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The Lawlessness in Our Courts

Susan P. Koniak

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Some exercises of state power are not worthy of the name of "law." Calling something "law" does not automatically legitimize it, but it does coat it with a veneer of legitimacy. Law, in other words, connotes right.[1] The notion of legitimacy is deeply embedded in the word "law" by our culture, our history, and our use of language.[2] Thus, for a state — indeed, for any group — to claim that its exercise of power is lawful is neither an empty claim nor a mere tautology. It is a claim that the state (or other group) has not merely the might to act, but the right to act. "Law" not only privileges certain exercises of state power, but it also privileges certain claims of right. Legal claims elevate moral claims from the "ought" to the "must." Only the law speaks in "or else" terms. Morality and philosophy ordinarily speak in gentler tones, asking for acceptance rather than demanding it.

To say that our culture, history, and language insist on a connection between law and right is to say that few, if any of us, would find it easy to describe as law every conceivable rule or practice that any conceivable regime might designate as law. Rodney Blackman made this point with a story:

> [Y]ou are in a strange country. You are walking down a main street in the largest city. Suppose that you hear a siren and notice that it comes from a small truck coming toward you. The truck looks like a police van. The van stops in front of you and several uniformed men get out. Without notice to you, the men grab you, beat you into submission with their gun handles, drag you into the van and throw you bound hand and foot with your mouth gagged onto the floor. The van speeds off with the siren blaring and stops in front of a building that looks like a courthouse. You are dragged

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1. *See* Robert M. Cover, *Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 180–81 (1985) (describing law as a valuable resource in the complex social game of legitimation).

2. *See id.* at 180 n.7. Legitimacy is so deeply embedded in the word "law" that the central project of legal positivism — to separate the question of what is law from the question of what is right — was doomed from the start. *See id.* at 180. Indeed, our culture, history, and language are so insistent on the connection between law and right that to call something an evil law is to grant it a legitimacy that no positivist intends, but which none can avoid. *See id.*

> out of the van, and brought before someone who is dressed like a judge. The "judge" then informs you that you are undoubtedly guilty (without informing you of the charges), but that you are still entitled to a trial before having the death sentence imposed. A burly looking gentleman who claims to be your lawyer then informs the "judge" that a trial isn't necessary because you are obviously guilty. "Your lawyer" then smacks you a few times across the face with his gun handle, apparently for the sheer joy of it. Accepting the "lawyer's" assertion that no trial is necessary, the "judge" says, "very well, I am sentencing you to death by torture."
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> But before being dragged out of the "courtroom," the gag is removed from your mouth and you are allowed to utter a few choice thoughts. Let us assume that you try charm, flattery, bribery and threats, and nothing works. What would you say? Assuming you have embraced the legal positivist position that there is no necessary connection between law and morality, you could still attack what has happened to you on moral grounds. You could call what was being done to you, "wicked, evil, indecent, immoral, barbarous and uncivilized."
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> But suppose you realize from his sardonic smile that the "judge" obviously does not care one bit whether your moral sensibilities have been offended. In your rage you then seek to hurl an invective at the "judge" which, given the "judge's" so-called job description, might actually have some impact. So you scream, "you call this law? This isn't law. It's a mockery of everything that law stands for."[3]

If you were to believe some version of the last sentences in Blackman's story, you would not be thinking or speaking as a legal positivist. More important, legal positivism cannot explain why totalitarian regimes fuss over the term "law" at all or bother with the trappings associated with law, such as courthouses, procedures, lawyers and judges. Why not declare, by law, that none of these trappings are necessary and that from now on, whatever the leadership does and whenever it does it is lawful at that time and forever more?

Instead, totalitarian regimes make great use of the power of "law" to legitimize their actions. Consider, for example, the "trials" held by Stalin in the 1930s to get rid of political enemies. It is important to remember that governments are not the only entities

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3. Rodney J. Blackman, *There Is There There: Defending the Defenseless with Procedural Natural Law*, 37 ARIZ. L. REV. 285, 294–95 (1995).

that use law and its trappings to legitimize acts of violence. Various elements of the militia movement in this country have established what they call "Common Law Courts," which hold "trials" to condemn as "illegal" acts of local, state, and federal government agents — acts that our courts contend, of course, are legal.[4] These groups spend considerable time and energy articulating what their law demands of themselves and of us. They understand what positivists miss: law, legitimacy, the classification of acts of violence, and the elevation of claims of right are interdependent matters; they always were and always will be. Thus, choosing to call something "law" is a matter of some significance, as is refusing to call something "law."

