

Exiting Litigation

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The American judicial system will face significant challenges in the twenty-first century. One of its immediate challenges is adapting the rules of civil procedure to the stresses under which the civil-justice system operates. Some of the most notable pressures arise from transnational litigation, mass litigation, proliferation of claims against governmental and corporate institutions, and competition from methods of alternative dispute resolution that promise to dispense cheaper, faster, and more satisfying justice.

One of the consequences of the pressure from alternative dispute resolution has been the rise of a panoply of procedural forms for resolving legal disputes. Despite its allure, a simple and uniform procedural form remains unattainable. Therefore, critical issues facing the present procedural system are the degree of divergence in procedural forms that it should tolerate and the criteria by which it should consign different types of claims to different procedural forms.¹

My point of departure for this inquiry is the well-known history of the common law and equity. As the story is usually told in short form (for the actual history is more complex), the limitations of common-law procedure led to the rise of the system of equity.² Equity's flexibility and relative uniformity in matters of procedure, coupled with its commitment to resolving cases on their merits, partially remedied the rigidity, technicality, and multiplicity of procedural forms that became the hallmarks of the common law's writ system.³ Equity too succumbed to the rigidity that plagued common-law procedure, so reformers of the nineteenth and early twentieth centuries proposed a

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1. See Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Adjudication*, 60 GEO. WASH. L. REV. 1683, 1808–11 (1992).

2. For classic treatments of the common law and its relationship to equity, see F.W. MAITLAND, *EQUITY—ALSO THE FORMS OF ACTION AT COMMON LAW* (A.H. Chaytor & W.J. Whittaker eds., 1929); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* (2d ed. 1898).

3. See THEODORE F. T. PLUNCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 680–81 (5th ed. 1956).

complete procedural overhaul.⁴ Many argued for the merger of the systems of law and equity into a single procedural form governed by a uniform set of rules.⁵ This merger borrowed some of the perceived best features from the common law—such as the single culminating trial of the jury system—but it relied far more heavily on the spirit of ancient equity.⁶ Thus, the merged system, whose classic instantiation is the 1938 Federal Rules of Civil Procedure, was designed to be flexible, non-technical, simple, uniform, and merits-oriented.⁷

As it has developed over the past seventy-plus years, the Federal Rules approach has proven to have its own problems. Principal criticisms include expense, delay, inefficiency, difficulty in resolving mass litigation, and obfuscatory adversarial practices.⁸ Some of these perceived problems have resulted in corrective amendments to the Federal Rules.⁹ At the same time, alternatives to the litigation system—such as arbitration, mediation, and settlement—have become popular.¹⁰

Alternative dispute resolution (“ADR”) methods rarely adopt the procedural rules that govern litigation in court; rather, each ADR

4. See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE §§ 1.7–8 (5th ed. 2001); Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 520–29 (2006).

5. England abolished the distinction between law and equity in the 1870s. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, § 3 (Eng.) (uniting the common-law courts and equity under one Supreme Court); Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77, §§ 16–17 (Eng.) (establishing a single set of procedural rules in English courts). On the recommendation of leading scholars such as Roscoe Pound and Charles Clark, see Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 491, 498–501 (1910); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 415–35 (1935), most American courts did the same. See, e.g., FED. R. CIV. P. 2 (creating a single type of claim, a “civil action”).

6. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922–26 (1987); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938).

7. For one treatment of the basic assumptions underlying the modern American procedural system, see SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE: THE ESSENTIALS (2007).

8. See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 30–31, 171–87 (A. Leo Levin & Russell R. Wheeler eds., 1979); Subrin, *supra* note 6, at 974; John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 830–55 (1985).

9. The principal reforms have occurred in Federal Rules of Civil Procedure 11, 16, and 26. For a brief discussion of these amendments up through 2006, see Tidmarsh, *supra* note 4, at 536 & n.106, 585–86 & nn.294–96. The subsequent electronic-discovery amendments to Rules 26(b) and 45 demonstrate the ongoing accommodation between the Federal Rules’ commitment to broad discovery and the rise of technologies unimagined when the Rules were adopted in 1938. *Id.*

10. See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 165–66 (2003); *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1851 (2000) [hereinafter *Developments*].

method has procedures peculiar to its form.¹¹ Given this reality, an evident question is whether, as we had once merged the procedural systems of law and equity, we should now merge the best features of litigation procedure with the best features of ADR procedure.

I asked exactly this question (although I did not try to answer it) in an article that I published three years ago. At the time, I thought that I had coined a clever phrase to capture the issue by referring to ADR as the “new equity.”¹² But it turns out that, at almost exactly the same time, Thomas Main published an article entitled *ADR: The New Equity*.¹³ Professor Main and I might argue over bragging rights to the phrase, except that the idea has been around for a long time. In 1938, when the ink on the Federal Rules of Civil Procedure was still fresh, Charles Clark, the Rules’ principal drafter, took note of the rise of administrative agencies’ use of adjudication.¹⁴ Dean Clark analogized the then-nascent phenomenon of administrative adjudication to the equity of old, and suggested that the “benefits of experience” with administrative adjudication might eventually suggest reforms for the Federal Rules.¹⁵

Dean Clark’s article makes a significant point: ADR and litigation are not the only government-backed procedural regimes.¹⁶ Adjudication in administrative agencies is a third process. A final dispute-resolution process involves ad hoc claims-resolution facilities or programs used in mass litigation.¹⁷ In her important article, Judith Resnik points out that resort to these various dispute-resolution processes is often dictated by

11. For a review of the basic forms of ADR, see LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 2–6 (abr. 2d ed. 1998); Hensler, *supra* note 10, at 165–66.

12. See Tidmarsh, *supra* note 4, at 577.

13. Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329 (2005). (Professor Main’s article came out in Winter 2005; my article came out in January 2006).

14. Clark, *supra* note 6, at 301–03.

15. *Id.* at 303. Dean Clark also recommended that administrative procedure be amended in light of experience with the new Federal Rules. *Id.*

16. The adjective “government-backed” is important. In ADR, the ultimate decision-maker is almost never a judge; either the parties themselves or a non-judicial neutral such as an arbitrator make the decision about how the dispute should resolve itself. Nonetheless, ADR can be “government-backed” in the sense that courts will: (1) encourage or require parties to use ADR methods during the course of litigation, see 28 U.S.C. §§ 651–58 (2006); (2) enforce contractual agreements to enter into ADR, see 9 U.S.C. § 4 (2006); and (3) enforce awards or decisions made in ADR, see *id.* §§ 9–10. *But see* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380–82 (1994) (holding that, unless they reserve jurisdiction, federal courts do not have ancillary jurisdiction to enforce settlement agreements).

