class members who developed Agent Orange-related injuries after 1994, received inadequate representation in the class action.[180] They also argued that their clients could not be bound by the settlement because the notice of the class action and the opportunity to opt out was inadequate for individuals who, at the time, had no reason to believe that they were in the class.[181]

Both cases were transferred to Judge Weinstein's court, and he dismissed the cases as barred by the settlement.[182] On appeal,

173. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001).
174. *Id.* at 255.
175. *Id.* at 260.
176. *Id.* at 260–61.
177. *See id.*
178. *See generally* Kevin R. Bernier, *The Inadequacy of the Broad Collateral Attack:* Stephenson v. Dow Chemical Company *and Its Effect on Class Action Settlements*, 84 B.U. L. REV. 1023 (2004) (analyzing the Second Circuit's use of a collateral attack standard in *Stephenson*); Gregory M. Wirt, *Missed Opportunity:* Stephenson v. Dow Chemical Co. *and the Finality of Class Action Settlements*, 109 PENN ST. L. REV. 1297 (2005) (arguing that *Stephenson* improperly disregarded the principle of finality).
179. *See* Wirt, *supra* note 178, at 1299–1300.
180. *Stephenson*, 273 F.3d at 257–61.
181. *Id.* at 259–61.
182. *See id.* at 251.

however, the Second Circuit reversed Weinstein and, to the shock and surprise of many in the class action bar, agreed with Stephenson and Isaacson that the settlement did not preclude them from pursuing their individual litigation because they were "inadequately represented" in the class litigation.[183] Key to the court's reasoning was the fact that neither plaintiff was eligible for compensation under the original settlement because their cancers had developed after the 1994 claim submission deadline.[184]

The Second Circuit relied upon *Amchem* and *Ortiz* to allow Isaacson and Stephenson to continue with their cases outside the *Agent Orange* settlement.[185] Like the purported class in each of the asbestos cases, *Agent Orange* included both present and future victims.[186] As a practical matter, this meant that like the asbestos settlement, the settlement in *Agent Orange* suffered from two fatal flaws. One was the difficulty in providing adequate notice to future victims.[187] The second was the difficulty in ensuring that members of a class, which included future victims, were adequately represented by class representatives whose injuries were already manifest.[188]

The Second Circuit focused on both of these concerns when it took a second look at the *Agent Orange* litigation on behalf of Isaacson and Stephenson.[189] In their arguments before the court, Isaacson and Stephenson's attorneys pointed out that the class representatives had yet to be identified when Judge Weinstein certified the *Agent Orange* class action.[190] They also noted that both the original class definition and the notice of settlement appeared to limit the litigation to only those veterans who had already experienced some sort of Agent Orange related injury.[191]

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183. *Id.* at 261.
184. *Id.* at 260–61.
185. *Id.* at 259–61.
186. *See* Samantha Y. Warshauer, Note, *When Futures Fight Back: For Long-Latency Injury Claimants in Mass Tort Class Actions, Are Asymptomatic Subclasses the Cure to the Disease?*, 72 FORDHAM L. REV. 1219, 1230 (2004).
187. *See id.* at 1257–58.
188. *See id.* at 1237–38.
189. *Stephenson*, 273 F.3d at 255–61.
190. *Id.* at 260.
191. *Id.* The original class definition identified the class as "persons who claim injury from exposure to Agent Orange." *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 788 (E.D.N.Y. 1980). Similarly, the notice of

The Second Circuit was primarily concerned, however, with the fact that the prior litigation purported to bind Isaacson and Stephenson to a settlement from which they obtained no compensation.[192] It determined that such a settlement could not possibly have provided adequate representation of their interests.[193] As a result, the *Agent Orange* settlement, at least with respect to Isaacson and Stephenson, was fatally flawed.[194] The defendants appealed the Second Circuit's ruling to the U.S. Supreme Court to no avail.[195] The Supreme Court affirmed the Second Circuit in a 4-4 decision, with no opinion.[196]