Elsewhere I have argued that the word "law" is too important a resource to reserve exclusively for state acts and pronouncements.[5] Here, however, my emphasis is somewhat different. Here, I want to concentrate on the importance of denying the label of "law" to some acts that the state calls "law," particularly the importance of lawyers denying the state's indiscriminate use of the word "law." The bar's rhetoric maintains that the profession's independence from the state is critically important because only an independent bar can serve as an appropriate check on tyranny, on state force masquerading as law.[6] Well, I write to say that we are falling down on the job. Much of class action practice has lost its claim to the name of law. Unfortunately, lawyers in position to sound the alarm are silent. That silence must be broken.

SPEAKING OF WHAT CANNOT BE LAW

A full account of what I would consider worthy of the term "law" is beyond what might be accomplished in this short Essay,

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4. *See* Susan P. Koniak, *When Law Risks Madness*, 8 CARDOZO STUD. L. & LIT. 65, 104–105 (1996).

5. I have maintained that dignifying the alternative normative vision of private groups with the name "law" helps us evaluate the world more fairly when comparing the world the state's normative demands would create with that which the private group's normative demands would create. Denying the label "law" to the normative vision of non-state actor's law, minimizes the contribution that private groups play in shaping the state's law. *See, e.g.*, Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1404 (1992) (describing the legal profession's law and its divergence from state law); Koniak, *supra* note 4, at 67–73 (describing the Common Law movement associated with many militia groups, the world their law would create, and that law's influence on our own).

6. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10–11 (1988); *see also* Koniak, *supra* note 5, at 1447–60.

and even if space were no obstacle, I fear that I would not be equal to that task. However, just as one need not know what is true to know that a particular statement is false, I will maintain that one need not be able to describe fully that which is worthy of the name of "law" to know that some things could not possibly qualify.

Returning to Blackman's example, I submit that, across a wide spectrum of political and jurisprudential positions, the system he describes would be considered unworthy of the name of "law." Given its normative significance and its cultural and historical centrality, what qualifies as law is bound to be an essentially contested matter, particularly in a society as diverse as modern America. Nonetheless, a concept may be essentially contested and, at the same time, fairly broad areas of agreement may exist on what the concept *excludes*, including agreement across groups with divergent ideas on what the concept includes — what it means as an affirmative matter.

In a recent article, Richard Fallon identifies four models of the Rule of Law competing for dominance in modern constitutional debate and Supreme Court decisions.[7] He documents the substantial disagreement that exists on what the Rule of Law means.[8] Fallon describes law as an essentially contested concept,[9] but he sees a sizable area of common ground[10] — ground that gives the

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7. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 93 COLUM. L. REV. 1 (1997). Fallon identifies four ideal types — historicist, formalist, proceduralist, and substantive — that each purport to identify what is both necessary and sufficient to the Rule of Law. *See id.* at 10. His claim is that each ideal type is incomplete in that it negates the importance of values affirmed (and in his opinion, rightly so) by the other types. *See id.* at 56. Fallon argues that each ideal type emphasizes values that make up strands of what it means to speak of the Rule of Law, *see id.* at 6, in opposition to the rule of men, *see id.* at 2, or, in my shorthand, what it means to speak of law versus lawlessness or tyranny. Fallon's thesis states:

> It is a mistake to think of particular criteria as necessary in all contexts for the Rule of Law. Rather, we should recognize that the strands of the Rule of Law are complexly interwoven, and we should begin to consider which values or criteria are presumptively primary under which conditions.

Id. at 6. Fallon's project is closer to that which I have claimed as mine — an affirmative account of what must be true about a system for it to qualify as a system of law. Nonetheless, his analysis provides support for my more limited claim that substantial agreement exists on what is unworthy of the name "law." Thus, with apologies to Professor Fallon for not engaging his creative thesis on its own terms, I will use his work as a springboard for my claim that substantial consensus exists on what is not law.

8. *See id.* at 7.