17. See *infra* notes 70–75 and accompanying text.

the parties' contractual agreement.¹⁸ She then argues that judges who enforce these agreements have imported—but also should do more to import—some of the basic due process protections applicable in litigation into contract-based dispute resolution.¹⁹ As she states, the judiciary in this century must decide when to allow parties to contract out of the litigation system, and whether to make the procedures by which contracted-out dispute resolution occurs more uniform.²⁰

Although my point of departure is different from that of Professor Resnik, her inquiry mirrors my own. Contrary to the sanguinity of my earlier article, my present view is that a merger of procedural forms will not be an easy, or necessarily advisable, matter for the foreseeable future. A principal reason is the lack of a single equity-like procedural form with which to merge litigation procedure. Rather, there are three distinct “equities”: first, disputes in which putative litigants themselves adopt a different procedural form; second, disputes in which putative litigants have a different procedural form adopted for them by a representative; and third, disputes in which the applicable statute requires an alternative procedural form. Loosely, these “equities” translate into traditional ADR, mass litigation, and administrative adjudication. Because these three “equities” present distinct procedural forms and needs, melding all three with the litigation process into a single procedural form seems an unlikely occurrence.

Rather, our efforts should be directed toward specifying the grounds on which courts should allow parties to exit from standard litigation procedure into another procedural form. I begin from a simple premise: a liberal democracy that maintains a court system promises to provide litigants in that system a reasonably adequate level of process.²¹ Given that promise, a democracy's decision to allow putative litigants to exit from its adjudicatory system is problematic on equality grounds—at least when non-litigation processes are likely to result in differential (and worse) outcomes for some putative litigants.²²

18. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 622–23 (2005).

19. *Id.* at 665–68.

20. *Id.* at 668.

21. *Cf.* U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”); *id.* amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law”)

22. It is well-known that different litigation procedures can affect the likelihood and amount of a party's recovery or liability. *See infra* notes 27–29 and accompanying text. The use of different procedures in non-adjudicatory processes can have the same effect. *See infra* notes 30, 38–39 and accompanying text.

In this essay, I argue that courts can legitimately allow exit on only three grounds. The first is the consent of the putative litigant(s) whose positions are made worse by exit. The second ground arises when exit is not worse for any putative litigant. Third, even when exit is worse for one or more putative litigants, the overall savings from exit into a non-litigation process exceed the losses incurred by those parties in the non-litigation process.²³ These three grounds roughly correspond to the three circumstances in which exit usually occurs: respectively, ADR, mass litigation, and administrative adjudication.²⁴ Policy-makers and judges should pay closer attention than they traditionally have to whether one or more of these grounds is present before allowing litigants to exit into a procedural form that competes with the litigation system. These grounds also suggest a framework for considering other issues of pressing concern to the American litigation system, including the extent to which the lack of uniformity in procedural rules should be tolerated.²⁵

I. BEFORE EXIT OCCURS: EXPECTATIONS GENERATED BY A LITIGATION SYSTEM

I begin with three simple propositions. First, if a modern liberal democracy chooses to establish a judicial system, one function of that system is to resolve the legal claims of the individuals who choose to enter the system. Second, the procedural form(s) established by the judicial system promise litigants a reasonably accurate resolution of each claim at an acceptable pace and an acceptable price. This second proposition contains, quite deliberately, a number of weasel words. Perfect accuracy, instantaneous decisions, and costless process are, of course, chimerical; nor is it necessary that, to fulfill its promise, a court provide the best available procedures.²⁶ It is enough that a court uses a set of procedures that, in the main, resolves disputes fairly well. A wide array of procedural approaches—for instance, inquisitorial versus adversarial, or jury-tried versus bench-tried—might satisfy this requirement.

Third, the procedural choices by which a given court system gives effect to its promise of a reasonably accurate resolution of each claim

23. *See infra* Part II.

24. *See infra* Part III.

25. *See infra* Part IV.

26. If a court were required to provide the best possible procedures, then any procedural system that provided anything less would be illegitimate. Proceduralists have not generally imposed such a stringent requirement. *See* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1198 (2009).

are not outcome-neutral. For instance, a rule permitting summary judgment suppresses settlement values and favors defendants;²⁷ conversely, a rule permitting liberal joinder increases most plaintiffs' chances of success, although it tends to suppress plaintiffs' awards.²⁸ For present purposes, it is unimportant whether a pro-plaintiff or pro-defendant orientation in any particular procedural rule, or in a procedural system as a whole, is chosen. The critical fact is that a chosen set of procedures is part of the calculus of a case's expected outcome, and changes to that set of rules affect the expected outcome.²⁹ Put differently, procedural choices have substantive consequences.

Alternatives to litigation adopt procedures different from litigation; indeed, it is precisely to avoid the seemingly less favorable procedures established for litigation—and the less favorable substantive outcomes that attend those procedures—that parties with sufficient bargaining power often opt for non-litigation alternatives.³⁰ The extent of the procedural differences depends on the alternative form chosen. Settlements and mediation employ entirely distinct models of dispute resolution, while arbitration and administrative adjudication hew closer to the litigation model.³¹ Regardless of the precise set of procedures selected, different procedural rules can alter the parties' expected outcomes in relation to the outcomes that they might have expected under the litigation system.

27. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 89 (1990).

28. See Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. APPLIED PSYCHOL. 909, 914, 917 (2000); Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209, 225–26 (1988).

29. Assuming the parties' risk neutrality, the expected outcome of a case for a plaintiff can be determined by the equation $P \times L - C_p$ and the expected outcome for the defendant can be determined by the equation $(1 - P) \times L - C_d$, where P is the probability of the plaintiff's victory, L is the amount of the plaintiff's recovery in the event of victory, C_p is the cost of litigation that the plaintiff bears, and C_d is the cost of litigation that the defendant bears. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 21.1–2 (7th ed. 2007); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 135–36 (3d ed. 2003). C_p and C_d are composed of two variables, the direct cost of litigation (such as attorneys' fees and expert-witness expenses) and the cost of erroneous decisions. POSNER, *supra*, §§ 21.1–2. Therefore, changes in procedural rules that affect either a party's cost of litigating the case or the accuracy of the judgment alter the expected outcome (unless the effect on the two costs is a washout).

30. See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 680–86 (1996).

31. For basic descriptions of the procedures used in different forms of dispute resolution, see sources cited *supra* note 11.

None of this is especially controversial. I am not claiming that the procedural rules that courts establish are necessarily better than alternative procedural forms, or that alternative forms are necessarily suspect. On the contrary, as with any set of broad rules, the rules of the litigation system are not optimal for some cases, and using these rules might be too expensive or might lead to errors that procedures more closely tailored to the needs of these cases can avoid. In some situations, it undoubtedly benefits both parties to exit from litigation. In other situations and for other parties, however, non-litigation procedures lead to less favorable outcomes than the outcomes that those parties could have achieved through litigation.³²

In economic terms, exiting from litigation into non-litigation procedures can constitute a Pareto improvement: in other words, exit can work to the advantage of all parties and the court by making at least one participant better off and none worse off.³³ Such an exit increases efficiency without damaging any person's expectations. When exit from litigation leaves one or more parties, or the court, in a worse position, however, courts cannot explain the exit on Pareto grounds, but must find another justification.

