

July 2019

On Individual Participation within Mass Litigation: The Case of the Fairness Hearing

Nourit Zimmerman

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Zimmerman, Nourit (2019) "On Individual Participation within Mass Litigation: The Case of the Fairness Hearing," *Akron Law Review*: Vol. 52 : Iss. 4 , Article 4.

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ON INDIVIDUAL PARTICIPATION WITHIN MASS LITIGATION: THE CASE OF THE FAIRNESS HEARING

*Nourit Zimmerman**

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I. INTRODUCTION

Class actions, like other forms of aggregate litigation, present a challenge to the notion of individualism, which dominates the common conception of civil litigation in the United States. In particular, mass litigation creates serious agency problems and lack of participation by individual class members in a process that may influence their rights.¹

* Assistant Professor Sapir Academic College School of Law, Israel. For their invaluable advice during the work on this project I am deeply grateful to Oscar Chase, Peggy Cooper Davis, Tom Tyler, and Joseph W. W. Weiler. My eternal gratitude, for making this project possible, goes to Aelia Akerman, Amikam Kovner and Eran Zimmerman.

One of the tools offered by the legislature in order to overcome these difficulties is the fairness hearing. Fairness hearings are held when parties to a class action reach a settlement. Before a class settlement is approved, the court must hold a public hearing to examine whether the settlement arrived at by defendant and class counsel is “fair, reasonable and adequate.”² The fairness hearing is intended to provide any individual that might be affected by a settlement with an opportunity to publicly support or oppose it.³ In the hearing, the court should serve as the guardian of the class members’ rights and interests by considering the extent of their representation and examining both the process through which the settlement was reached and the adequacy of the settlement’s terms in light of the strengths and weaknesses of the legal claims of the class.⁴

Despite its potential importance, in practice, the fairness hearing is generally considered to have failed as a procedural tool for protecting the interests of class members and mitigating agency problems.⁵ Class members usually lack incentives to participate and oversee the work of the lawyers. Therefore, objections to class action settlements are usually infrequent⁶ and, in many cases, not even one class member attends the hearing. Those who do choose to participate face problems due to lack of information and expertise that limit their ability to meaningfully oppose the settlement. Moreover, in many cases, the court itself is involved in the process leading to the settlement and is therefore invested and motivated to accept the very settlement it should examine carefully.⁷ This could

1. Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* 86 (2009); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 Rev. Litig. 25, 51-52 (2002); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 359 (1996).

2. Fed. R. Civ. P. 23(e)(2).

3. The Federal Rules of Civil Procedure provide other balances and safeguards to protect class members’ rights, such as the mandatory notice mechanism (Fed. R. Civ. P. 23(c)(2)), or the right to opt out (Fed. R. Civ. P. 23(c)(2)(v), and 23(e)(4)).

4. This review is highly important because when a class action ends in a settlement, an important feature of the legal process, namely ‘adverseness,’ is missing, thus diminishing the court’s ability to observe the merits of the lawsuit or the work of class counsel. See Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. Rev. 1257, 1270 (1995); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L. Rev. 837, 842 (1995); Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. Legal Stud. 55, 56 (1999).

5. William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1437-38 (2006).

6. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1533 (2004).

7. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. Chi. L. Rev. 337, 337 (1986).

evoke the claim that the court's decision in the fairness hearing is a foregone decision meant to create the mere appearance that class members actually have a say in the litigation process. Based on these characteristics, scholars have come to doubt the protective nature or value of these hearings for absent class members, describing the fairness hearing as a "peculiar juridical moment,"⁸ that lies "at best, at the periphery and not the core of adversarial procedure."⁹

Employing a unique methodology for analyzing court transcripts, this study offers a renewed evaluation of the function and socio-legal meaning of the fairness hearing. Through a close examination of hearings held in three different class actions, I examined and recorded what actually happened when legal procedures opened up to allow specific participation of litigants during the fairness hearing, that is, what happened when individuals were offered the opportunity to speak freely about the proposed settlement in a class action case, what characterized the discourse and interactions that evolved in these communications by absent class members, and whether this form of participation had any impact on the outcome of the cases. The analysis of original data, studied here for the first time, reveals aspects of the fairness hearing that have not been discussed in the literature thus far. Based on a close examination of the hearings, I make the claim that while the participation of individual class members in these events may not have had a strong legal impact (i.e., influencing the legal outcome), it still had a significant socio-legal meaning, in, among other things, providing an opportunity for interaction between lay and legal actors and offering a forum for public deliberation regarding issues of great social importance and great personal importance to the class members.

