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The Complexity of Modern American Civil Litigation: Curse or Cure?

Stephen B. Burbank†

I. Introduction

I am honored to have been invited to address this distinguished group, and I thank the Association and my friend and colleague, Professor Michele Taruffo, for affording me an opportunity to reflect about a phenomenon that has been one of my research and teaching interests for more than twenty years. I am particularly pleased that the occasion invites a comparative perspective. My delight at the prospect of talking to you about a subject that fascinates me is, however, equaled by the humility that any sensible scholar should feel after contemplating the challenges of the subject, the perspective and the audience.

Professor Taruffo has asked me to give a general lecture about the most important features of complex litigation in the United States. It is important for you to know at the outset that there is no accepted definition of complex litigation in the United States, that there may not even be a consensus on what that category should contain, and that it means different things to different American lawyers, judges, and scholars. The view I take of it is informed by decades of teaching, writing, consulting as a lawyer, and serving as a mediator and arbitrator, but it is a personal view.

There is a dearth of scholarship in comparative procedure in the United States, and very little of it is worth reading. That is due in part to the fact that good scholarship in comparative procedure requires one to master far more than laws of procedure, leading one very quickly to the comparative study of social and political institutions. Although this challenge is familiar to those who subject substantive law to comparative inquiry, it comes as a shock to those who have been indoctrinated in traditional rhetoric about procedure, which would have us believe that it is “adjective law,” which is to say technical, unimportant, and best left to experts. On the contrary, by now any informed observer should know that, at least in the United States, even if procedure is technical, it is also a source of enormous power, left to experts only at a polity’s peril.¹

Although I will attempt to inform my analysis of American complex litigation with insights from the study of other systems, I recognize that its main value for you is likely to repose in the light it sheds on Italian (or other foreign) legal institutions. My third challenge, then, is the dilemma that greets anyone seeking to describe American law to those from other countries, namely, how to deal with a robust federal system consisting of fifty-one jurisdictions with

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† David Berger Professor for the Administration of Justice, University of Pennsylvania. This is a revised version of a lecture presented to the Italian Association of Comparative Law in Ferrara, Italy, on May 11, 2007.

¹ See, e.g., Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004).

lawmaking power and their own courts. The customary response to that dilemma, even if only as a concession to the shortness of life, is to focus only on federal law and federal institutions. For my current project, that response could be misleading, not just because the great bulk of the law invoked in American litigation is state law and more than 95% of civil litigation occurs in state courts, but also because the complexity of modern American litigation is (on the view I take of that phenomenon) due in part to the existence and dynamics of the U.S. federal system. In addition, and a related point, the traditional response would be inadequate to the extent that the existence of, or prospects for, complex litigation in Italy (or elsewhere in Europe) are due to the regional legal arrangements made for the European Union.

Chastened but undaunted by these challenges, I will seek to excavate the roots of procedural complexity in modern American litigation. That inquiry will lead me to discuss five related phenomena that I regard as consequential for this purpose: (1) the architecture of modern American lawsuits and the procedural philosophy that architecture reflects, (2) the volume of litigation and the public and private policies, attitudes and arrangements that affect it, (3) the dynamic nature of, and dispersed institutional responsibility for, American law, (4) the enormous amounts of money at stake in some litigation, and (5) the search for, and the forms of, relevant evidence in modern American litigation, and the impact of science and technology on both. I will conclude with reflections prompted by the insight that modern American procedural policy has been inconsistent in its approach to complexity. This insight prompts the title of this lecture: “The Complexity of Modern American Civil Litigation: Curse or Cure?”

II. The Architecture of Modern American Lawsuits

Modern American procedure traces to 1938, when the Federal Rules of Civil Procedure became effective. Those rules have proved highly influential in the fifty states, with many states explicitly borrowing the Federal Rules and others informing the interpretation of formally different rules with federal precedent. Thus, although there is evidence that states are less enthusiastic about following the federal lead than they have been in the past, the Federal Rules are usually a fair source for comparison, to the extent that procedural rules affect a measure of interest in a comparative project.