These cases, along with several others, proceeded individually in Judge Weinstein's court.[197] Shortly after the cases were remanded to Weinstein, however, he dismissed them on the grounds of the government contractor defense.[198] Weinstein noted that he would likely dismiss the individual cases on causation grounds should the Second Circuit reverse on the government contractor defense.[199]

IV. THE TRANSFORMATION OF THE CLASS ACTION DEVICE

"The successes of history belong to those who are capable of seizing [the] rules, to replace those who had used them, to disguise themselves so as to pervert them, invert their meaning, and redirect them against those who had initially imposed them . . . ."[200]

Like other legal "crises" that have recently been diagnosed, the class action "crisis" may have more to do with perception than

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the class settlement advised of "WHAT YOU MUST DO NOW IF YOU BELIEVE YOU HAVE A CLAIM FOR ADVERSE HEALTH EFFECTS." Brief for Respondents at 6, Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003).

192. *See Stephenson*, 273 F.3d at 260–61.

193. *Id.* at 261.

194. *Id.*

195. *See* Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003).

196. *See id.* Justice Stevens, whose son served in Vietnam and died of cancer at a relatively young age, recused himself from the litigation. *See* Warshauer, *supra* note 186, at 1252 n.181.

197. *See In re* "Agent Orange" Prod. Liab. Litig., 304 F. Supp. 2d 404 (E.D.N.Y. 2004); *In re* "Agent Orange" Prod. Liab. Litig., 344 F. Supp. 2d 873 (E.D.N.Y. 2004).

198. *See In re* "Agent Orange" Prod. Liab. Litig., 304 F. Supp. 2d 404; *In re* "Agent Orange" Prod. Liab. Litig., 344 F. Supp. 2d 873.

199. *In re* "Agent Orange" Prod. Liab. Litig., 344 F. Supp. 2d at 875.

200. Foucault, *Genealogy*, *supra* note 18, at 86.

reality.[201] For example, a report by consumer watchdog Public Citizen suggests that many of the complaints about the problems with class actions have little empirical support.[202] Perception, however, is no small matter because a widely held perception that something is wrong can lead to significant changes in public policy, even when the perception is demonstrably at odds with empirical reality.[203]

The remarkable thing about the current perception of a "crisis" in class action is that, in earlier days, the class action device was viewed as an important tool for social justice—one that was especially important to the civil rights and consumer movements.[204] Today, however, the class action has eroded to something that focuses on judicial economy and capping defendants' liability rather than justice for under-represented groups.[205]

Under the historic leadership of Judge Weinstein, the *Agent Orange* litigation resulted in a global settlement resolving the claims of both present and future victims for injuries resulting from their exposure to Agent Orange in Vietnam.[206] Many have praised Weinstein's role in the settlement as a creative, if somewhat controversial, solution to an intractable legal problem that threatened

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201. *See, e.g.*, WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS (2004).

202. *See* PUB. CITIZEN CONG. WATCH, CLASS ACTION "JUDICIAL HELLHOLES": EMPIRICAL EVIDENCE IS LACKING (2005), http://www.citizen.org/documents/OutlierReport.pdf.

203. *See, e.g.*, Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996) (discussing the impact of empirically unfounded anecdotes about the tort system on the tort reform policy agenda).

204. *See* Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) (discussing the role of the class action device in consumer and civil rights litigation); McGovern, *supra* note 165, at 595 (noting the historic use of class actions to resolve consumer and employment disputes).

205. *See generally* Koniak, *supra* note 126 (describing how the class action device was employed to limit class members' rights in the asbestos context); McGovern, *supra* note 165 (describing the strategic use of class actions to cap defendants' liability); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996) (noting problems with class action settlements providing adequate protection for class members' rights).