Fairness hearings provide a venue for direct, unmitigated participation of litigants, thus creating a distinctive forum for public deliberation and direct interaction of legal and non-legal actors within a formal legal setting. The transcripts of the hearings in three different cases, presented here for the first time, provide a rare set of data in the study of legal institutions. The transcripts record numerous accounts of individuals who were given the unusual opportunity to speak freely about their understanding of a legal matter. The transcripts examined here present a substantial body of information about what individuals choose to say before a formal court and how they express themselves in that

8. Rubenstein, *supra* note 5, at 1437.

9. William B. Rubenstein, *A Transactional Model of Adjudication*, 89 Geo. L.J. 371, 413 (2001).

setting. The informality of the fairness hearing setting (there is no oath or evidentiary constraint) produces accounts that are constrained mainly by what the participants themselves perceive as the appropriate way to approach the court and by what they consider to be relevant to the resolution of the case. The transcripts hence reveal how individuals actually conduct themselves within the legal sphere, how “real” judges react when confronted with lay perceptions of justice and the law, and how the legal system maintains its legitimacy in the face of the demands of litigants.

While the right to participate—to be heard, and “have your day in court”—is well established, the form of the legal process often fails to provide opportunities for meaningful participation and communication by parties involved and affected by the process. This is especially true of mass litigation, which presents one of the least participatory forms of adjudication.

The following analysis of fairness hearing transcripts is situated both within socio-legal studies and mass litigation scholarship. It combines questions concerning the actual function of the fairness hearing within the procedural design of the class action mechanism with broader questions concerning the participation of lay people within legal procedures. In examining the fairness hearings, I explore the degree to which this specific legal setting allows for a *meaningful inclusion* of lay perceptions of the participants therein. Whether participation is meaningful or not is related, firstly, to its “legal effectiveness,” meaning whether the inclusion of participants’ perceptions has the ability to influence the outcome and actually does influence the outcome. However, because legal procedures serve different social and personal functions in addition to reaching legal outcomes, the examination of participation will not be limited to this question. The following empirical examination of the hearings, instead, frames larger questions regarding lay participation in legal procedures and individual participation in mass litigation through three additional modules: voice, interaction, and deliberation.

Most directly, the question of lay participation is related to the experiences of those individuals who take part in and are affected by the legal process. This study is not aimed at individuals’ perceptions as such, but rather at the way these perceptions are manifested within legal settings. At the same time, my construction of the notion of participation is greatly informed by the significance attributed to the value of expression (or voice) in the psychological study of litigants. Procedural justice research has repeatedly affirmed the importance of individuals taking part in procedures that influence their lives, expressing themselves,

voicing their concerns, and being treated with respect by decision makers.¹⁰ People want to tell their stories, but mostly, they want to be heard. Indeed, “words are active insofar as they are employed by persons in relationship, insofar as they are granted power in human interchange.”¹¹ Any assessment of forms of lay participation must take into account the relational elements of the process and acknowledge the interpersonal meanings generated within the courtroom reality.¹² This study, therefore, pays close attention to the types of interactions that develop within the class action fairness hearings between judges and litigants as well as between judges and attorneys.

Finally, in my review of the hearings, I ask questions aimed at understanding and evaluating the degree to which these events provide opportunities for meaningful deliberation among all participants.¹³ While courts are designed as forums of deliberation based on the idea that substantive justice will emerge from the presentation of arguments by both sides, both the content and the form of legal deliberation are highly regulated and limited. Concerns regarding deliberation within the courtroom can ultimately be reduced to the following questions: Who has the opportunity to speak and to be heard and thus influence the decision maker? How inclusive and responsive is the legal environment? What argumentative forms are acceptable within the process? Owen Fiss states that the legitimacy of the courts depends on the feature of “dialogue which judges must conduct: they must listen to all grievances, hear a wide range of interests, [and] speak back.”¹⁴ This notion of dialogue is crucial in the deliberative sense as well as the relational sense; not only does it require that litigants are able to participate in the process, but also that there is

10. See generally John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 Calif. L. Rev. 541 (1978); E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (1988); Tamara Relis, “*It’s Not about the Money!*”: *A Theory on Misconceptions of Plaintiffs’ Litigation Aims*, 8 U. Pitt. L. Rev. 701 (2007).