9. *See id.*

10. *See id.*

Rule of Law enough meaning to qualify as a shared concept.[11] A concept worth fighting over. Fallon finds common ground on "the elements generally recognized as constitutive of the Rule of Law."[12] The elements Fallon claims are common to otherwise divergent understandings of the Rule of Law mirror those identified by Lon Fuller in *The Morality of Law*.[13] Fallon reduces Fuller's eight criteria (generality, publicity, prospectivity, clarity, noncontradictoriness, capability of being followed, stability and congruence between norms as stated and norms as applied)[14] to a somewhat smaller number on the ground that some of the elements are redundant.[15]

Fallon sets out five criteria: (1) "People must be able to understand the law and comply with it";[16] (2) "[t]he law should actually guide people, at least for the most part";[17] (3) "[t]he law should be . . . stable [enough] . . . to facilitate planning and coordinated action over time";[18] (4) "[t]he law should rule officials, including judges [and kings], as well as ordinary citizens;"[19] and (5) "[c]ourts . . . [that] employ fair procedures" should be charged with enforcing the law.[20]

I agree with Fallon's position that some formulation of Fuller's list describes common ground. Although I would locate that ground outside rather than inside the concept of law, I believe the goals listed as criteria by Fuller and Fallon together create an outer

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11. *See id.* at 5.
12. *Id.* at 4.
13. LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).
14. *See id.* at 38–39.
15. *See* Fallon, *supra* note 7, at 8 & n.27.
16. *Id.* at 8. Fallon should not be read as asserting that our legal system actually meets these criteria or that any legal system could avoid departing from the principles he lays out. *See id.* at 3. Instead, he consciously describes an "ideal, not a mirror of what is done" or even possible. *Id.* at 4. As Fallon clearly recognizes, ideals are important precisely because they reveal the gap between what is and what we affirm law should be. They thus provide both the ground for a meaningful critique of the present and a direction for efforts at reform.
17. *Id.* at 8.
18. *Id.*
19. *Id.*
20. *Id.* at 9. Fallon describes this element as "involv[ing] instrumentalities of impartial justice." *Id.* He writes: "Courts should be available to enforce the law and should employ fair procedures." *Id.* I have rewritten this to remove the implication that "courts" in and of themselves, for example and without reference to their procedures, contribute to the legal system. I am confident that Fallon did not intend courts apart from their procedures to count, but his sentence is not as clear on this point as it could be.

boundary that generates substantial agreement about what is unworthy of the name of law while allowing substantial disagreement about what is worthy. Put more simply, few, if any of us, would call that which falls far short of all these goals "law" or a "legal system."

As Fallon emphasizes, many of the operative terms in his list of agreed-upon elements of law are vague. He views this vagueness as a flaw to be fixed. After all, vagueness allows significant disagreement to continue on what the Rule of Law means. I agree that the vagueness perpetuates disagreement, but I believe it is also what makes agreement possible. Disagreement on fundamental matters of principle is inevitable in a nation as large and diverse as ours. Our central normative commitments must therefore be expressed with sufficient abstraction to permit the coexistence of divergent understandings; otherwise, our union might dissolve.

Robert Cover attributed this insight to Joseph Caro, a brilliant codifier of Jewish Law, a scholar and a mystic.[21] Caro wrote: "[T]here is a difference between the [force needed for the] preservation of that which already exists and the [force needed for the] initial realization of that which had not earlier existed at all."[22] This difference, Caro continued, explains the different statements made by Simeon the Just, circa 200 B.C.E., and Rabbi Simeon ben Gamaliel speaking three hundred years later. Simeon the Just said: "Upon three things the world stands: upon Torah; upon the temple worship service; and upon deeds of kindness."[23] Conversely, Rabbi Simeon ben Gamaliel stated: "Upon three things the world [continues to] exist[]: upon justice, upon truth, and upon peace."[24] The forces necessary to *create* a world of shared normative meaning must be "culture-specific designs of particularist meaning."[25] In contrast, the forces necessary to *maintain* a world of shared normative meaning are "weak" forces, or broad principles capable of ensuring the coexistence of worlds whose normative understanding on the specifics diverge from one another.[26] Contrast the many culture-specific references in our Declaration of Independence, which

21. *See* Robert M. Cover, *The Supreme Court 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 12 (1983).

22. *Id.* (quoting JOSEPH CARO, BEIT YOSEF AT TUR: HOSHEN MISHPAT 1 (Robert M. Cover trans.)).

23. *Id.* at 11 (citing MISHNAH, Aboth I:2).

24. *Id.* at 12 (referring to MISHNAH, Aboth I:18).