This last statement requires brief explanation. It derives from the simple ethical proposition that, at a minimum, people and governments should "do no harm." As a complete statement of ethics, the proposition is inadequate: on the one hand, people might owe affirmative obligations beyond not harming others, and on the other, even good and necessary actions can harm others. But in a democracy committed to maximizing the liberty to act, the "do no harm" principle acts as a starting point for determining the legitimate scope of governmental action.³⁴ Captured by the aphorism that my right to swing my fist ends at your nose,³⁵ the principle requires that good

32. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626–27 (1996) (describing a class-action settlement in which some class members received no compensation for their claims, and future claimants received awards that were, due to a lack of protection from inflation, effectively less than those given to present claimants); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003) (holding an arbitration procedure unenforceable when it provided a significant disincentive for plaintiffs to pursue their claims).

33. For a qualification to this statement, see *infra* note 52 and accompanying text. For general discussions of Pareto efficiency, see POSNER, *supra* note 29, §1.2, at 12–13; THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW* 4–6 (2004); POLINSKY, *supra* note 29, at 8–9.

34. See William B. Rubenstein, *Divided We Litigate: Addressing Disputes among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1644–50 (1997); Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 756 (1989).

35. The saying is sometimes used as a shorthand description of John Stuart Mill's argument for liberty. See JOHN STUART MILL, *ON LIBERTY* 142 (Gertrude Himmelfarb ed. 1985) (1859) (stating that if "a person's conduct affects the interests of no persons besides himself . . . there

reasons support any harm an individual or the government proposes to cause to another individual's liberty or economic interests.

Put differently, by recognizing and then opening its doors to the vindication of certain claims through its court system, the government creates something of value. Along with the substantive rules, the court's procedural rules establish that value. Thus, a set of litigation rules helps to create a certain level of expected entitlement in putative litigants.³⁶ This entitlement is not "strong," in the sense that a court is powerless to change its procedural rules without violating the rights of parties.³⁷ Nonetheless, because using different procedural rules can change a claim's value, a court's willingness to allow parties to exit into processes that use different rules to resolve their dispute requires justification.

Take, for example, a person with a \$100,000 claim. Assuming that using litigation procedures leads to a 50% chance of recovery on the claim and the expected litigation expenses are \$20,000, then the claim has an expected value of \$30,000 in the litigation system. Permitting exit into an arbitration system can alter this value. Assuming that arbitration uses procedures that reduce the putative plaintiff's chance of success to 40%,³⁸ and the putative plaintiff's expenses in arbitration are

should be perfect freedom, legal and social, to do the action"); *id.* at 141 ("As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it.").

36. *See supra* note 29 and accompanying text.

37. Some aspects of these rules, however, might be strong enough to lie beyond a court's capacity to alter. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be afforded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

38. Such a reduction in the likelihood of recovery is possible for a number of reasons. One is that the arbitration process uses truncated discovery, which denies the plaintiff the opportunity to obtain information that might increase the chance of recovery. *Cf.* FED. R. CIV. P. 81(a)(6)(B) (extending the Federal Rules of Civil Procedure to arbitration proceedings "to the extent applicable"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1990) ("Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))); *Penn. v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 756 (7th Cir. 2001) (noting limitations on discovery in arbitration). Another is that the arbitrators themselves consistently tend to favor the interests of one party. *Cf.* 9 U.S.C. § 10(a)(2) (2006) (permitting a court to set aside an arbitration award only when there exists "evident partiality or corruption in the arbitrators"); *Winfrey v. Simmons Foods Inc.*, 495 F.3d 549, 551 (8th Cir. 2007) ("Where an agreement entitles the parties to select interested arbitrators, 'evident partiality' cannot serve as a basis for vacating an award under § 10(a)(2) absent a showing of prejudice."); *Penn.*, 263 F.3d at 756 (refusing to enforce an arbitration agreement that used an arbitrator with an incentive to "tilt the scales" in favor of one party).

\$12,000, then the expected value of the claim falls to \$28,000—a net loss of \$2,000 to the putative plaintiff.³⁹ Before a court allows exit into arbitration, it should be required to justify why it has allowed a \$2,000 harm to befall a person to whom it has putatively held open its doors.

II. WHEN EXIT MIGHT OCCUR: THE JUSTIFICATIONS FOR ALTERING THE PARTIES' LITIGATION EXPECTATIONS

Assuming that a court's raw exercise of political power favoring powerful interests is an insufficient justification for causing harm to less powerful litigants,⁴⁰ a court can readily invoke two grounds to justify its willingness to acquiesce in a putative litigant's decision to exit from litigation. One is the autonomy of individuals to make their own decisions, even decisions that harm their interests.⁴¹ The other is an increase in social utility that results from exit—in other words, any losses to some individuals are offset by greater gains to others.⁴² The social-utility rationale divides into two scenarios: situations in which no individual suffers a loss but at least one person enjoys a gain (Pareto improvements), and situations in which the losses to one or more individuals are smaller than the gains to others (non-Pareto gains in social utility).⁴³

39. I have created an example in which a plaintiff is the person whose litigative expectations are harmed. It is easy to construct other examples in which a defendant's expectations are harmed.

40. Admittedly, this assumption can be made only with some difficulty. Legal realists and critical legal scholars argue that the interests and preferences of political elites shape or determine the results in adjudication. See Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009) (arguing that the skepticism of legal realists exposed the political and moral influences affecting judicial decisionmaking, but that legal realists also believed that the rule of law controlled these influences to some degree); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983) (arguing that political interests shape the law). But the aspiration of adjudication, however imperfectly realized, is impartial and equal treatment of all who come before a court. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))); *id.* at 2263 (noting that "fairness and disinterest and neutrality are among the factors at work" in rendering judicial decisions).

41. The classic liberal argument for autonomy is that of John Stuart Mill. See MILL, *supra* note 35; see also Rubenstein, *supra* note 34 (discussing the circumstances in which this autonomy must give way when a party's litigative position threatens to harm the interests of similarly situated litigants).