11. Kenneth J. Gergen, *Realities and Relationships: Soundings in Social Construction* 47 (1994).

12. Looking at the relational, interpersonal dimensions of the legal process is informed by relational theories in psychology, which focus on the central and critical role that connections with others play in our lives and wellbeing. Stephen A. Mitchell, *Relationality: From Attachment to Intersubjectivity* 31 (2000); Jean Baker Miller, *Toward a New Psychology of Women* 83 (1976).

13. Deliberative theorists maintain that decisions should not be made unless all those affected by them have the opportunity to meaningfully participate in the decision-making process. This is the principle of consent and true participation by the governed, otherwise defined by Habermas as the principle of “self-determination.” Namely, that “citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees.” Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 449 (1992).

14. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 Law & Hum. Behav. 121, 125 (1982).

communication among all participants, which requires a shared language.

This Article, thus, explores, through the use of fairness hearing transcripts of three different cases, the extent to which communication between absent class members, attorneys, and the judge in the fairness hearing context, (1) permits participants to affect the outcome of the proceedings; (2) provides participants an important forum in which to tell their stories; (3) contributes to effective dialogue between legal and nonlegal actors; and (4) provides a public forum in which participants may tell their personal or group-related stories and contribute to the historical record and social memory of the events underlying the lawsuit. I conclude, in part, that participation of absent class members in fairness hearings has and will likely continue to have minimal impact on the substantive elements of the settlement, largely because of the complexity of the claims and the significant investment of lawyers and judges in the proposed settlement. Nevertheless, there is value in lay participation in fairness hearings by absent class members when the court accords respect to the lay participants and permits relatively free expression. That value lies in, among other things, satisfying the class members' psychological need to be heard; allowing participants to take part in proceedings that affect their lives; allowing for a dialogue between legal and nonlegal actors about what law is and what it can and cannot do; and enabling lay expression to become part of the social meanings and historical narratives that the legal process generates and records, particularly since class actions often address significant social events. In short, lay participation in the fairness hearing permits absent class members – who have so little role in the rest of the adjudicatory process of their claims – to have a measure of input into the truth-seeking, lawmaking, norm-generation, public debate, and reflection over issues that are important to them and, often, are also of public significance.

II. CASES AND METHODOLOGY

A. *The Cases*

This study examines fairness hearings held in three different class actions. The first is the Agent Orange Product Liability Litigation (hereinafter the Agent Orange case). This was a large-scale class action filed in 1979 by Vietnam veterans and their wives and children against seven American chemical companies that were involved in the manufacturing and distribution of Agent Orange—an herbicide used by the U.S. army during the Vietnam War. Agent Orange was extensively

sprayed in Vietnam in order to defoliate roadsides and jungle areas to assist the military efforts of the American forces. Vietnam veterans filed the suit claiming that their exposure to Agent Orange (which contained dioxin, a highly toxic chemical) was causing them various illnesses as well as physical and emotional disabilities. Veterans were suffering from high rates of cancer and skin diseases, some fathered babies with various birth defects, and their wives suffered from high rates of miscarriages. Yet the Department of Veterans Affairs would not recognize their cases as service-related.¹⁵ While veterans were certain of the cause of their suffering, scientific proof of the connection between exposure to Agent Orange and physical illness was weak.

After five years of pre-trial procedures, on the day that the jury trial was about to open in the District Court in Brooklyn, Judge Weinstein announced that the case had settled.¹⁶ The chemical companies had agreed to establish a fund of \$180 million, which at that time was the largest award ever to be won by a class in a mass tort case, but was also certainly a seemingly insignificant sum given the over 200,000 class members and the severe disabilities suffered by them.