The Federal Rules marked a stark break with the dominant procedural system that came before them, common law procedure inherited from England and adapted to U.S. needs and conditions. Perhaps the single most salient feature of common law procedure was its unremitting search, pursued in pleading practice that sometimes resembled a ping pong match, for a single issue (of law or fact) that would enable decision of the case. The quest, in other words, was to avoid complexity at all costs, and the most important cost of common law procedure was that so many cases were decided on pleading points rather than the merits.

At the same time, however, the Federal Rules marked the triumph of equity procedure, the rules for a separate system of courts in England that had developed a body of jurisprudence

and remedies designed to fill gaps in, and mitigate the rigors of, the common law.² One of the inadequacies of the common law that equity sought to address was the inability of its procedure to accommodate disputes involving multiple claims and parties.

Even before the Federal Rules, some states had merged common law and equity procedure, but the codes that did so, starting with the Field Code in New York, although more attentive to the desirability of adjudication on the merits than was common law procedure, placed numerous restrictions on the joinder of causes of action and parties. Borrowing heavily from the Supreme Court's Equity Rules of 1912, the drafters of the Federal Rules virtually eliminated those restrictions. They created a system characterized by complete freedom to join different (that is, unrelated) claims as well as different theories of relief as part of the same claim,³ very great freedom to join parties, whether as plaintiffs or defendants,⁴ effective compulsion to make related, and complete freedom to make unrelated, counterclaims,⁵ and numerous mechanisms further to ramify litigation through the joinder or intervention of other parties and the assertion of other claims.⁶

These rules permitting liberal joinder of claims and parties leave a great deal of power to structure litigation with the parties, particularly plaintiffs, and they are tempered by rules that repose limited discretion in courts to discipline the complexity they invite.⁷ Like the rules of preclusion (*res judicata*) that soon developed to back up them up, they reflect the presumption that justice will be served best when disputes arising out of related transactions are adjudicated together and that the parties and their counsel are usually the best judges of the scale of litigation that is efficient (from the perspectives of both cost and accuracy).

Professor Stephen Subrin has written eloquently about the effects of translating equity procedure to all federal civil litigation, including the lack of definition and formlessness – that is, the complexity – of the resulting system.⁸ Indeed, the search for greater definition, and for the

² See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

³ See FED. R. CIV. P. 18 (“JOINDER OF CLAIMS AND REMEDIES”).

⁴ See FED. R. CIV. P. 20 (“PERMISSIVE JOINDER OF PARTIES”).

⁵ See FED. R. CIV. P. 13 (“COUNTERCLAIM AND CROSS-CLAIM”).

⁶ See FED. R. CIV. P. 14 (“THIRD-PARTY PRACTICE”), 19 (“JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION”), 22 (“INTERPLEADER”), 23 (“CLASS ACTIONS”), 24 (“INTERVENTION”).

⁷ See FED. R. CIV. P. 21 (“MISJOINDER AND NON-JOINDER OF PARTIES”), 42(b) (“SEPARATE TRIALS”).

⁸ See Subrin, *supra* note 2.

ability that it affords courts to make rational decisions as to whether a case should be permitted to proceed, is a unifying theme of all of the approaches to the perceived litigation crisis of the last 30 years, from heightened pleading, to managerial judging, to sanctions, to summary judgment.⁹

One of the joinder mechanisms that the framers of the Federal Rules borrowed from equity was the class action. For a foreign observer, the contributions that both joinder rules and a transactional approach to litigation have made to the etiology of complexity is perhaps most vividly apparent when considering that procedural vehicle. Yet, it was not until 1966 that the class action rule, Rule 23, became a major source of federal litigation, because until the amendments that were effective in that year, the rule was largely confined to the limited circumstances in which class actions had traditionally been permitted.