25. *Id.*

26. *See id.*

created our normative world, with the much more general terms of our world-maintaining Constitution.[27]

Thus, the vagueness in the agreed-upon elements of law is inevitable. Indeed, I see the vagueness as the feature that makes agreement possible. Does this vagueness mean the agreement on what counts as law is illusory? Or, put another way, is there really any common ground? Yes, outside the circle. For example, while substantial disagreement may — and in fact, does — exist on what "fair procedures" means, it may simultaneously be true, and I claim it to be true, that substantial agreement exists that some procedures are not fair. Thus, while there is substantial disagreement on the quality of the counsel that must be provided in a criminal proceeding to qualify the proceeding as fair[28] and substantial disagreement on whether, and if so when, the state must provide counsel to the indigent in a civil proceeding,[29] I am confident that

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27. Today it is the world-maintaining language in the preamble that is most often quoted: "All men are created equal . . . ." The Declaration of Independence para. 2 (1776). But most of the Declaration is devoted to a list of the American colonists' grievances against King George. *See id.* For example, the colonists complained that: "He [King George] has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people." *Id.* para. 7. They also objected that "[h]e [King George] has kept among us, in times of peace, Standing Armies without the Consent of our legislature." *Id.* para. 13. This is what one finds at the beginning of a normative world.

Once the normative world is created, more general principles are needed to keep that world together, because disagreement on what a nation or a people stands for will inevitably develop over time. Consequently, broader principles, like those found in the Constitution of the United States with its world-maintaining language, are needed. The Constitution guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. art V. It also says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.* art. I.

Thus, our basic law demonstrates the role played by culture-specific principles and that played by world-maintaining principles.

28. *See, e.g.*, Richard P. Rhodes, Jr., Strickland v. Washington: *Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 141–55 (1992) (discussing the task of defining "effective assistance of competent counsel" in criminal proceedings); Jennifer N. Ide, Comment, *The Case of Exavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1111–20 (1998) (proposing that the right to effective counsel is nonexistent, as well as is a remedy for violating this right); Notes, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1923 (1994) (arguing "that capital trials are so complex, and the death penalty so different in kind from other punishments, that, for capital defendants, the Eighth Amendment requires a higher standard of effective assistance of counsel" than indigent criminal defendants are usually afforded).

29. *See* Colene Flynn, *In Search of Greater Procedural Justice: Rethinking* Lassiter

all would agree that the role played by counsel in the Blackman hypothetical is one of the features that made the proceeding at issue unworthy of the name of law.

Similarly, while substantial disagreement exists on how much stability is required for a system to be worthy of the name of law or how accessible the rules must be to ordinary people, a system in which the rules change every hour, or one in which the rules are completely inaccessible to those expected to comply with them, would almost surely be universally condemned as not a legal system. In short, common ground exists, and it can be found by restating Fallon's criteria in the negative.

A system is unworthy of the name of "law" when one or more of the following assertions appears to be true:

(1) There is no way to discover or comply with the legal rules;
(2) The "legal" system, acting through its judges and other officials, does not require itself or others to take the legal rules seriously;
(3) The law is completely unstable, changing moment to moment, a constantly moving target. (This point is fairly subsumed under the first assertion);
(4) Officials, judges, and kings are exempt from the burden of following any particular set of rules; and
(5) Courts employ procedures that guarantee, or all but guarantee, that the outcome will be "*x*" and not "*y*" where the ostensible purpose of the proceedings is to decide between the outcomes "*x*" and "*y*."

Few, if any, would defend a system with one or more of these characteristics as a legal system. I cannot prove that this is so; some things are just not easily subject to proof. I do, however, believe that agreement on what cannot be law exists, and that that

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v. Department of Social Services, 11 WIS. WOMEN'S L.J. 327, 338–50 (1996) (discussing the role gender may play in the need for counsel at termination of parental rights proceedings); Rosalie R. Young, *The Right to Appoint Counsel in Termination of Parental Rights Proceedings: The States' Response to* Lassiter, 14 TOURO L. REV. 247, 266–75 (1997) (analyzing different state standards for determining the right to counsel in termination of parental rights proceedings); Peter E. Van Runkle, Comment, Lassiter v. Department of Social Services: *What It Means for the Indigent Divorce Litigant*, 43 OHIO ST. L.J. 969, 987–88 (1982) (finding that a divorce decree, like the termination of parental rights, affects fundamental individual interests; thus, an indigent divorce litigant may have a constitutional right to counsel).

agreement is captured by the statements above.

THE LAWLESSNESS OF CONTEMPORARY CLASS ACTION PRACTICE

You are in a strange country, but unfortunately you are not visiting. You live there. Class action practice in this country now includes these features.