The settlement proved to be highly controversial among the class members. Judge Weinstein, in an exceptional order, held not one hearing but eleven days of hearings in five different cities across the country. More than 500 class members spoke in these hearings, which lasted from early in the morning until late at night. Many veterans came in their old uniforms or wearing an orange ribbon on their clothes. A study published during the period of the hearings found that the amount of dioxin (the deadly component) in the herbicide sprayed in Vietnam was minimal. The *New York Times* published an editorial calling the veterans to take the money offered to them and run.¹⁷ And yet, most veterans who testified opposed the settlement, and outside the courthouse veterans were

15. Several years after the case was settled, Congress enacted the Agent Orange Act of 1991, which provides that veterans would be eligible for treatment for a list of presumptive medical conditions related to exposure to herbicides used during the war. Pub. L. 102-4, 105 Stat. 11.

16. The Settlement was practically made possible, and even constructed to some extent, by Judge Weinstein himself. On the weekend before the trial was to begin, Weinstein ordered the parties to come to the courthouse in Brooklyn for an around-the-clock negotiation marathon. Weinstein told the plaintiffs' attorneys that while his heart bled for deformed children, he actually considered their case "very weak," and predicted they would lose and go bankrupt. To the defendants' attorneys, he said that the jury would probably be sympathetic to the veterans who served voluntarily and were now sick with cancer, and of course towards their sick children. Some argue that Weinstein himself even determined the final figure of \$180 million. Wilbur J. Scott, *Vietnam Veterans Since the War: the Politics of PTSD, Agent Orange, and the National Memorial* 185 (2004); see also Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 143-167 (1986).

17. *The Truth About Agent Orange*, N.Y. Times, August 13, 1984, at A22.

demonstrating against the settlement wearing “sprayed and betrayed” orange t-shirts¹⁸

I present an analysis of the last two days of hearings, held in San Francisco, on August 23 and 24, 1984. During these two days, 92 class members spoke, most of them Vietnam veterans and a few wives and mothers of veterans. Sixteen lawyers participated, five of whom were themselves veterans. Following the hearings Judge Weinstein approved the settlement.¹⁹

The second fairness hearing I present took place as part of the Holocaust Victim Assets Litigation, (hereinafter referred to as the Holocaust Assets case) and generally known as the Swiss Banks case. This class action included several lawsuits filed by Holocaust survivors and heirs of Holocaust victims against Swiss banks, claiming that by concealing and confiscating assets of Holocaust victims and laundering the money obtained through Nazi looting, the banks had, in effect, collaborated with the Nazi regime in its furtherance of war crimes against humanity. Class members in this case resided in over 50 countries around the world. But interestingly, due to unique features of the American legal system,²⁰ the suits against the Swiss banks (as well as other Holocaust era cases²¹) were filed in American courts many years after, and far away from, where the atrocities actually occurred. The unique role of the American courts in the Holocaust era litigation would prove significant in the following analysis. In the other two cases (the Agent Orange case discussed above and the Connecticut Welfare Case discussed below), which involved American governmental institutions, the court was at least partly associated with the defendants. In the Holocaust Assets case, by contrast, class members regarded the American judge and the American justice system as, at the least, removed and unbiased, and at the most, as the real heroes of the case.

In the Holocaust Assets case too, a settlement was reached after lengthy negotiations.²² The Swiss banks had agreed to pay \$1.25 billion

18. Agent Orange on Trial, p. 214. See also: *Veterans Speak Out on Agent Orange*, NY Times, August 9, 1984.

19. *In Re Agent Orange Product Liability*, 597 F. Supp. 740, 862 (E.D.N.Y. 1984).

20. These features include the possibility of foreign citizens to file suites for human rights abuses committed outside the United States; the class action mechanism; contingent fee arrangements; a legal culture in which lawyers are willing to take such cases upon themselves; recognition of jurisdiction over foreign defendants who conduct business in the United States; fixed and affordable court fees and an independent judiciary. Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts*, at xxii-xxiii (2003).

21. See *In re Nazi-Era Cases against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000).

22. Judge Korman, presiding over this case, was very much involved in the negotiations leading to the settlement. Michael Bazyler writes: “The person most responsible for putting the deal

to be distributed according to a plan created by the court.²³ Judge Korman held two fairness hearings, one in New York and the other in Israel. Following the fairness hearings, Judge Korman ordered some modifications to be made to the settlement and eventually approved it.²⁴ I present an analysis of the hearing held on November 29, 1999, in Brooklyn, New York. About 200 people attended this hearing. Twenty-six class members spoke before the court in a session that lasted the entire day. Seventeen lawyers also testified, four of whom were themselves Holocaust survivors.