In making the class action more broadly available, the rulemakers were animated by a combination of very different policy goals. The most adventurous of those amendments is found in Rule 23(b)(3), intended for situations in which “the court finds that questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods available for the fair and efficient adjudication of the controversy.”¹⁰ The goals animating it included both enabling the more efficient resolution of related disputes and enabling people with small claims not worth litigating individually to band together against a common opponent.¹¹ Even the first of these goals, thoroughly conventional from an American perspective, is hardly a universal procedural aim, as the limited use of the related actions provision in the Brussels Convention and its successor European Council Regulation suggests.¹² The second was a remarkable use of procedure to enable the enforcement of substantive rights. Both invited more litigation, and litigation in a complex form.

III. The Volume of Litigation

Attention to the divergent policy goals underlying the 1966 amendments to Federal Rule of Civil Procedure 23 suggests two different sources of complexity in modern American litigation: first, the desire to ensure that legal rights have legal remedies, and second, the desire to achieve both accuracy and efficiency through the combined litigation of related disputes. It is, of course, not obvious why the first of these should be thought a cause of complexity. The

⁹ See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. LEG. STUD. 591, 624 (2004).

¹⁰ FED. R. CIV. P. 23(b)(3).

¹¹ See Stephen B. Burbank, *The Class Action in American Securities Regulation*, ZZZPINT 4 at 322-26 (1999).

¹² See Samuel P. Baumgartner, *Related Actions*, ZZZPINT 3 at 203 (1998).

explanation lies in the function of litigation in American society, which also helps to explain the perceived need for combined litigation.

The “adversarial legalism” of American society is due to preferences for decentralized over centralized governmental institutions and for private over public ordering.¹³ In a society that distrusts big government and is accustomed to challenging authority, and hence the status quo, litigation is likely to play a more prominent role than it does where the people accept, and rely on, the State’s role in providing compensation for injury and in enforcing important social norms. Thus, private litigation plays a role in American society that is probably unique in the world.¹⁴ Moreover, the 1966 amendments to Rule 23 were but one of a host of developments that made possible the enormous increase in the volume of litigation that occurred in the 1970’s. Other influences, old and new, included (1) the traditional American Rule, whereby each party bears its own attorney’s fees (win or lose), which enables greater risk neutrality among plaintiffs uncertain about prevailing than does the English Rule, (2) increased competition among lawyers, contributing to the growth of a highly entrepreneurial plaintiff’s bar, (3) the contingency fee, (4) legal insurance, (5) an explosion of new legal rights, and (6) procedural rules that do not require litigants to plead with specificity and that offer them broad discovery.¹⁵

As the market for legal services became more competitive starting in the 1960’s, the players in that market found that they were operating in another highly competitive market, the market for litigation (or dispute resolution) created by the existence of fifty state court systems and a parallel system of federal courts.¹⁶ Although this market had for many years been dominated by business corporations, the loosening of restraints on the power of state courts to exercise personal jurisdiction (adjudicatory authority) had over the years empowered plaintiffs, as had a variety of changes that made the federal courts a less attractive object of forum shopping by corporate defendants. Indeed, those changes and the altered political complexion of the federal

¹³ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

¹⁴ See Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 710 (2002); Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts*, 80 WASH. U. L.Q. 835, 840, 851-52 (2002).

¹⁵ See Burbank, *supra* note 9, at 620; Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 691-95 (1997).

¹⁶ See Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUSTON J. INT’L L. 385, 388-89 (2004).

courts had by the 1960's made those courts an attractive venue for many plaintiffs.¹⁷

In a highly mobile (inter)national economy of goods and services, these market forces combine to yield a great deal of litigation, much of which involves the same or similar claims. Many such related cases involve claims of injury by different plaintiffs against the same defendants, as for instance product liability actions brought by individuals exposed to the same drug or device. Some of them, however, involve claims on behalf of the same individuals. Thus has the Rule 23(b)(3) class action, designed in part to make related litigation more efficient, fallen victim to the markets for representation and for dispute resolution. Contemporary American class action practice seems to confound the basic assumptions of preclusion (*res judicata*) law by preferring multiple cases to just one. This has long been true in certain substantive fields, such as securities law, and the phenomenon of multiple overlapping class actions has increased as the class action bar has become more entrepreneurial, more sophisticated, and more competitive.¹⁸