206. *See* Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2013–14 (1997).

to tie up his court and those of other judges.[207] In many ways, however, Weinstein's historical maneuver also paved the way for today's "crisis" in class action law.[208]

Even from this very genealogy, it is clear that Judge Weinstein viewed the class action device as an important tool for increasing judicial economy.[209] He also perceived the ability of the defendants to obtain "global peace" through a class action settlement as an important bargaining chip that could bring otherwise recalcitrant defendants to the settlement table.[210] Perhaps more importantly, Judge Weinstein understood that the threat of a class action trial potentially offered justice to Agent Orange victims whose injuries might otherwise go unrecognized.[211]

In other words, in the *Agent Orange* litigation, the somewhat unique ability of the class action device to provide judicial access to large numbers of injured people was an important motivating force for the litigation and the settlement that followed.[212] This is important because it suggests the extent to which Judge Weinstein employed the class action device in *Agent Orange* in much the same way that others had employed the device in the civil rights context, i.e., to obtain results that could not be achieved through individual litigation alone.[213] In the cases following *Agent Orange*, however, we see the advent of class action litigation "for settlement purposes only," allowing both courts and defendants to resolve large personal injury cases without the actual risk of a potentially unwieldy and otherwise unmanageable class action trial.[214]

What is perhaps most remarkable about these cases is that many of them were brought at the defendants' behest.[215] In particular,

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207. *See, e.g., id.*; David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064 (1997).

208. *See generally* SCHUCK, *supra* note 11, at 277–97 (noting that Weinstein's "'procedural' law reform" in the context of the *Agent Orange* litigation ran the risk of "sacrific[ing] the promise of substantive justice").

209. *See* Minow, *supra* note 206, at 2014.

210. *See id.* at 2017–19.

211. *See id.* at 2016.

212. *See id.* at 2017–18.

213. *See id.*

214. *See id.* at 2020.

215. *See, e.g.*, Coffee, Jr., *supra* note 34, at 1350 (describing how defendants have "begun to solicit plaintiffs' attorneys to bring [] class actions"); Koniak, *supra* note 126, at 1056 (describing the history of a class action asbestos

federal class action filings posed little concern to defendants during this time.[216] This was largely because defense counsel essentially invited the litigation as a mechanism for obtaining "global peace" of a mass tort.[217] From the perspective of many observers, however, the Supreme Court's rulings in *Amchem* and *Ortiz* put the class action settlement practice of purchasing "global peace" out of business in federal court.[218] Perhaps, as a result, class actions became less attractive to defendants as a means of obtaining "global peace." This became especially true after the latest round of *Agent Orange* litigation.[219]

In short, the *Agent Orange* litigation brought about two key shifts in the way we think about class actions. The first shift involved a greater focus on the utility of the class action device as a vehicle for increasing judicial economy.[220] This shift is perhaps easiest to see in the many attempts to resolve the asbestos crisis through creative uses of the class action device, but it was also apparent in *Agent Orange* itself.[221] The second shift has been to place greater emphasis on the economic need of class action defendants to obtain "global peace" through class settlements that capped their liability.[222]

Although recent Supreme Court rulings may have limited a defendant's ability to obtain "global peace," especially with respect to future victims, this shift in thinking continues to significantly

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settlement in which the author claims that the defendants "paid class counsel on the side" to obtain class action resolution of the claims); McGovern, *supra* note 165 (describing settlement class actions instigated by defendants); Wolfman & Morrison, *supra* note 205, at 448 (describing how asbestos defendants "approached two prominent members of the plaintiffs' asbestos bar in an attempt to negotiate a [class action] settlement of all future asbestos claims" long before the case was filed).

216. *See* McGovern, *supra* note 165.

217. *See* Coffee, Jr., *supra* note 34, at 1350 (describing how defendants have "begun to solicit plaintiffs' attorneys to bring [] class actions" as a "means of resolving their mass tort liabilities"); Koniak, *supra* note 126, at 1051 (describing defendants' efforts to initiate a settlement class action in the asbestos context as a way out of the asbestos "mess").