The third case, *Raymond v. Rowland* (referred to hereinafter as the Welfare Case), was a class action suit filed against the State Department of Social Services (DSS) in Connecticut. The suit was filed by a group of disabled recipients of various benefits and welfare programs (such as food stamps, Medicaid, and state administered general assistance) following the closing of one third of the social services offices in the state as part of re-organization and reduction processes. The claims, which were based on Title II of the Americans with Disabilities Act, alleged that there was not an adequate transition plan in place to deal with the office closings and that DSS failed to make the required accommodations to maintain accessibility of disabled persons to the benefits and services provided by the office.²⁵ For example, many class members did not own a car nor could they use public transportation, and many had difficulties communicating by phone or mail. Also, the additional caseload of DSS workers (which was increased by 15%) resulted in workers not having enough time to properly handle the needs of recipients with disabilities.

Plaintiffs sought an injunctive remedy—for the DSS to make institutional changes in order to provide nondiscriminatory service to the class members (estimated at more than 120,000 individuals with disabilities).²⁶ The settlement itself, reached after two years of

together was Judge Korman . . . His successful efforts in both the settlement and the all-important implementation phase of the agreement have made him one of the champions of the Holocaust restitution movement.” See Bazyler, *supra* note 19, at 27-28. Judge Korman himself writes in his final decision that he “became intimately involved in the settlement discussions that led to an agreement.” *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 142 (E.D.N.Y. 2000).

23. For a detailed review of the Holocaust Assets litigation, see Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 Wash. U. L.Q. 795 (2002).

24. *In Re Holocaust Victim Assets Litig.*, 311 F. Supp.2d 407 (E.D.N.Y. 2004).

25. *Raymond v. Rowland*, 220 F.R.D. 173, 175 (D. Conn. 2004).

26. This lawsuit can be characterized as institutional reform litigation, seeking to bring on systemic changes in the functioning of a large public organization. See generally Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998); Leonard Koerner, *Institutional Reform Litigation*, 53 N.Y.L. Sch. L. Rev. 509 (2008).

negotiations,²⁷ presented a series of changes to be made by DSS, including, for example, staff training in identifying disabilities and providing accommodations as needed and modifications to the DSS computer system and physical environment. A fairness hearing was held on September 10, 2007, in which 12 class members participated. Judge Kravitz of the District Court in New Haven, Connecticut, accepted the settlement directly following the hearing.

B. *Methodology*

This study presents an analysis of court transcripts. In analyzing this data, I use a unique methodology which incorporates interpretive reading with more structured methods of content analysis, which are based on systematic categorization and coding of the data. The methodology draws on critical discourse analysis and content analysis as well as on legal ethnography and, in particular, the ethnography of legal discourse.²⁸ Unlike traditional ethnography, this data was not collected through actual observation in the field.²⁹ The source of the data is the official court transcripts, providing a word for word report of what was said at the hearings (naturally occurring talk).³⁰ As presented in the transcripts, discourse is used as evidence of individuals' perceptions of social interaction and social meaning. In this regard, my analysis follows the method of critical discourse analysis in its use of discourse as a source of evidence and as a way to better understand social phenomena. The work further reveals how "discourse in its first sense (language in use) also functions as discourse in its second sense (a form of social practice that 'constructs the objects of which it purports to speak')."³¹

27. Judge Kravitz indicated in the hearing: "it's apparent from the docket sheet, that the Court itself while not involved in the settlement discussions, had numerous status conferences with the parties throughout that process, the parties could and did update the Court on progress." Class counsel, Ms. Bergert replied saying that the Court's close supervision over the process "was very helpful to keep negotiations going on track because they were rather intensive and difficult." Hearing transcript, at 9. The docket sheet (on file with author) indeed indicates that numerous telephone status conferences were held and joint status reports were filed along the litigation process.

28. See generally John M. Conley & William M. O'Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (1990).

29. John M. Conley and William M. O'Barr, *Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 *Loy. L.A. L. Rev.* 41, 45 (1993).

30. The research is also based on newspaper reports and accounts of people who attended the hearings as audiences and on interviews I held with special masters for the Agent Orange case (Ken Feinberg) and for the Holocaust Assets case (Burt Neuborne), who were present at the hearings and were involved in the management of the litigation. Court documents and decisions are additionally incorporated into the study.