A. Confirmatory Discovery

Confirmatory discovery refers to discovery class-counsel conducts *after* agreeing to a settlement on behalf of the class and filing that settlement with a court. It is designed to replace the discovery that one might imagine a lawyer doing before sitting down to settle a case. Confirmatory discovery is becoming all to commonplace in class actions, accepted as a perfectly decent substitute for old-fashioned pre-trial or pre-settlement discovery.[30]

B. Defendant Nomination of Class Counsel

Someone must select counsel for the class. Why not the defendant? The defendant, after all, will be forced to pay the bill for class-counsel's services in the form of an award for attorney's fees. Letting the defendant select its counsel *and* class-counsel undoubtedly aids the progress of settlement. What could possibly be wrong

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30. Indeed, "confirmatory discovery" is becoming so commonplace that the term is used without explanation in newspaper articles describing announced settlements. *See, e.g., Cygne Designs, Inc. Announces Tentative Settlement of Shareholder Claims*, BUS. WIRE, Jan. 14, 1997, *available in* WL, Allnewsplus File (describing settlements subject to confirmatory discovery); *Micro Warehouse, Inc. Settles Class Action Lawsuit*, PR NEWSWIRE, Sept. 3, 1997, *available in* WL, Allnewsplus File (broadcasting: "The agreement [to pay thirty million dollars] is contingent on completion of confirmatory discovery . . . ."); Michael A. Riccardi, *Philadelphia Lawyers Negotiate $30 Million Settlement in Securities Class Action*, LEGAL INTELLIGENCER, Sept. 5, 1997, *available in* LEXIS, News Library, LGLINT File (stating: "The company said that 'confirmatory discovery' must take place as well as the negotiation of a detailed settlement stipulation."); *SFX Broadcasting Announces Settlement of Lawsuits*, BUS. WIRE, Mar. 18, 1998, *available in* WL, Allnewsplus File (quoting: "The settlement is conditioned on the consummation of the merger, the completion of confirmatory discovery, and approval of the court."). For a rare example of confirmatory discovery failing to confirm the already reached settlement, see *In re Donald Trump Casino Securities Litigation*, 793 F. Supp. 543, 546 (D.N.J. 1992). Note, however, that class-counsel in that case paid dearly for discovering that he could not "confirm" the fairness after they had already agreed to settlement; the court dismissed the class action with prejudice. *See id.* at 569.

with such an efficient procedure? Nothing, according to the courts that have considered the matter.[31]

C. Class Actions That May Only Be Settled

Courts may approve settlements in class action cases that would not be eligible for trial as class actions.[32] In these settlement-only class actions, one may become class-counsel (and thus become eligible for generous attorney fees) only by presenting the defendant with a settlement that the defendant is willing to support. As John Coffee has explained, this state of affairs is likely to lead to "reverse auctions."[33] By reverse auctions, Coffee means: plaintiffs' lawyers competing against one another for the class-counsel position by submitting low bids to the defendant on behalf of the class.[34] The lawyer who is willing to submit the lowest bid for the absent class wins. In this strange country, the courts say the class has a constitutional right to adequate counsel,[35] yet they give the defendant effective control over the plaintiffs' lawyers.

D. Class Actions That Settle Claims Before They Exist

These class actions are a special subset of the class actions that may be settled but may not be tried. This subset includes class actions to settle claims that are not only legally ineligible for trial in class form, but are also legally ineligible for trial in any form. For example, some class actions purport to settle the claims of

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31. *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 329 (E.D. Pa. 1994) (approving class-counsel as adequate representatives of the class, despite the fact that the defendants "approached" class-counsel about bringing and settling the case), *order vacated*, 83 F.3d 610 (3d Cir. 1996), *cert. granted and aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997); *see also* Ahearn v. Fibreboard, Corp., 162 F.R.D. 505, 514 (E.D. Tex. 1995) (approving class settlement reached by class lawyers "approached" by the defendant about a "global" settlement before those lawyers purported to represent any class), *aff'd sub nom.* Flanagan v. Ahearn (*In re* Asbestos Litig.), 90 F.3d 963 (5th Cir. 1996), *cert. granted, judgment vacated*, 117 S. Ct. 2503 (1997), *reaff'd sub nom. In re* Asbestos Litig., 134 F.3d 668 (5th Cir. 1998), *cert. granted sub nom.* Ortiz v. Fibreboard, Corp., 118 S. Ct. 2339 (1998).

32. *See Amchem*, 521 U.S. at ___, 117 S. Ct. at 2247 (suggesting that class actions not manageable for trial might nonetheless be settled in court); *see also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 386 (1996) (holding that a class action settlement may include claims that cannot be tried in the court certifying the class).

33. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–72 (1995) (describing the reverse auction phenomenon).

34. *See id.*

35. *See* Hansberry v. Lee, 311 U.S. 32, 42–43 (1940).

people who are yet to be conceived, and those of people who have yet to marry or even meet other members of the class.[36] The reverse auction problem exists in these cases, as in all cases in which the class may not be certified for trial. Settlements in this subset, however, are likely to be even more damaging to the absent class because when claims do not yet exist, it is highly unlikely that any absent class members will emerge to monitor class-counsel or bring objections to the attention of the courts.

E. Defendant-Designed Alternatives to Court for the Injured

In mass tort cases, class settlements are likely to guarantee individuals within the absent class, not money, but an alternative to the court process, some form of non-judicial dispute resolution.[37] For all the reasons I have already given, the defendant, to put it mildly, is likely to have more leverage than class-counsel in dictating the design of these alternatives to court process. Yet, no court has ever even suggested that a set of minimum procedural safeguards be present in these alternatives. Instead, each class, receives its own "justice system," hand-crafted by the entity responsible for harming the class and class-counsel, who is likely to be beholden to the defendant. Consequently, the justice one is due in this strange country is, as a practical matter, often within the discretion of the defendant, the de facto designer of the alternative system to which its victims, absent class members in a mass tort suit, are relegated.[38]

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36. *See, e.g., Flanagan*, 90 F.3d at 993, 1019 (approving class settlement for class that included children not yet conceived and spouses not yet married to class members).

37. *See id.* at 996 (describing the alternative dispute resolution process set up by the settlement). For reference to other cases discussing alternative dispute resolution processes, see *Campbell v. Dalkon Shield Claimants Trust* (*In re* A.H. Robins Co.), No. 98-1714, 1998 WL 726751 (4th Cir. Oct. 16, 1998) (remanding the matter "[b]ecause the ADR referee did not apply the Reichel proof scheme"); *King v. Dalkon Shield Claimants Trust* (*In re* A.H. Robins Co.), No. 98-1395, 1998 WL 537715 (4th Cir. Aug. 17, 1998) (finding the Reichel proof scheme should have been applied); *Dalkon Shield Claimants Trust v. Reiser* (*In re* A.H. Robins Co.), 972 F.2d 77 (4th Cir. 1992) (staying the state claim pending a decision by the Trust to determine the cause of the plaintiff's injury and whether the claim would qualify as an Unreleased Claim); *Dalkon Shield Claimants Trust v. Finkel* (*In re* A.H. Robins Co.), 197 B.R. 513 (Bankr. E.D. Va. 1994) (determining that the Trust may challenge causation in any arbitration and finding that there are three possible outcomes in Alternate Decision Method (ADM) arbitration: the Trust's final offer; the claimant's final demand; and no liability); *In re A.H. Robins Co.*, 88 B.R. 742 (Bankr. E.D. Va. 1988) (confirming Robins' Fifth Amended and Restated Plan of Reorganization because it was proposed in good faith, not forbidden by law, and reimbursed the plaintiffs).

38. For a critique of the procedures contained in the *Georgine* class settlement

F. Hearings for Show

The system pays lip service to the possibility that class counsel and the defendant may collude to harm the absent class, particularly in settlement-only classes.[39] It is generally accepted in this country that one may not be bound to law written by two private parties, such as a contract, which is a settlement by definition, or a settlement per se, unless one agrees to be bound or has authorized another to agree on his behalf.[40] Therefore, no class settlement is binding without court approval, which is supposed to operate both as a check on collusion and as a substitute for individual assent to the contract's terms.[41]

Courts must find that the settlement is fair and reasonable, that class-counsel has adequately represented the class and that counsel and the defendant did not collude against the class's interest.[42] While the rules of procedure do not state that a court must hold a hearing before making these findings, hearings are routinely held.[43] No rules, however, seem to govern the manner in which these hearings are held.

The court may, for example, refuse to hear testimony.[44] The

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rejected by the Supreme Court on other grounds, see Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1107–14 (1995).

39. *See, e.g.*, Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971). The court acknowledged that when a class action is not filed until it is settled, plaintiffs' counsel may have been "under strong pressure to conform to the defendants' wishes," and reminded courts that they must be extra vigilant in evaluating the settlement. *Id.* at 33. This extra vigilance, however, seems to make little difference in the result courts reach. In other words, almost every class settlement is approved. *See infra* text accompanying notes 54–55.