218. *See* Cabraser, *supra* note 168, at 1475–76.

219. *See* Bernier, *supra* note 178, at 1044–45; Wirt, *supra* note 178, at 1310.

220. *See* Minow, *supra* note 206, at 2014.

221. *See id.* at 2017.

222. *See, e.g.*, McGovern, *supra* note 165, at 606.

affect our view of class actions and our approach to mass torts.[223] In mature mass torts such as asbestos, there is a sense that defendants have paid enough.[224] Further, in newer torts, such as litigation arising out of the 9/11 attacks, there has been a concern with preventing bankruptcy.[225] Perhaps, more importantly, we see continuing attempts by defendants and others to obtain "global peace" through ongoing experimentation with class actions and new innovations that seek to obtain a similar result, such as collective waiver arbitration clauses and legislation to cap liability in asbestos and other torts (e.g., the 9/11 compensation fund).[226]

All of these changes brought shifts in power relations among and between the clients, lawyers and the courts.[227] Who gained? Who lost? What were the effects of those shifts in power? At first glance, the settlement in *Agent Orange* seemed to offer a win-win situation all the way around: the veterans, whose claims Judge Weinstein perceived to be weak, received some compensation for their alleged injuries; the defendants obtained "global peace"; counsel for both parties received more than adequate compensation; and Judge Weinstein cleared his court of a very large number of cases.[228]

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223. *See, e.g.*, Wirt, *supra* note 178, at 1313 (arguing that, despite the recent Supreme Court rulings, "[t]he Court should seek to . . . protect the finality of existing settlements").

224. *See, e.g.*, Mark D. Plevin et al., *Don't Bankrupt Asbestos: It's Sad that Bankruptcy Offers the Only Rational Method of Resolving Litigants' Claims*, LEGAL TIMES, Mar. 19, 2001 (arguing, among other things, that repeated punitive damages awards in asbestos cases have gone "far beyond any justifiable amount").

225. KENNETH R. FEINBERG, DEP'T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 3 (2004), http://www.usdoj.gov/final_report.pdf ("[T]he purpose was to provide financial assistance to an airline industry potentially threatened with collapse as a result of the terrorist attacks and thereby to protect the American economy against the consequences of that collapse").

226. *See, e.g.*, 49 U.S.C. § 40101 (2000) (creating the September 11th Victim Compensation Fund); Gilles, *supra* note 162, at 396–400 (describing the "birth" of the collective action waiver); Mark K. Moller, *Let a Hundred Cases Bloom*, LEGAL TIMES, Feb. 21, 2005, at 62 (arguing for opt-in class actions).

227. See HENSLER ET AL., *supra* note 4, at 31–37 for an overview of some of the politics surrounding class actions in recent years.

228. *See supra* notes 209–215, and accompanying text.

The veterans, however, were not happy with the settlement, even from the start. At fairness hearings held around the country, the vast majority opposed it.[229] More recently, veterans groups have continued to voice their opposition to the settlement in briefs filed in the Second Circuit's hearings on "collateral attack" litigation.[230] Despite the opposition, Judge Weinstein and class counsel approved the settlement, apparently convinced that they knew best.[231]

What Judge Weinstein and the lawyers may have missed is that, for the veterans, resolution of the Agent Orange issue may not simply have been a matter of obtaining an appropriate amount of economic compensation. Instead, like many plaintiffs, it is likely the veterans wanted to tell their stories and have them heard by a court of law.[232] The fairness hearings provided some opportunity for this, but the veterans ultimately did not have their day in court. Indeed, they are still struggling to obtain it.[233]

What about the plaintiffs' lawyers? Given the costs and risks of trial, particularly in the *Agent Orange* litigation, which raised thorny causation issues, there is little doubt that the global settlement served their immediate, individual interests. It is equally clear that class action settlements in other mass torts allow plaintiffs' lawyers to eliminate risks while walking away with often astronomically large fees.[234]

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229. See SCHUCK, *supra* note 11, at 173–78 for an account of the fairness hearings.