31. Deborah Cameron, *Working with Spoken Discourse* 123 (2001).

The main advantage in working with this sort of written account is that it enables a close examination of the content of individuals' accounts, of the choices people make in speaking before the court, and of the verbal exchanges between participants. While this investigation lacks a first-hand impression of the events, it excels in examining a clear and neutral representation of the hearings.

The following analysis combines interpretive reading with systematic coding of the data. These different methods complement each other in what they reveal and in the kind of insight they yield.³² On the one hand, the in-depth reading of the transcripts yields insight into the nature of these events and the nature of different incidents that occur within them. Such a reading allows the researcher to be influenced (perhaps even moved) by the data, and thus a new dimension of understanding is introduced and incorporated into the study.

On the other hand, the use of systematic categorization reveals phenomena within the text, frequencies, and relationships between different phenomena which would not be discovered through a qualitative, interpretive reading. And while categorization is helpful in organizing the data, "it also deflects attention away from uncategorized activities."³³ Human behavior, individual's accounts, or interactions often challenge this kind of categorization, so it is helpful to complete this type of analysis with a closer, interpretive reading.

The unit of analysis for this study is the account of one speaker. The data set consists of a total of 156 units of analysis, representing 156 speakers (97 in the Agent Orange case, 45 in the Holocaust Assets case and 14 in the Welfare Case). For each account I counted the number of words spoken by the speaker, the number of interactions with the judge, and the number of words spoken by the judge in the interaction with that speaker.³⁴ I then created the set of categories according to which to analyze the materials. Based on the grounded theory approach, the creation of a categorization scheme was conducted while moving back and forth between theory and data, facing the challenge of translating the notion of meaningful participation, as explained above, into something that can be "measured" on the ground.

32. On the use of mixed methods, see generally Sharlene Nagy Hesse-Biber, *Mixed Methods Research: Merging Theory With Practice* (2010).

33. David Silverman, *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction* 123 (2d ed. 2001).

34. At this stage, interactions with the judge were not differentiated according to their length or substance. The number of words uttered by the judge, however, was later used as an indication for the degree and quality of interaction.

A preliminary list of categories was formed based on the theoretical framework (examining lay participation around the themes of interaction, deliberation and expression) as well as on themes and phenomenon identified through preliminary readings of the transcripts. Based on this list, the transcripts of two of the hearings were read and categorized both by myself and by a co-reader. We then compared and discussed our results. This process achieved two goals: it helped refine the set of categories (removing ones that proved statistically insignificant and adding ones that were identified through the reading) and confirmed the reliability of the categories to create clear rules of inclusion for each one of them. At this stage I re-read and categorized the transcripts of all three hearings.³⁵ Once the categorization and coding processes were completed, findings were classified through the counting of instances in each of the categories, and using statistical analysis, different comparisons were drawn: between lawyers and non-lawyers, between the three different cases, and between the different judges.

The main categories used throughout the analysis include:

- Type of speaker: litigants, class counsels (including defense lawyers), and lawyers representing individual class members. Depending on the question the two groups of lawyers were sometimes consolidated.
- Opinion regarding approval of settlement: speakers were either for or against the approval of settlement, and some did not talk about the settlement at all (coded ND—not discussed).
- Opinion on settlement itself: This category was added as it became clear that speakers considered both whether the settlement should be approved and the quality of settlement. This category was coded as: favorable, ambivalent, neutral, or not discussed.
- Boundaries—Formal and Substantive: referring to the enactment and enforcement of boundaries of discourse and rules of participation by the judge. I distinguish between formal boundaries, relating mainly to the time allotted to each speaker,³⁶ and substantive boundaries, which relate to the content of speech.

35. The process described here is referred to in grounded theory literature as ‘coding stage I, II, and III.’ See Sally A. Hutchinson, *Education and Grounded Theory*, in *Qualitative Research in Education: Focus and Methods* 123 (Robert R. Sherman & Rodman B. Webb, eds., 1988).

36. The court would usually set a time limit of five or ten minutes per speaker, a practice that is mentioned as appropriate in the *Manual for Complex Litigation* (Fourth) § 21.634 (2004).