One would think that a society taking a transactional approach to litigation and encouraging the broad joinder of claims and parties would have both a robust *lis pendens* doctrine to guard against the inefficiency of duplicative litigation, akin to that in the Brussels Convention and its successor European Council Regulation,¹⁹ and mechanisms to enable the coordinated or consolidated litigation of related cases more robust than the barely utilized related actions provision of the European Union.²⁰

The federal courts do have something approximating a *lis pendens* doctrine for duplicative cases,²¹ and they also have a variety of tools to transfer cases so as to effect coordinated or consolidated proceedings in related cases, including overlapping class actions. Enacted in 1968 to permit the federal judiciary to refine and extend the reach of techniques developed informally in order to deal with a flood of antitrust cases involving the electrical equipment industry, the Multidistrict Litigation Statute empowers the Judicial Panel on

¹⁷ See EDWARD A. PURCELL, *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958* (1992).

¹⁸ A recent Federal Judicial Center study of class actions in the period July 1, 2001 to June 30, 2006 found that approximately “37% of class actions overlapped with or duplicated other federal class actions.” Thomas E. Willging & Emery G. Lee III, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* 24 (Federal Judicial Center April 2007).

¹⁹ See Council Regulation 44/2001, 2001 O.J. (L12) art. 27.

²⁰ See *id.* art. 28; Baumgartner, *supra* note 12.

²¹ See Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention, and Progress in National Law*, 49 AM. J. COMP. L. 203, 213 (2001).

Multidistrict Litigation (“JPML”) to transfer all cases having common questions of fact to a single federal court, where they are subject to coordinated or consolidated pretrial proceedings.²² So long as a case has been filed in federal court or can be removed there, it can be transferred by the JPML, and it is no surprise that overlapping class actions are particularly likely to receive multidistrict treatment.

There is, however, virtually no interjurisdictional *lis pendens* doctrine and no currently effective mechanism for the coordinated or consolidated treatment of cases dispersed among state courts or between the state and federal courts.²³ The absence of such a mechanism led to the perceived powerlessness of the federal courts in many instances to avoid the disruption of multidistrict treatment of federal court class actions by state court class actions that could not be removed to federal court. The federal judiciary’s frustration in that regard was a major reason, if not for the enactment of the Class Action Fairness Act of 2005,²⁴ then for the exceedingly narrow carve-outs and exceptions in that statute.²⁵ As a result, most putative class actions involving at least 100 class members and at least \$5 million in controversy will be brought in, or removed to, federal court. Moreover, because of the market forces previously discussed, these cases that are themselves complex will predictably not be isolated responses, and thus the lead action and its imitators will predictably be subject to transfer by the JPML for coordinated or consolidated pretrial proceedings. Complexity on stilts.²⁶

IV. The Dynamism and Dispersed Institutional Responsibility of American Law

A society ever refreshed by new members is not likely to be wedded to the status quo. Particularly when such a society has a tradition, backed by constitutional protections, of challenging authority, it *is* likely to generate constant pressure for legal change. Such pressure, in turn, is easier to mount effectively in a decentralized system of government, as it is in a system where lawmaking authority is dispersed among various institutional actors.

The pace of legal change in the United States that commenced in the 1960's was a product of, and contributor to, both a general social revolution and a revolution in the legal profession. Courts not only greatly enhanced the constitutional rights of American citizens through judicial

²² See 28 U.S.C. § 1407 (2000).

²³ See Burbank, *supra* note 21, at 213-14.

²⁴ Pub. L. No. 109-2, 119 Stat. 4 (codified in various sections of 28 U.S.C.).

²⁵ See 28 U.S.C. § 1332 (d)(3), (d)(4), (d)(5), & (d)(9).