230. *See* Brief for Veterans and Military Service Organizations as Amicus Curiae Supporting Plaintiffs-Appellants, *In re* "Agent Orange" Prods. Liab. Litig., No. 05-1820 (2d Cir. Oct. 12, 2005).

231. Judge Weinstein preliminarily approved the settlement agreement on January 7, 1985; reaffirmed that decision on June 18, 1985; and issued a final order of dismissal on July 9, 1985. *See* Ryan v. Dow Chem. Co., 618 F. Supp. 623, 624–25 (E.D.N.Y. 1985); *Agent Orange IV*, 597 F. Supp. 740, 857–58 (E.D.N.Y. 1984).

232. Other reasons for suing that have little to do with compensation include a desire to prevent similar harm in the future, the need for an explanation, and a desire to hold someone accountable. *See generally* Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609 (1994) (discussing reasons motivating patient lawsuits).

233. *See* Brief for Veterans and Military Service Organizations as Amicus Curiae Supporting Plaintiffs-Appellants, *supra* note 228.

234. *See* Wolfram, *supra* note 4, at 1231.

Plaintiffs' lawyers may benefit in other ways as well. Unlike individual litigation, there is no class-wide retainer agreement in class action litigation and, as a result, the client has relatively little control over fees.[235] Instead, the judge (or defense counsel, through settlement) sets the fees for class counsel.[236] Under these circumstances, the potential for collusion is not insignificant.[237] As the Rand Institute noted in its study of class actions, the "central fear" is that class counsel "unregulated in any real way by clients" will agree to settlements that offer little value to their clients and large fees for themselves.[238]

Why would defendants and the court agree to such a deal? To obtain "global peace," of course.[239] In an adversarial system, the defendants are under no obligation to ensure that the class obtains a fair deal. If defendants can obtain "global peace" by paying plaintiffs' lawyers enough money to disregard their clients' interests, there is little incentive for them not to do so. In the "long run," the Rand Institute warned, such practices will "bring the legal system into disrepute."[240] Indeed, one of the key complaints in our present "crisis" is that class counsel is being enriched with little benefit to the classes they purport to represent.[241]

With the rise of the tort reform movement, plaintiffs' lawyers are under increasing public attack.[242] In the class action context, these attacks have been exacerbated by conflict within the plaintiff's bar.[243] As we saw in *Amchem* and *Ortiz*, class-wide resolution of personal injury claims drew heated opposition from those members of the plaintiff's bar who represented individual asbestos clients and who had little to gain from a global resolution of asbestos claims.[244] In this respect, the effects of *Agent Orange* and its progeny on the

235. *See* HENSLER ET AL., *supra* note 4, at 77.
236. *Id.* at 77–78.
237. *See id.* at 79.
238. *Id.*
239. *See id.* at 108–10.
240. *Id.* at 79.
241. *See, e.g.*, Koniak, *supra* note 126, at 1109.
242. Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781, 1781 (2002).
243. *See id.* at 1783–95.
244. *See, e.g.*, McGovern, *supra* note 165, at 596.

plaintiff's bar both echo and contribute to what has been going on in the plaintiff's bar more generally.

For instance, as a result of the tort reform movement, it has become more difficult for personal injury lawyers to win their lawsuits.[245] Moreover, in some instances, legislative changes have made it more difficult for these lawyers to bring new litigation.[246] Because of these developments, personal injury lawyers have adopted an "entrepreneurial" spirit to survive.[247] For some, this has meant becoming more creative in finding new clients and new areas for litigation.[248] For others, it has resulted in organizational changes of their practice.[249]

Class action attorneys are among the "entrepreneurial" attorneys in the plaintiff's bar who are struggling to adapt to the new conditions. They are "entrepreneurial" in the sense that they are willing to sit down with defense counsel and craft inventive global settlements resolving large numbers of personal injury claims.[250] While this line of work is lucrative, the professional and social capital costs cannot be overlooked as these attorneys are under attack from both fellow plaintiffs' lawyers and the general public.[251] Still, the choice for many may come down to business from class action settlements or potential loss of business due to global resolution of claims.