42. For modern arguments that the legal system should adopt a utilitarian approach, see LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

43. The third justification accepts the definition of Pareto efficiency from the second justification, but with one important modification: it does not require that those who gain from an action provide a portion of their gains to the losers in order to make the losers indifferent to the action. Such compensation would be necessary to satisfy the condition of Pareto efficiency. This

Obviously, the three justifications (consent, Pareto improvements, and net-utility gains) are in philosophical tension. The first is libertarian; the last two are utilitarian. The first is deontological; the last two are consequentialist. Moreover, because they state different conditions for allocative efficiency, the Pareto and net-utility justifications are distinct from each other.⁴⁴ Moreover, the Pareto justification requires that the procedures used in an alternative process are cheaper for at least one party, while the net-utility justification can apply when an alternative process is either cheaper or leads to greater accuracy in the decision.⁴⁵

For present purposes, however, it is unnecessary to determine which principle is “correct.” The justifications often overlap in their practical import. For example, a common reason why a person exits from litigation is consent, and the most likely reason for parties to give consent is that the expected non-litigated result is more advantageous than the expected result from litigation.⁴⁶ Conversely, people will not usually consent to exit when they perceive the expected non-litigated result to be less advantageous than the litigated result. As a pragmatic matter, choosing between justifications in such cases is unnecessary.⁴⁷

modification, known as the Kaldor-Hicks refinement, is commonly made in modern economic theory. See MICELI, *supra* note 33, at 4–6; POSNER, *supra* note 29, § 1.2, at 13.

44. See *supra* note 43.

45. As described before, two variables determine the costliness of procedure: the error rate and the direct costs of litigation. See *supra* note 29. The error rate is the cost imposed by inaccurate decisions. Many of these costs are borne by other actors in society, who might be unwilling to engage in risky but socially beneficial actions if they believe that the legal system will erroneously judge their actions to be unlawful. POSNER, *supra* note 29, § 21.1. But the error rate also affects a plaintiff’s probability of recovery. If we assume that a plaintiff in a perfect world has a 50% chance of recovering on a \$100,000 claim, but the procedures are systematically biased in such a way as to cause a 5% error rate in defendants’ favor, the plaintiff’s actual chance of recovery is 45%; the claim is thus worth \$45,000. If an alternative process reduces that error rate to 0%, then the value of the plaintiff’s claim rises to \$50,000. Because this \$5,000 increase in value comes at the expense of the defendant, such an alternative procedure—even though it enhances accuracy—is not a Pareto improvement unless the alternative process also cuts the defendant’s direct litigation costs by at least \$5,000. For this reason, Pareto improvements in procedure always involve reductions in direct litigation costs. On the other hand, a procedure that increases accuracy meets the condition for the net-utility justification even when it increases direct litigation costs, as long as any additional direct litigation costs from the alternative process are less than the savings from reduced error costs.

46. For examples of situations in which settlement is mutually advantageous to the parties, see THOMAS D. ROWE, JR. ET AL., CIVIL PROCEDURE 174–75 (2d ed. 2008); POLINSKY, *supra* note 29, at 137–39.

47. In many cases, both justifications are likely to lead to the same conclusion. The circumstances in which the choice of justification matters are: (1) when one or more parties consent to use of a non-litigation process whose expected outcome is sufficiently less than the expected outcome from litigation that the net social utility of the choice is negative; and (2) when

Indeed, theories of consent and utility both operate in American law. Doctrines that allow the voluntary and knowing relinquishment of a legal entitlement are common in substantive fields.⁴⁸ So are doctrines that seek to increase social utility.⁴⁹ Consent and utility also shape procedural doctrines.⁵⁰ Regardless of which justification is ethically superior—an issue that I cannot pretend to resolve in this essay—judicial action that harms putative litigants but satisfies neither principle is difficult to defend.⁵¹

Taken together, these justifications suggest three conditions that courts should impose on parties' decisions to exit litigation. The first condition is the harmed party's knowing and voluntary consent to exit. The second condition involves an exit that puts no one—not the parties, the court, or society as a whole⁵²—in a worse position; in this case, an

one or more parties refuse to consent to a non-litigation process that increases net social utility. In these situations, the two theories lead to different conclusions on the propriety of exit.

48. *See, e.g.*, *Shneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (permitting use of evidence seized after a defendant consented to a search of his brother's car); Omri Ben-Shahar, Essay, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1829 (2004) (“One of the pillars of the law of contract formation is the principle of mutual assent.”).

49. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (determining negligence by weighing the cost of safety precautions against the expected reduction in accidents); POSNER, *supra* note 29 (providing an economic interpretation of tort, contract, criminal, property, antitrust, corporate, taxation, and constitutional law).

50. For two Federal Rules that rely on the parties' consent, see FED. R. CIV. P. 15(a)(2) (allowing consent to amendments to pleadings); FED. R. CIV. P. 29 (allowing parties to stipulate to alter certain discovery procedures). For Federal Rules that specifically invoke concerns for efficient resolution of the dispute, see FED. R. CIV. P. 1 (establishing a rule of construction that the Federal Rules “be construed and administered to secure the just, speedy, and inexpensive determination of every action”); FED. R. CIV. P. 16(c)(2)(P) (giving courts case-management powers to “facilitat[e] . . . the just, speedy, and inexpensive disposition of the action”); FED. R. CIV. P. 26(b)(2)(C)(iii) (permitting a court to limit discovery when “the burden or expense of the proposed discovery outweighs its likely benefit”).

51. Aside from autonomy and utilitarianism, there are numerous ethical theories on offer, including altruism, egoism, Kant's categorical imperative, and virtue ethics. *See Tidmarsh, supra* note 26, at 1142–44. With the possible exception of egoism, none of these theories supports the imposition of harm on another without good cause. For example, the categorical imperative requires that people be treated as ends, not means. *See Hans Reiss, Introduction to KANT: POLITICAL WRITINGS 1*, 18 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991). Imposing costs on other persons by forcing them to exit litigation merely to achieve greater personal advantage would be impermissible from a Kantian perspective.

52. An argument can be made that, in some circumstances, the court system or society is disadvantaged by exit decisions, even though the parties are better off because of exit. For the classic argument about the possible social costs of allowing parties to settle out of court, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

exit decision is usually a Pareto improvement.⁵³ The third condition requires that exit result in greater social utility.⁵⁴

Only one of these three conditions must exist in order for a court to allow exit. It is not necessary that a court permit exit in each of these circumstances: if a court is oriented toward the promotion of liberty, it might permit exit only when consent is given despite the efficiency of an alternative; and if a court is oriented toward efficiency, it need not allow exit when the parties consent to an inefficient alternative to adjudication. Moreover, a court might legitimately choose a middle course, and apply one rationale in one situation and another in other situations. At a minimum, however, a court should not permit parties to exit its judicial process unless they meet one of these three conditions.