40. *See* Derrickson v. City of Danville, 845 F.2d 715, 715–25 (7th Cir. 1988) (discussing the essentially contractual nature of class settlements); Morgan v. South Bend Community Sch. Corp., 797 F.2d 471, 477–79 (7th Cir. 1986) (stating that judgments based on compromise hinge on actual authority of the parties to the compromise).

41. See Federal Rule of Civil Procedure 23(e), and its state counterparts, which require court approval of any class action settlement or dismissal.

42. *See* 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 11.25 (3d ed. 1992).

43. *See id.*

44. *See* Scot J. Paltrow, *Rulings in Prudential Case Are Questioned*, L.A. TIMES, Mar. 16, 1997, at D1. In one of the largest class actions ever filed, involving a settlement by Prudential valued between $410 million and $1.9 billion, the trial judge refused to allow those objecting to the settlement to call any witnesses at the fairness hearing. *See id.* The court approved the settlement and was affirmed on appeal. *Compare In re* Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 528 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998), *with* Glicken v. Bradford, 35 F.R.D.

judge ruling on the fairness of the settlement may have played a large role in creating the very settlement he is now charged with reviewing.[45] Indeed, because the hearing judge may well have met behind closed doors with the defendant alone — or with the defendant and class-counsel — on one or more occasions prior to the hearing, there is no way to gauge just how committed the hearing judge may have become to the settlement prior to the "hearing."[46] Even if someone objected to the settlement, neither he nor his lawyer is likely to have been invited to these closed pre-hearing sessions between the judge and the settlement proponents.[47] This scenario, however, is just one of many obstacles placed in the path of those foolhardy enough to challenge a class settlement.

Additionally, objectors to the settlement are routinely required to submit their objections in writing, before the settlement proponents have submitted any papers purporting to establish an affirmative case for the settlement.[48] The burden of establishing the fairness of the settlement and the adequacy of the class's representation is supposedly placed on the settlement's objectors.[49] Generally, those with the burden must make their case first. Thus, objectors are left in the ridiculous position of having to anticipate an affirmative case that has yet to be made.[50]

Courts, moreover, are not required to grant the objectors any discovery.[51] Even if discovery is granted, it is likely to be limited

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144, 148 (S.D.N.Y. 1964) (finding: "While an objectant must be given leave to be heard, to examine witnesses and to submit evidence, it is within the Court's discretion to limit the proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision." (citing Cohen v. Young, 127 F.2d 721 (6th Cir. 1942))).

45. *See Flanagan*, 90 F.3d at 998–1002 (5th Cir. 1996) (Smith, J., dissenting) (discussing the trial judge's involvement in the settlement he later approved and suggesting that such involvement may violate due process, which guarantees parties an impartial judge).

46. *See* Paltrow, *supra* note 44, at D1 (relating charges that the hearing judge made "crucial decisions" prior to the fairness hearing in "closed, off-the-record court hearings" for which the objectors received no notice); *see also Ahearn*, 162 F.R.D. at 515 (noting a meeting between class-counsel and the defendant's counsel held at the "court's house," referring to the trial judge's residence).

47. *See* Paltrow, *supra* note 44, at D1.

48. I have been consulted by objecting counsel in more than 20 class actions and in each case the objector's papers were due before those of the settlement proponents.

49. *See generally* NEWBERG & CONTE, *supra* note 42, §§ 3.13 at 3-75; 3.16 at 3-93; 3.42; 7.08.

50. Moreover, judges are free to forbid objectors from filing new objections once they have had a chance to review the proponents' case. *See* Paltrow, *supra* note 44, at D1 (reporting on a judge's order that forbade objectors from adding new objections).

51. *See* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L.

in important respects.[52] The best available data indicates that the average fairness hearing in federal court only takes about forty minutes.[53]

The result of these hearings is all but guaranteed. The Federal Judicial Center studied class action practice in four federal district courts. It found that "[a]pproximately 90% *or more* of the proposed settlements were approved *without changes* in each of the four districts."[54] In these four districts, the courts made changes and then approved another 8% of the settlements.[55] Adding 8% to 90% "or more" gets awfully close to a 100% settlement approval rate. Given the "legal" process I have just described, these statistics are not surprising.