²⁶ See Stephen B. Burbank, *The Social Meaning of the Class Action Fairness Act of 2005*, U. PA. L. REV. ____ (2008).

review of legislation; they promoted the use of litigation to effect legal change. Some of that litigation sought radical reform of basic institutions such as schools and prisons and yielded long-running, highly complex proceedings reminiscent of the corporate reorganizations for which equity had become famous in the 19th century.²⁷ Other litigation sought to improve the lot of average citizens by using the tools of modern procedure to bring the substantive law into accord with the perceived needs of a highly competitive, but relatively unregulated, economy.²⁸

The insight of the Legal Realists that there is no bright line between “procedure” and “substance” was for decades the main redoubt of those responsible for procedural lawmaking when challenged for overreaching. As indicated at the outset of this lecture, that insight has yielded to the realization that procedure is power. In a system of dispersed institutional lawmaking responsibility, the dispersion can lead to competition for effective lawmaking power, and it is bound to enhance the complexity of the system.

Finally, the complexity of American substantive law, contributing to the complexity of American litigation, results in part from its dynamism and in part from its multifarious sources. Examining those sources, American legislation breeds complexity because so much of it is either badly drafted or reflects the strategic political uses of ambiguity necessitated both by a two-party system and by the fact of dispersed institutional responsibility.²⁹ American common law, the private law made by (mostly state) judges, breeds complexity because it functions inductively rather than deductively, requiring detailed attention to factual particularities and to numerous potential sources of authority. Lawmaking power in the United States is not only dispersed within each state and the federal government; it is shared among the states and between the states and the federal government. Conflicts of laws abound. Finally, all modern American substantive law – legislative, judicial, and administrative – is complex to the extent that the problems with which it deals are complex problems demanding complex legal solutions. A complex society invites a complex legal response.

V. The Stakes of Modern American Litigation

Empirical studies of American litigation have consistently demonstrated that, contrary to the story that those seeking litigation “reform” would have us believe, discovery does not pose a

²⁷ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

²⁸ See, e.g., *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975) (presumption of reliance in securities fraud class action).

²⁹ See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002).

serious problem of expense or delay in most civil litigation.³⁰ In a small percentage of cases, however, discovery does consume a great deal of time and resources, both of the parties and of the courts. The cases in which there is a great deal of discovery activity, and also in which pretrial judicial management is likely to be most active, are high stakes cases.³¹

It is no surprise that cases in which the stakes are high attract greater litigation effort by counsel and the court, including the quest for greater amounts of potentially relevant evidence. What may escape notice, however, is the extent to which aggregation devices – whether the class action or the various other techniques for combining cases – so raise the stakes for the parties as virtually to guarantee exhaustive (and exhausting) discovery, intensive judicial effort in managing the pretrial stages of the cases, and high levels of risk aversion by defendants contemplating trial by jury. In the case of small claims or negative value class actions, it is too easy to skip over the fact that the costs of such enhanced litigation effort must be part of the calculus in determining whether the level of enforcement of the substantive law is optimal or excessive.³² In cases where aggregation is intended to effect the more efficient resolution of related controversies, one must wonder whether the whole is greater than the sum of the parts.

Like the exceptional American doctrine of non-mutual issue preclusion (collateral estoppel), which permits a stranger to litigation who would not have been bound by an adverse result to take advantage of one that is favorable, infatuation with bigger and bigger “litigations” can convert what would have been local skirmishes into a world war.³³ In both cases, the quest for economy may yield its opposite. Moreover, particularly if aggregation comes too early in a litigation cycle, it may also doom the goal of accuracy in litigation (or settlement).³⁴

³⁰ See Linda Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

³¹ See JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, JUST SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

³² See Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975); Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1926-31 (2006).

³³ See Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEXAS L. REV. 1551, 1585 (1992).

³⁴ See Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1998 (1997).