I recognize the difficulty involved in applying these three conditions in practice. For the consent condition, the principal issue is precisely how voluntary and informed the decision to exit must be. For instance, must the putative plaintiff in my prior hypothetical⁵⁵ know that the expected value of the claim in arbitration is \$2,000 less in order for the court to regard the consent to arbitration as effective?⁵⁶ Is the same type of consent necessary when the parties agree before litigation to opt for an ADR process, as opposed to when they agree to use ADR after litigation has begun? What about form contracts?⁵⁷ For the efficiency-

53. As I have described, a Pareto improvement occurs when no person is made worse off and at least one person is made better off. *See supra* note 33 and accompanying text. When exit into a different procedural regime leaves everyone in the same position, no Pareto improvement has occurred. But it is unlikely that many exit decisions will place every interested person in precisely the same position as they would have been in without exit; hence, as a general matter, when exit makes no one worse off, someone is made better off.

54. To be clear, the utility calculation must compare the error costs and direct costs of litigation on one hand with the error costs and direct costs of the alternative procedure on the other. *See POSNER, supra* note 29, §§ 21.1–.2 (describing the calculation and costs of error in civil litigation). Included within the direct costs of the alternative procedure is the social cost of uncertainty in legal rules, a cost that results from fewer litigated cases. *See Fiss, supra* note 52, at 1085–87; Rex R. Perschbacher & Debra Lyn Basset, *The End of Law*, 84 B.U. L. REV. 1, 6–8 (2004). Exit into a non-litigation alternative is permissible under this third condition only when the net costs from using the alternative to litigation are less than the net costs from litigating the dispute.

55. *See supra* notes 38–39 and accompanying text (describing the change in value of a plaintiff's claim moving from litigation to arbitration).

56. If so, one question is why a rational plaintiff would ever consent to a process likely to result in a worse outcome. One answer might be that the plaintiff is a risk taker; another is that the plaintiff mistakenly assesses the likely outcome or the costs of arbitration.

57. *Compare, e.g.,* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001) (holding that the Federal Arbitration Act includes most employment contracts and thus allows employers to enter into form arbitration contracts with employees), *and* Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (holding that a contractual agreement to waive the use of class actions in arbitration can in some instances be enforced), *with* Kristian v. Comcast Corp., 446

based conditions, the principal issue is informational: without knowing what the evidence will reveal or how difficult it will be to obtain it, a court's effort to calculate expected outcomes and litigation costs is fraught with the prospect of error.⁵⁸ Courts are even more likely to lack the experience with litigation alternatives to accurately calculate the comparable expected outcomes and costs for those processes.⁵⁹

As significant as they are, these practical concerns are surmountable. With mature⁶⁰ or common⁶¹ litigation, data and experience can be useful for calculating expected values. Moreover, in some cases, parties do not make exit decisions until the evidence has been discovered and the majority of litigation expenses have been incurred.⁶² Finally, through presumptions, burdens of proof, and rules of thumb, courts can address remaining uncertainties.⁶³ My preference is to impose the burden of proving the existence of an available justification on those who seek to exit from the litigation system; otherwise, harmful exit without adequate justification becomes too easy. But my preference is itself a rule of thumb, not an absolute requirement demanded by the principles justifying exit.

F.3d 25, 29 (1st Cir. 2006) (striking down prohibitions against treble damages, attorneys' fees, and the use of class actions in a consumer contract requiring arbitration).

58. See POSNER, *supra* note 29, § 21.1, at 594 (“[I]t is rarely possible (or at least efforts are rarely made) to quantify the terms.”); Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 896 (2009).

59. This statement is not true for many settlement agreements, in which the amount of the settlement is known and the costs of implementing the settlement are insignificant. But even here, the judge still faces the problem of calculating the expected net outcome from litigation, against which the settlement figure must be compared.

60. See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1843 (1995) (arguing that, with mass torts, cases can eventually reach a mature equilibrium in which the chances of victory and recovery can be predicted with some level of confidence).

61. See JAMES S. KAKALIK & NICHOLAS M. PACE, RAND CORP., COSTS AND COMPENSATION PAID IN TORT LITIGATION (1986) (estimating total costs in automobile-accident cases and in non-automobile-accident cases); JAMES S. KAKALIK ET AL., RAND CORP., COSTS OF ASBESTOS LITIGATION (1983) (estimating total costs in asbestos cases).

62. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.12 (2004) (noting that “the parties may be unwilling or unable to settle until they have conducted some discovery”).

63. See *White v. Mayflower Transit, L.L.C.*, 543 F.3d 581, 584 (9th Cir. 2008) (holding that a person seeking to set aside an arbitration award bears the burden of proof); *cf. Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2002) (noting the difficulty of the precise valuation of a class's expected recovery in litigation in comparison to settlement, but suggesting ways to achieve at least a “ballpark valuation”). Compare *Wilko v. Swan*, 346 U.S. 427, 432 (1953) (holding that pre-dispute arbitration agreements are unenforceable in the securities area despite the “hospitable attitude of legislatures and courts toward arbitration”), with *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (overruling *Wilko* and rejecting the “outmoded presumption of disfavoring arbitration proceedings”).

III. WHEN EXIT DOES OCCUR: MATCHING EXIT DECISIONS WITH THE JUSTIFICATIONS FOR EXIT

Exit most commonly occurs in one of three situations: movement into ADR,⁶⁴ determination through mass claims-resolution facilities,⁶⁵ and adjudication in administrative agencies.⁶⁶ The first and the third situations present opposing paradigms. Movement into ADR typically occurs because of the parties' voluntary consent to enter an alternative process.⁶⁷ Conversely, statutes created in the democratic process but not necessarily with the consent of the parties compel some putative litigants to adjudicate their claims before administrative agencies.⁶⁸ In

64. The exact number of cases that exit from litigation into ADR is uncertain, but it likely significantly exceeds the number decided through litigation procedures. For instance, according to a somewhat dated study, the number of federal cases that end in a judgment (whether the judgment results from a motion to dismiss, summary judgment, or decision after trial) is about 20%; 63% of cases were resolved through settlement, which is one ADR method; and others were resolved through arbitration. See Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 163 (1986); see also Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40, 1387 (1994) (analyzing the factors likely to cause greater movement toward settlement since the Kritzer study). To use another measure of the popularity of ADR, in a 2005 survey of forty-nine of the ninety-four federal district courts, courts referred a minimum of 24,835 cases to some ADR process. John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 224 n.62 (2006). In comparison, between October 2004 and September 2005, federal courts tried 5294 civil cases. LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2005 ANNUAL REPORT OF THE DIRECTOR 194 tbl. C-7 (2005). Civil filings in federal court during this same period were 253,273. *Id.* at 152 tbl. C.