Thus, *Agent Orange* and its progeny have threatened the plaintiff's bar in important ways. Even though some plaintiffs' lawyers became more empowered through their involvement in class actions, others saw their practices threatened.[252] In response, these threatened attorneys criticized their fellow plaintiffs' lawyers.[253] These criticisms, in turn, fueled the critiques of the plaintiff's bar that have characterized the tort reform debate.[254] As a practical matter, this meant that the application of class actions to personal

245. *See, e.g.*, Daniels & Martin, *supra* note 242, at 1799–1800.
246. *See, e.g., id.* at 1798.
247. *See id.* at 1782.
248. *See id.*
249. *Id.*
250. *See id.* at 1796.
251. *See id.* at 1781.
252. *See id.* at 1781–82.
253. *See* McGovern, *supra* note 165, at 604.
254. *See id.* at 604–05.

injury cases, even when brought at the defendant's request in an attempt to obtain "global peace," introduced a whole new set of problems for plaintiffs' lawyers who were already on the defense in public discourse.[255]

From this perspective, defendants would appear to be the winners in the turn toward class action settlement of personal injury claims. In particular, by bringing class actions "for settlement purposes only," defendants obtained "global peace" with relatively low risk and disreputed the plaintiff's bar.[256] As a result, defendants might be accused of having "seiz[ed] [the] rules" on class actions and "pervert[ing] them" to their own purposes.[257] But, again, the picture is not so simple.

For one thing, the Supreme Court's rulings in *Amchem*, *Ortiz*, and *Stephenson* suggest that it may no longer be possible for defendants to buy "global peace" through class action settlements, especially in federal courts.[258] Meanwhile, applying the class action device to personal injury litigation has opened Pandora's Box. Plaintiffs' lawyers are filing class actions in personal injury and other types of cases in record numbers, especially in state courts.[259] These cases are extremely problematic for defendants, largely because of concerns that state court judges are more willing to let the cases go to trial.[260]

Under these circumstances, defendants feel that they must settle the cases, even when there are serious questions about the merits of the litigation, because they are unwilling to risk potentially huge jury verdicts.[261] Thus, from the defense perspective, *Agent Orange* and its progeny may be viewed as more trouble than it was worth.

The picture is even less happy for defense counsel. Although a handful of defense counsel have developed expertise in resolving class actions, as with the plaintiff's bar, "global settlements" threaten to put large numbers of defense attorneys out of work. One wonders, for example, what will happen to the insurance defense bar if

255. It also introduced a troubling new narrative into public discourse about class actions. NC - there should be a "See e.g.," here

256. *See supra* note 214 and accompanying text.

257. Foucault, *Genealogy*, *supra* note 18, at 86.

258. *See* HENSLER ET AL., *supra* note 4, at 66.

259. *See id.*

260. *See, e.g.*, Center for Individual Freedom, *supra* note 4.

261. *See* HENSLER ET AL., *supra* note 4, at 75.

Congress were to pass legislation funding an independent compensation system for asbestos victims. This is not to say that defense counsel do not support their clients in obtaining a "global settlement" of asbestos litigation. Rather, the defense bar is likely aware of the effects that such a settlement will have on the economic well being of their firms. The same would also be true for "global settlements" of other mature torts on which small industries of legal practice have become more or less dependent.

What about the courts? From a judicial economy perspective, they seem to be the clear winners. Many judges may also enjoy the increased status associated with being a leader in resolving mass torts.[262] Certainly, *Agent Orange* seemed to increase Judge Weinstein's professional capital in important ways.[263] To the extent that these settlements draw criticism, however, the courts may be viewed as complicit in degrading the civil justice system. As I argue below, this leads to less legitimacy for the political system in the long run.