VI. Evidence in Modern American Litigation

Discovery in the American sense of the court-sanctioned pretrial exchange of relevant information by the parties was unknown at common law, as it is unknown today in the many litigation systems that do not mark the American distinction between pretrial and trial and that repose responsibility for taking evidence in the court. Indeed, one of the ways in which equity sought to mitigate the rigors of the common law was by affording limited discovery in aid of a common law action. But the discovery thus afforded was extremely limited in both purpose and technique, and code procedure, while merging common law and equity, tended to import equity's limitations.³⁵ When combined with the codes' requirement that a plaintiff plead all of the facts necessary to constitute his cause of action, such a system meant that, in an increasingly mobile society and economy producing injury in the absence of direct interpersonal relations, effective access to justice was often denied.

The Federal Rules replaced fact pleading with so-called notice pleading designed merely to provide the opponent with notice of the general nature of the claim,³⁶ and they eliminated most antecedent restrictions on discovery, providing a broad array of devices for seeking information and a very expansive definition of the permissible scope of discovery.³⁷ The animating goals behind these linked innovations were to afford effective access to justice, enabling litigation on the merits instead of the pleading niceties of common law, and to make trials efficient rather than, as at common law, proceedings full of surprises and ambushes resulting from ignorance of what was really at issue. The procedural philosophy underlying them was in equal measure a reflection of the Progressives' project of "legibility" – the notion that transparency is essential to effective regulation – and of the Realists' faith in the power of facts to yield a just solution³⁸.

Professor Edson Sunderland, the chief architect of the Federal Rules' provisions on discovery and pretrial procedure, saw the solution to the problems of waste, delay and unfairness at trial in an integrated system of broad party discovery and what he thought of as the judicial discovery of pretrial conferences and summary judgment. Moreover, he knew that both types of discovery were likely to be even more important in a system of notice pleading, which he also favored. With eyes focused on remedies for the inefficiencies of a common law trial, and although they saw in the same sources a cause of pretrial inefficiency for lawyers and their clients, Sunderland and his colleagues failed to anticipate, or at least seriously underestimated, the costs that notice pleading and broad discovery – and that equity procedure more generally –

³⁵ See ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE (1952).

³⁶ See FED. R. CIV. P. 8 ("GENERAL RULES OF PLEADING").

³⁷ See FED. R. CIV. P. 26-37 ("DEPOSITIONS AND DISCOVERY").

³⁸ See Burbank, *supra* note 9, at 597 n.20.

might impose, particularly in the hands of adversaries with very different economic incentives.³⁹

Although, as I have noted, empirical studies do not support the claims often made that discovery routinely is a source of high cost and delay in American litigation, it clearly can be, particularly in high stakes cases where the desire to find the proverbial needle in the haystack may be reinforced by the economics of hourly billing. The challenge for the parties of dealing effectively and efficiently with the enormous amount of information produced through discovery in such cases was recognized decades ago, with the result that it has long been the conventional wisdom that, for instance, high stakes commercial litigation requires lawyers to have a computerized litigation support system. Scanning technology has dramatically reduced the cost of inputting documents, of which there may be millions, and increasingly sophisticated technology has enhanced search capacities. In the last decade or so, however, the problem of evidentiary complexity in American litigation has reached a different plane. Just as developments in science and technology have helped to discipline evidentiary complexity, so have they created it.

A historical review of scientific and technological developments that have led to the availability of more information potentially relevant in litigation would undoubtedly include the invention of the typewriter, carbon paper, and the photocopy machine. It seems incredible today that the Supreme Court of the United States did not have a photocopy machine until 1969. It seems even more incredible when one realizes that Americans are on the verge of living in a paperless society, with all documents created and stored electronically and the post replaced by e-mail. One result is that, although hardware and software advances create opportunities for greater efficiency in the production, management and analysis of electronically created documents for discovery purposes, those gains are counterbalanced by the enormous increase in the amount of information that can be stored and in the potential expense of producing it in discovery. Perhaps the best way for one not previously exposed to this part of the litigation landscape to gain perspective is by considering e-mail.