65. Again, the exact number of cases that are resolved through mass processes is uncertain, and is variable from year to year. Mass resolutions can dispose of anywhere from a few hundred cases to hundreds of thousands of cases. For instance, five mass-tort settlements in the 1990s resolved anywhere from about 6,500 to an estimated 130,000 or more cases apiece. See JAY TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 10 (1998). For other examples, see *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005) (approving settlement of a class action involving 5,000,000 members); *In re Combustion, Inc.*, 978 F. Supp. 673 (W.D. La. 1997) (establishing claims-resolution process under aegis of the court for 10,000 claimants).

66. Professor Resnik estimates that, in recent years, the four largest administrative agencies have conducted approximately 750,000 adjudications each year. See Resnik, *supra* note 18, at 604. By way of comparison, approximately 264,000 civil cases have been filed, on average, over the past five years. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 48 tbl. S-7 (2008).

67. If a court rule or statute compels entry into a binding ADR process, the analysis of the exit slides into the opposing paradigm. But such compulsion is rare. See *Developments*, *supra* note 10, at 1857 & n.44; *infra* note 78.

68. For a description of one important administrative process—the four-step, mostly non-adversarial process used to handle Social Security claims—see Frank S. Bloch et al., *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003).

this regard, the two paradigms—voluntary agreement and majority will—mirror the two basic forms of social ordering, other than adjudication, by which societies legitimately make decisions.⁶⁹

The second situation—the mass handling of claims in claims-resolution facilities—presents a mixed picture. Like consensual agreements associated with ADR, most mass resolutions occur as a result of negotiated agreements that establish the process under which individual awards are made.⁷⁰ As with democratic decision-making, individual claimants typically do not consent (at least in the ordinary sense of that word) to the mass-resolution process. Instead, others who represent the interests of individual claimants—typically class representative(s) and class counsel—consent on the claimants' behalf.⁷¹ Moreover, these facilities often involve scheduled compensation benefits comparable to those provided by administrative agencies.⁷² Individuals usually have an opportunity to oppose the process,⁷³ and in some cases have the opportunity to exit from this process back into the litigation system.⁷⁴ But a court can impose the process on objectors even against their will, as long as the settlement is “fair, reasonable, and adequate.”⁷⁵

In theory, any of the three justifications for exit into a different procedural form (consent, Pareto improvement, or net gains in social

69. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357–65 (1978) (indicating that the two principal forms of social ordering are organization by common aims (or government) and organization by reciprocity (or contract)).

70. For descriptions of some of these agreements and their resulting processes for determining individual claims, see S. ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (2000); TIDMARSH, *supra* note 65; Symposium, *Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 LAW & CONTEMP. PROBS. 1 (Autumn 1990); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986).

71. See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1443–50 (2003) (discussing class-action settlements).

72. See Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 LAW & CONTEMP. PROBS. 113, 121–27 (Autumn 1990) (describing the operation of various claims-resolution facilities); see also Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997) (analogizing global mass-tort settlement mechanisms to those of administrative agencies); Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603 (2008) (discussing interplay of class-action settlements and the positive political theory of the modern administrative state).

73. See FED. R. CIV. P. 23(e)(5) (describing how an individual objects to settlement).

74. See FED. R. CIV. P. 23(e)(4) (noting the court's procedure to allow an individual to be excluded from the class before settlement); TIDMARSH, *supra* note 65, at 53–54, 66 (describing back-end opt-out provisions, under which some claimants dissatisfied with the award provided in the mass-resolution process, could re-enter the litigation system).

75. FED. R. CIV. P. 23(e)(2).

utility) can apply to any of the three situations in which exit typically occurs (ADR, mass resolutions, and administrative adjudication). For example, movement into an ADR process might be justified by the parties' consent, or by the net savings that it generates if the court mandates use of the process over the objection of one or more parties. In practice, however, a rough correspondence exists between consent and ADR processes; between Pareto improvement and mass-resolution processes; and between net gains in social utility and administrative processes.

The first and third correspondences require only brief discussion. The connection between consent and ADR is evident. Parties typically agree to settle, mediate, arbitrate, or use another ADR process; indeed, their consent to opt into such a process serves as the reason for courts' enforcement of ADR agreements and awards.⁷⁶ Although courts can strongly encourage parties who have entered the litigation system to agree to resolve disputes through ADR,⁷⁷ they cannot force the parties to accept the outcome of such a process⁷⁸—at least without showing that either the mandatory use of binding ADR is a Pareto improvement or the outcome results in greater social utility. Available data and other considerations suggest that courts might often have difficulty making either showing for binding ADR.⁷⁹ Therefore, in most instances, the

76. See 9 U.S.C. §§ 4, 9–10 (2006) (with certain exceptions, requiring courts to enforce arbitration agreements and awards); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 382 (1994) (stating that a settlement agreement is a contract enforceable in state court).

77. See, e.g., 28 U.S.C. § 652(a) (2006) (requiring federal district courts to provide litigants “with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration”).

78. It is critical to distinguish between orders that mandate litigants to participate in an ADR method in the effort to resolve the dispute and orders that effectively require parties to accept or to be bound by the outcome of the ADR process. In addition, courts might not even be able to order parties to participate in some forms of non-binding ADR. Compare *Strandell v. Jackson County*, 838 F.2d 884, 888 (7th Cir. 1987) (holding that district court cannot compel litigants to participate in summary jury trials without their consent), and *Kamaunu v. Kaaea*, 57 P.3d 428, 431 (Haw. 2002) (holding that trial court could not impose a sanction on a party who failed to make a settlement offer because of the stated desire to go to trial), with *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 655 (7th Cir. 1989) (affirming imposition of sanctions when a party disobeyed a court order requiring the presence at a settlement conference of a person with settlement authority). But see *Heileman*, 871 F.2d at 653 (“If this case represented a situation where [defendant] had sent a corporate representative and was sanctioned because that person refused to make an offer to pay money—that is, refused to submit to settlement coercion—we would be faced with a decidedly different issue—a situation we would not countenance”).

79. Compare JAMES S. KAKALIK ET AL., *RAND CORP., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT*, at xxx–xxxv (1996) (finding little evidence that various ADR methods improved time to disposition, costliness of litigation, or satisfaction with outcomes), with Fiss, *supra* note 52, at 1085–87 (discussing the

argument for using ADR processes rather than litigation procedure hinges on the parties' consent. That fact does not resolve all issues regarding ADR; as I have said, exactly how fully informed the parties' consent to ADR must be remains an open issue.⁸⁰ But consent in some form will typically serve as the justification for a court's decision to force (or enforce) the parties' movement into ADR.