In the end, *Agent Orange* and its progeny look and feel lawyer and judge-driven rather than client-driven.[264] This has proved problematic. Specifically, the shift in the way we approach class actions plays up the economic advantages of using the class action to resolve mass torts. Consequently, the original rationale for class actions (to provide improved court access for previously uncompensated victims) is left behind.[265]

In sum, the roots of a perceived "crisis" in class action law lie in Judge Weinstein's inventive, but ultimately problematic, attempt to use the class action device to resolve personal injury litigation.[266] Although well intended, the move led to important changes in the relative power of plaintiffs, defendants, their lawyers and the courts in resolving mass torts.[267] Ultimately, these changes led to both the relative disempowerment of victims and a perception that class actions have more to do with making money for lawyers than providing access to justice for individuals who might otherwise go

262. *See, e.g.*, Minow, *supra* note 206.
263. *See id.*
264. *See, e.g.*, *supra* notes 161–162 and accompanying text.
265. *See* Carter, *supra* note 2, at 1123–25.
266. *See, e.g.*, Luban, *supra* note 207.
267. *See id.*

unrepresented.[268]

For all of these reasons, Judge Weinstein's employment of the class action device to resolve large numbers of personal injury claims established the foundation for what became an especially important branch in the class action family tree. Although well intentioned, the fruit of that litigation is now proving to be problematic.[269]

V. CONCLUSION

In a 2000 report on the state of class actions, the Rand Institute asked what seemed to be a fundamental question about the future of class actions:

> [Is the class action device] primarily an administrative efficiency mechanism, a means for courts and parties to manage a large number of similar legal claims, without requiring each litigant to come forward and have his or her claim considered individually? Or is it primarily a means of enabling litigation that could not be brought on an individual basis, in pursuit of larger social goals, such as enforcing government regulations and deterring unsafe or unfair business practices?[270]

The report then argued that the debate between efficiency and enabling goals was a false one because, in their view, an increase in efficiency would necessarily lead to an increase in access.[271] The recent history of class actions, however, suggests that this is clearly not so.[272] Instead, it is apparent that the employment of class actions in mass tort litigation has led to some serious problems regarding access to justice, particularly for future victims.[273] In other words, there is a conflict between approaching the class action device as a mechanism for increasing the economic efficiency of litigation, and its utility as a mechanism for expanding judicial access to those who might otherwise go unrepresented.

What is the solution? The answer was provided in part by the

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268. *See id.* at 2078.
269. *See, e.g., id.* at 2080.
270. HENSLER ET AL., *supra* note 4, at 49.
271. *See id.*
272. *See, e.g.*, Coffee, Jr., *supra* note 34; Wolfman & Morrison, *supra* note 205.
273. *See, e.g.*, Koniak, *supra* note 126.

Supreme Court in *Amchem* and *Ortiz*. In both cases, the Court called for a return to a more careful reading of class actions rules, with greater attention to how settlements affect the rights of class members, especially "future" victims.[274] The answer was also provided in the Second Circuit's decision in the second generation of *Agent Orange* litigation, when veterans who had been injured without receiving compensation from the earlier settlement were allowed to have their day in court.[275]

These rulings recognize and keep alive what is perhaps our most fundamental legal maxim—that each individual is entitled to his or her own day in court.[276] Class actions are an exception to this principle, but an exception of limited scope and application. Perhaps the clearest limitation on class actions is found in the constitutionally based right to opt out of class actions "wholly or predominantly for money judgments."[277] Several more limitations are embodied in Federal Rule 23, which governs the formation and resolution of class action litigation.[278] By continuing to adhere strictly to these limitations on class actions, courts ensure that the focus on class actions remains on expanding access to justice, rather than economic efficiency.