Consider how co-workers communicated before desktop computers, and how, if at all, those communications would have been preserved and produced if potentially relevant in litigation. In a business environment dominated by e-mail, much that never would have been recorded may be available forever. Indeed, even when one thinks that e-mail has been deleted, it may not have been destroyed. Back-up tapes can be searched, although it may be very expensive to do so, and even erased tapes may be capable of complete or partial restoration.⁴⁰

Computers are not, of course, the only products of scientific and technological progress that have affected the creation or analysis of information, fostering complexity in litigation even

³⁹ *See id.* at 597-98, 603.

⁴⁰ *See, e.g.,* *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003).

if also seeking to discipline it. Scientific and statistical evidence are now common in American civil litigation, and the problems of ensuring that such evidence is undergirded by valid theories and valid methodologies are daunting for generalist judges,⁴¹ as understanding both its tenor and the weight it should be given is for lay juries.

It is a sobering experience to review the history of asbestos litigation in the courtroom of one of America's brightest and most innovative trial judges. Faced with more than 3,000 cases seeking damages for exposure to asbestos, Judge Robert Parker tried a variety of techniques to avoid case-by-case adjudication. When nonmutual issue preclusion (collateral estoppel) proved impossible⁴² and partial class certification followed by consolidated mini-trials⁴³ inadequate, Judge Parker turned to statistical techniques. Although he was twice reversed by the court of appeals,⁴⁴ his efforts may be the harbinger of the future. If so, those injured will win or lose their cases, and have any amounts they may recover, based not on the trial of their cases but on statistical extrapolation from the trial of other peoples' cases. And if so, it will be interesting to see whether those who have decried the nontraditional judicial role in structural reform litigation will similarly criticize this manifestation of the functional transformation of American courts into administrative agencies.

VII. Conclusion

Americans have been fabulously successful in affording access to court in a system that depends heavily on litigation to provide compensation for injury and to enforce important social norms. For the last thirty years, however, Americans have suffered agonizing reappraisals of that success. It is perhaps no surprise that, having opted for equity's approach to the joinder of claims and parties – in part to ensure effective enforcement of rights but also in part to make such enforcement more efficient -- Americans have repeatedly turned to the tools of aggregation as a remedy for that success. In doing so, the people responsible for the courts often override the preferences of the parties (and thus the principle of party autonomy), alter the balance of power in litigation, and render trial effectively impossible. In such instances, they are creating complexity where it is not necessary for effective access to court; the stated goal of efficiency may be a delusion, and in any event aggregation can make little pretense to a goal of accuracy as

⁴¹ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

⁴² See *Hardy v. Johns-Manville Sales Corp.* 681 F.2d 334 (5th Cir. 1982) (reversing preclusion orders).

⁴³ See *Jenkins v. Raymark Industries, Inc.* 782 F.2d 468 (5th Cir. 1986) (affirming partial class certification and trial plan calling for consolidated mini-trials).

⁴⁴ See *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990) and *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998) (disapproving two different trial plans relying on statistical sampling).

opposed to dispute resolution simpliciter. Moreover, as the Class Action Fairness Act of 2005 suggests, in a federal system, the unremitting quest for aggregation may come at a heavy price to individual state autonomy.

Having written about the “costs of complexity” twenty years ago,⁴⁵ I take satisfaction in having then identified the rush to more and more aggregation as problematic. But my satisfaction as a scholar is overwhelmed by the deep frustration I feel as a citizen when I witness the unwillingness of the federal and state governments to commit sufficient resources to their court systems to honor the wishes of those who prefer to litigate as individuals, prefer trial over settlement or summary adjudication, prefer state to federal court, and who, above all, do not wish to be treated as data points in a statistical calculation. Taken to the extremes to which Americans appear to be heading, complex litigation seems to me a cure that has become a curse.

⁴⁵ See Stephen B. Burbank, *The Costs of Complexity* (book review), 85 MICH. L. REV. (1987).