Conversely, using administrative-agency procedures rather than litigation procedures must, in most cases, be justified by the gain in social utility from such procedures. Because statutes require claimants to enter administrative adjudication, consent is usually inoperative as a justification for using such procedures. Likewise, unless the procedures used by an agency in fact make all parties better off, the Pareto-improvement rationale is unavailable. But the final justification—a net gain in social utility—remains in play. Indeed, the law concerning administrative procedure reflects exactly this justification. *Mathews v. Eldridge* held that, to be consistent with the Due Process Clause, an agency's decision to terminate benefits without an adversarial hearing is justified only when the gains to the government from using a non-adversarial process outweighs the expected losses to individuals from the process: in other words, when any losses in accuracy are offset by savings from the use of a non-litigation process.⁸¹ In more recent years, the Court has extended the *Mathews v. Eldridge* approach into contexts other than the deprivation of government benefits.⁸² This expansion

social costs of settlements), and Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (discussing participants' concerns with mediation and other litigation alternatives). See also Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008) (reporting data from longitudinal study that showed parties' ex post level of satisfaction with adjudicatory and non-adjudicatory processes tended to correlate with ex ante preferences for third-party control of the dispute).

80. See *supra* notes 55–57 and accompanying text (discussing when consent is appropriate).

81. 424 U.S. 319, 349 (1976). *Mathews v. Eldridge* described the three factors that composed the test for due process as follows:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. By balancing the product of the first two factors against the third factor, the net social utility of using non-litigation procedure can be determined. See POSNER, *supra* note 29, § 21.1 (describing *Mathews v. Eldridge* as implicitly adopting an economic interpretation of procedure).

82. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2268 (2008) (citing the *Mathews v. Eldridge* test to support the “idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (using the *Mathews*

suggests that the efficiency rationale can serve as a more general justification by which courts can judge the government's decision to require individuals to exit into an agency's adjudicatory process.

The correspondence between the Pareto-improvement justification and mass-resolution processes is less evident. To begin, mass-resolution processes typically involve the intermediation of representatives who act on behalf of individual claimants. In many cases, mass resolutions are accomplished through the vehicle of the class action, in which members of the class are represented by the class representative(s) and class counsel.⁸³ Comparable mass resolutions occur in other aggregated or representative processes, including multidistrict litigation, actions brought by agents or trustees, *parens patriae* actions, and actions brought by associations or organizations on behalf of their members.⁸⁴ In such cases, it is common for a lead counsel, who has significant control over the litigation, to represent the entire group.⁸⁵ Elsewhere I have argued that the duty constitutionally demanded of class representatives and class counsel requires that they act in a way that causes no harm to the interests of those they represent.⁸⁶ The same duty can be ascribed more generally to representatives and counsel in other mass proceedings.⁸⁷

v. *Eldridge* test to determine the scope of an enemy combatant's opportunity to contest his detention).

83. See FED. R. CIV. P. 23(a), (g) (outlining the role of the class representative and class counsel).

84. See 28 U.S.C. § 1407(a) (2006) (describing transfers in multidistrict litigation); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. b(1)(B) (Proposed Final Draft 2009) [hereinafter PRINCIPLES] (noting that representative actions other than class actions "may be numerically more common").

85. See MANUAL FOR COMPLEX LITIGATION, *supra* note 62, § 10.22 (suggesting the appointment of lead counsel in appropriate complex cases); PRINCIPLES, *supra* note 84, § 1.05 cmt. c ("[B]ecause individual participants [in aggregated litigation] are a small part of the total litigation, a lawyer may have insufficient incentive to see that individual participants are fairly treated"); *id.* cmt. f ("[a] lead lawyer in an aggregate proceeding operates without the usual tethers of loyalty and obedience"); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987) (arguing that the conflicts of interest between attorney and client that arise in mass litigation are an "agency cost" problem); Jonathon R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 22-27 (1991) (arguing that class members' inability to monitor attorneys and the inefficacy of bonding in class actions create deviations of interests between attorneys and clients).

86. See Tidmarsh, *supra* note 26.

87. See PRINCIPLES, *supra* note 84, § 1.05 cmt. f (stating that, in any aggregate proceeding, a lawyer should "take all steps that have reasonable potential to make one or more parties or represented persons better off without harming others"). *But see id.* cmt. c (suggesting that a duty

Thus, the best justification for exits from litigation into mass-resolution facilities is that of Pareto improvement for individual claimants: no harm results to any claimant as a result of using non-litigation procedures to resolve the dispute and at least one claimant is made better off. Assuming that the defendants, which are typically sophisticated institutions and business entities, are unlikely to assent to exit into a mass-resolution process unless the process is better for them, then an exit into a mass-resolution process is a Pareto improvement. To the extent that this assumption is untrue, then the defendants' consent justifies their exit from litigation.⁸⁸

The rough correspondence between the three grounds under which courts can permit exit into non-litigation processes and the three common grounds for such exit suggests rules of thumb by which courts can determine whether exit from litigation is justified. First, courts should not permit exit into ADR without the consent of the parties. Second, courts should not permit exit into mass-resolution processes unless at least one person is made better off and no one is harmed. Third, courts should not permit exit into administrative adjudication unless the agency's process results in a net gain in social utility when compared with the litigation process.

These are, of course, rules of thumb. On certain facts, a justification other than the most evidently corresponding one might provide the court with a basis to allow exit.⁸⁹ The critical point is that courts should think much harder than they typically have about the reasons why they allow exit to occur. Courts typically have not seen themselves as skeptical gatekeepers in the exit game. All of us, judges included, have become conditioned to think of exit as a private matter—as something into which courts have little input other than to grease the hinges leading out of the courthouse door.⁹⁰

of adequate representation might not be constitutionally compelled in aggregated proceedings other than class actions).

88. When exit into a mass-resolution process harms individual claimants, consent would be a justification only if each harmed claimant consents to the exit; as I have said, consent cannot be given by proxies. See *supra* note 70 and accompanying text (describing individual awards in negotiated agreements). Nor is the net-social-utility justification available in situations, such as class-action litigation, in which the Constitution defines adequate representation to require that the actions of representatives not visit harm on those that they represent. See *Hansberry v. Lee*, 311 U.S. 32 (1940) (discussing the scope of the binding effect of a class-action judgment on class members); Tidmarsh, *supra* note 26 (discussing the theory of adequate representation in class actions).

89. See, e.g., *supra* note 88 and accompanying text.

90. See, e.g., *In re HealthSouth Corp. Sec. Litig.*, 572 F.3d 854, 862 (11th Cir. 2009) (“Public policy strongly favors the pretrial settlement of class action lawsuits.” (quoting *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992))); *United States v. Glen Falls Newspapers, Inc.*,

But the litigation system is a type of government program, and thus a public good.⁹¹ Like any government institution, courts have an obligation to ensure that the program they administer works to the advantage, rather than to the detriment, of its intended beneficiaries. One point at which they must do so is the point of exit, regardless of whether exit results from the initiative of claimants or their representatives or from the dictates of an administrative scheme. Because exit can occur only with courts' explicit or tacit acquiescence, courts bear responsibility for justifying their choice to permit exit to occur.