In *Agent Orange*, *Amchem* and *Ortiz*, lawyers and judges favored efficiency over preserving access to future victims.[279] In Judge Weinstein's mind, this was the best way to achieve what he felt was a just result.[280] The lawyers and judges involved in crafting the *Amchem* and *Ortiz* settlements undoubtedly felt the same way. As Justice Ginsburg noted in *Amchem*, however, courts are not especially well suited for the cost-benefit balancing that is involved

274. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods. v. Windsor, 521 U.S. 591 (1997).

275. *See supra* notes 183–185 and accompanying text.

276. *See, e.g., id.*

277. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985); *see also* Penson v. Terminal Transp. Co., 634 F.2d 989, 993 (5th Cir. 1981) (holding that a court may mandate a right to opt out of a certified class).

278. *See, e.g.*, FED R. CIV. P. 23; Cabraser, *supra* note 168, at 1499–1506.

279. *See, e.g.*, SCHUCK, *supra* note 11, at 127; Coffee, Jr., *supra* note 34, at 1431 ("Georgine [v. Amchem] and Agent Orange suggest that federal courts will resist any effort at curtailing the justiciability of future claims in mass tort class actions when to do so threatens their ability to control their dockets."); Koniak, *supra* note 126.

280. *See Agent Orange IV*, 597 F. Supp. 740, 761 (E.D.N.Y. 1984).

when economic efficiency enters the mix as a legal principle.[281] In traditional tort litigation involving individual litigants, cost-benefit balancing is typically done by the jury. On the other hand, Ginsburg suggested that in the case of mass torts, the answers should perhaps come from the legislature.[282]

The continuing legitimacy of the political system itself is at stake. As in other liberal democracies, courts in the United States play an important role in bolstering the legitimacy of liberal, democratic regimes.[283] This legitimacy is largely maintained by committing to open and equal access to the courts.[284] Because of this, many argue that open and equal access to the courts is essential for Americans to believe that the United States legal system achieves social justice.[285]

All this suggests that a greater attention to judicial access, as opposed to economics, might serve the legal system well in addressing the perception of a "crisis" in class action law. While economic efficiency and "global peace" are surely admirable goals, they should not be the guiding principle of courts in the class action context. Instead, economic considerations should only be considered to the extent that they directly impinge on preserving access to justice. When judges and lawyers place more emphasis on economics than justice, legal rulings begin to lose their legitimacy and critiques of the legal system follow.

In the context of mass torts, this does not mean that class action treatment is never appropriate for personal injuries involving future victims. Under some circumstances involving future victims, the tension between preserving judicial access for individual litigants and economic efficiency in mass tort cases may be particularly complex. In these cases, the legal interest in preserving the future victims' right to individualized hearings may be directly at odds with extremely compelling economic considerations, including the very real possibility that the defendant's assets will be exhausted by the

281. *See* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 628–29 (1997).

282. *See id.*

283. *See* David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 460 (1994).

284. *See id.*; TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT (1987).

285. *See* Trubek et al., *supra* note 283, at 459–60.

claims of early litigants. Under these circumstances, preserving the future victim's right to his or her own day in court becomes, as a practical matter, little more than a hollow gesture.

Because of the importance of ensuring meaningful judicial access, we should be extremely cautious and skeptical about class action settlements that promise greater judicial access at the price of compromising a future victim's rights. Certainly, *Agent Orange* did not provide us with a sufficiently compelling set of circumstances to justify this trade-off, as it left some victims without any compensation at all.[286]

In sum, to reclaim the historic role of class actions as a vehicle for justice, we must place more emphasis on access and less on "global peace." By doing so, we will go a long way toward defusing the perceived "crisis" in class actions and, perhaps, restore the class action to its original and best use—expanding judicial access for litigants who would otherwise find it too expensive to pursue their claims.

286. *See supra* notes 189–191 and accompanying text.