While some might argue that I have not given settlement-only class actions their due because I have made no effort here to explain, for example, how much fairer the alternative dispute resolution systems created by class settlements might be compared to the present tort system, they would be missing the point. The chief virtue of the settlement-only class action is supposed to be that its availability makes it easier to settle class action cases. The reasoning is this: If to receive court approval of a class settlement the defendant has to first concede that the class action could be tried, in effect waiving all possible objections to certification, defendants would not be as inclined to pursue settlement. What if the court rejects the settlement? The defendant would have conceded objections to certification for nothing. In short, that is the argument.

Let us assume, however, that settlement-only classes greatly aid settlement. How can the desire to encourage settlements justify a procedure so likely to produce reverse auctions that result in unfair settlements to the plaintiffs? Moreover, the settlement-only device sits within a system in which the defendant faces virtually no risk of settlement rejection. In short, the system is amazingly solicitous of a fear highly unlikely to materialize. And what protects the class from the abuse that the device might generate? The stan-

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REV. 1051, 1109–10 (1996).

52. *See id.* (discussing various limits commonly placed on objector's discovery, most notably forbidding inquiry into the trade-offs made during settlement negotiations).

53. Thomas E. Willging et al., Federal Judicial Center, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 169 tbl.19 (1996) (copy on file with author).

54. *Id.* at 58 (emphasis added).

55. *See id.* at 178 tbl.38 (showing that changes were made in 9 of 117 settlements).

dard argument is court review of the settlement. Oh yes, the fairness hearing will save the class from collusive settlements. Who could doubt the efficacy of hearings as a means of protecting the absent class when those hearings are conducted in the manner I have described above?

As to the argument that the alternative dispute resolution systems created by class settlements might be fairer to injured individuals than the current tort system, nothing about the process for approving these alternatives suggests that would be true. But, let us assume it is true. And while we are at it, let us assume that the judge and all his peers described in Blackman's story sentence to prison only those whom we all would agree, if later we learned the facts, deserved imprisonment. So what? The fact that a process reaches a result we think is right is surely not sufficient to justify calling that process law. If it were, some lynchings would be worthy of the name "law" also. Thus, even if the alternative dispute resolution system actually served the interests of tort victims better than our present tort system, that fact would not justify the process courts are using to create those systems.

None of the features of contemporary class action practice belong in a legal system, not individually and surely not in combination. Let us return to my criteria. Are the rules knowable? Absent class members who wish to object to the settlement proposed for them cannot discover the legal rules or attempt to comply with them. What, if any, information are the absent class members entitled to and when? No answer. What rights, if any, do the absent class members have at the fairness hearing? No answer. What procedure, if any, must the judge follow before finding that the objections of the absent class members are without merit? No answer.

Do judges take rules seriously? The mere fact that no court has even attempted to delineate what must be done at a fairness hearing for its result to be considered law is telling. No court has, for example, attempted to articulate the rights of objectors. Everything about the process is discretionary. Does the law change from moment to moment? A system in which almost every matter is entrusted to the court's discretion is precisely that variable.

While one might quibble about whether the features of the class action practice I have described are bad enough to meet the first three criteria, there can be little argument about the last two.

Judges in contemporary class action practice are all but exempt from the burden of following any particular set of rules. Even more

damning, all the procedures I have described, from confirmatory discovery to hearings before partial judges, are designed to guarantee one outcome and one outcome only: settlement approval. As the Federal Judicial Center's own statistics demonstrate, the system is virtually incapable of producing a contrary outcome, incapable of rejecting a class action settlement.[56]

Consequently, one corner of our court system is well-nigh lawless. It matters not how well-intentioned the judges and lawyers are who helped create this state of affairs. It must end. The experiment has gone awry.

CONCLUSION

Academics spend a lot of time trying to impress one another. What legal academics find impressive is a subtle mind, nuanced thinking, and eyes that can see grey in what appears to be the blackest black. Alas, not everything is grey.

The past is not unique in having witnessed great wrongs, even though every present generation is inclined to think just that. Nevertheless, injustice lives in the present too. It always has, and it always will. There are still things in our world that warrant strong condemnation. Does this essay address the worst of all present wrongs? Of course not. But lawlessness may spread, particularly if a "good result" is all that is necessary to excuse it. There will be time enough for nuanced thinking once the problem has been acknowledged and the search for solutions has begun in earnest. First, however, must come the alarm.

In the end, I say to my academic colleagues, speaking out against the powers that be *is* what tenure is for. Use it — if not on this problem, on another. Risk something. To my colleagues at the bar, I say our "independence" from the state, like tenure, is supposed to serve some purpose. Where are you?

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56. *See supra* notes 54–55 and accompanying text.