IV. BEYOND EXIT: THE JUSTIFICATIONS FOR EXIT AND THE LIMITS OF PROCEDURAL UNIFORMITY

The argument that courts must justify their decisions to permit exit has two premises: the reality that different dispute-resolution procedures can affect the outcome of a dispute and the belief that courts ought to care about the inequity that can result from a putative litigant's entry into a procedural system that is less favorable than the default procedural system that the courts provide. The argument and its premises can also apply beyond exits from litigation. Let me suggest two further applications. First, courts can (and sometimes do) adopt different procedures for different types of cases.⁹² Procedural rules that apply only to some types of cases are, to use the word common among proceduralists, "non-transsubstantive."⁹³ One of the challenges in

160 F.3d 853, 858 (2d Cir. 1998) (noting the district court's "Article III function of crafting a settlement" in a complex case).

91. See Elizabeth Chamblee Burch, *CAFA's Impact on Litigation As a Public Good*, 29 CARDOZO L. REV. 2517, 2518–19 (2008); Fiss, *supra* note 52, at 1085.

92. For instance, some courts develop tracks, complete with different case-management and discovery limitations, for cases of different size and complexity. See, e.g., C.D. ILL. R. 16.1; D. ME. R. 16.1, 16.3; N.D. W. VA. R. 16.02–03. Other courts develop specialized rules for substantive fields such as patent law. See, e.g., S.D. TEX. R. OF PRACTICE FOR PATENT CASES, available at <http://www.txs.uscourts.gov/district/rulesproc/patent/rules.pdf>.

93. Procedural rules are "non-transsubstantive" only when a procedural code uses different procedures to resolve cases in different substantive fields (say, different rules in tort cases and antitrust cases). But the word is sometimes used in a looser sense to describe any situation in which a procedural rule applies only to a subset of cases. *But see* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 536 (describing such rules as "transprocedural"). The classic article describing the aspiration and limits of transsubstantive procedural rules is Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732–35, 737 (1975). For compilations of literature discussing the transsubstantive premise of modern federal procedure, see JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 6–7 (1998); Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State*

modern procedural theory is to determine whether and when it is permissible to use non-uniform—in other words, non-transsubstantive—procedural rules that can be expected to result in more favorable outcomes for some cases than for others.⁹⁴

It is beyond the scope of this essay to explore the issue in detail.⁹⁵ Nonetheless, the question of justifying the use of non-uniform procedural rules within the litigation system strikes me in many ways as identical to the question of justifying the use of non-uniform procedural rules among the litigation system and alternative systems such as ADR, mass-resolution facilities, and administrative adjudication.⁹⁶ In both situations, the judiciary must justify its decisions to permit (or at least to acquiescence in) the use of different procedures that can be expected to result in different outcomes for similar disputes. As with the use of non-litigation procedural forms, the justification for non-transsubstantivity must ultimately lie either in a notion of autonomy (consent) or in some notion of efficiency (whether measured by Pareto improvements or net gains in social utility).

Second, the principles that I have suggested also seem applicable when a court is considering whether to allow a litigant to exit from one form of litigation into another. The situation I have in mind is the movement from class-action or other aggregated litigation into individual litigation. The circumstances under which a class member enjoys the right to exit from class litigation are presently contested.⁹⁷

Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure, 46 VILL. L. REV. 311, 318 n.30 (2001).

94. For my earliest attempt to explore the reasons why different, outcome-affecting rules might be applied in complex cases and ordinary cases, see Tidmarsh, *supra* note 1.

95. I thank Professor Spencer Waller for pointing out this connection.

96. There are some differences in the two situations, such as the need for courts to respect the democratic process' decision to require exit from litigation into an administrative process—a consideration that does not apply in the litigation context unless the non-transsubstantive rules at issue are legislative in origin. *Cf.* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) (changing jurisdictional and settlement rules for federal class actions); Y2K Act, Pub. L. 106-37, 113 Stat. 185 (1999) (codified at 15 U.S.C. §§ 6601–6617 (2006)) (imposing notification and heightened pleading requirements in Y2K liability lawsuits); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 743 (codified at 15 U.S.C. § 78u-4 (2006)) (changing aspects of the federal class-action rule in federal securities cases). The differences in the two situations, however, suggest to me a heightened need to justify non-transsubstantive litigation rules.

97. At present, there are two distinct threads to this question. The first is whether (and when) the Due Process Clause requires class members (or, possibly, others caught up in aggregate litigation) to be given the right to opt out of the class action. The second is whether class members that did not opt out of the class action can later repudiate the results of the action by contending that they were inadequately represented in a collateral suit. Both questions have their origin in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Despite opportunities when it

Often the issue is framed as one of “voice” versus “exit”: whether it is better to keep litigants in the aggregated proceeding but ensure that their voices are heard and heeded, or to give them the opportunity to exit and pursue their own interests separately.⁹⁸ Typically, this discussion centers on the circumstances in which a class member or other aggregated litigant *should* be allowed to exit. The framework developed in this essay suggests that the focus ought to lie on the circumstances in which a class member or other aggregated litigant *should not* be allowed to exit from one procedural form (class or aggregated proceedings) into another (an individual proceeding).⁹⁹ The analysis in this essay suggests that a court should not allow exit from one litigation form into another unless all affected parties consent to the exit, exit is better for at least one affected party and worse for none, or exit increases net social utility.¹⁰⁰

These last two conclusions are tentative, and require greater analysis than I can provide in this essay. The desirable degree of uniformity in procedural rules and the proper relationship between aggregated and individual proceedings are significant questions that the judiciary faces in the twenty-first century—as significant as the question of exit into non-litigated procedural forms. My suggestion here is that these seemingly different problems have a common denominator in the set of reasons that can justify judicial efforts at reform.

might have done so, the Supreme Court has yet to resolve either issue. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844–48 (1999) (raising the first issue but deciding the case on other grounds); *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (per curiam) (4-4 decision) (affirming a judgment that allowed a collateral attack). The issues have generated a number of lower-court decisions and a vast secondary literature. For a sampling, see ROWE ET AL., *supra* note 46, at 682–88; TIDMARSH & TRANGSRUD, *supra* note 93, at 294–310.

98. The seminal article is John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000).

99. The converse is also true: a court should not require a litigant who has commenced an individual suit to exit into a class action or aggregated proceeding unless one of the justifications outlined in this essay exist. The timing of the filing of a class action or aggregation in relation to the filing of individual suits can therefore matter, at least in situations in which the burden of proof might decide the permissibility of exit. *See supra* note 63 and accompanying text (discussing how courts manage arbitration).

100. Even if exit from a class or other aggregated proceeding is not justified, a court can still work to improve the litigants’ voices within the proceeding.