- Reaction to boundaries: examining whether the speaker complied with boundaries that were set by the judge.
- Judge-Speaker Interaction: Engagement over substantive matters and acknowledgement of other person's point of view, and empathy of the judge towards speaker. Substantive issues are those concerning the merits of the case relating to the settlement, to the process, etc. Empathy and acknowledgement identify all instances in which a judge was responding to a speaker on a personal level acknowledging feelings, personal circumstances, asking personal questions, etc.³⁷

In addition, the content of the speakers' accounts was coded based on the following subjects:

- Generating legitimacy for settlement;
- Relating to the importance of the opportunity to speak;
- Use of legal discourse or reasoning;
- Direct speech or appeal towards judge;
- Speaking about the group;
- Speaking about the "self" and about personal experiences;
- Speaking about the past;
- And discussion about what should happen in the future.

III. SETTING THE STAGE: STRUCTURE, RULES, AND BOUNDARIES

This Section discusses the procedural and substantive limits the judges established in each case for participation at the fairness hearing and the extent of enforcement of those limits.

Once a settlement was reached in the Welfare Case, a notice was distributed among the class members. It read: "If You Have a Disability: Important Information about a Court Settlement." The notice described the background of the case, described the settlement that had been reached, and explained in plain language the changes it would bring about within the DSS offices. It then went on to explain "how you can tell the Court if you object." The notice continued: "The Court is holding a 'fairness hearing' to consider whether the settlement agreement is fair, reasonable and adequate Class members do not have to attend the

37. The rules of inclusion for this category were to a large degree provided by literature on problem-solving or therapeutic approach to adjudication, which discusses specific ways to enhance personal skills of judges, in their attempt to create more meaningful, respectful and empathic connections with litigants. *See, e.g.,* Susan Goldberg, Nat'l Judicial Inst., Can., *Judging for the 21st Century: A Problem-Solving Approach* (2005).

hearing, but may attend and comment on or object to the settlement agreement.” Having provided details for the hearing (time and place), the notice ended, in bold letters: “You do not have to go to the hearing or do anything else if you do not want to object to the settlement.”³⁸

Judge Kravitz started the hearing by mentioning the wide public interest in the case and the written comments he had received from class members in relation to the settlement. He then set the ground for the administration of the hearing: “I would like to hear from counsel for the parties in support, they filed a joint motion for approval of the settlement . . . but then I’m willing to listen to and take comments from others who may be interested in commenting on the settlement.”³⁹ Judge Kravitz then introduced two limitations on the participation of class members. First, due to the large number of people who might wish to comment, he asked that the speakers limit themselves to three minutes each (a shorter time-frame in comparison to what was allowed in the two other hearings). And second, more substantially, the judge asked people to:

. . . focus their comments on the settlement agreement itself and my inquiry at this point, which is a twofold inquiry, which is first to ensure that notice has been provided to class members, reasonable notice; and secondly, to make sure that the settlement agreement’s terms are fair and reasonable and adequate for the class members.⁴⁰

Judge Weinstein, presiding over the Agent Orange hearing, and Judge Korman at the Holocaust Assets hearing, did not define boundaries concerning the subject matter of the hearings or the content of participants’ accounts. Both judges stressed, however, the time limits, alongside the importance of hearing everyone who wanted to have an opportunity to be heard. Judge Weinstein, arriving at the San Francisco hearing after nine days of hearings in four different states, said:

Good morning, everybody. It’s a great pleasure for me to be here in San Francisco, although not under the happiest of occasions.

We have heard almost 400 witnesses up to now, and I have a list, which is growing rapidly, of those who wish to be heard in San Francisco. I’m going to try to hear everybody who wishes to be heard. I’m going to

38. Citations are from the notice published by the court prior to the hearing (on file with author).

39. Transcript of Record at 3, *Raymond v. Rowland*, Fairness Hearing, September 10, 2007, New Haven, Connecticut (file with author) [hereinafter *Welfare hearing*].

40. *Id.* at 3.

work as late as possible tonight, if necessary.

I'd like to ask you to limit your remarks to five minutes. . . . although I know some of you have been waiting for a long time to express your views on these matters and to ventilate some of your frustrations, we do want everybody to have an opportunity.⁴¹

Judge Korman opened the Holocaust Assets hearing saying that it was “an honor and privilege for me to have participated in this case and to be here this morning to listen to you and hear your views about the settlement.” He then set the course of the hearing: “We’re going to first hear opening statements from counsel, and then I will listen to everyone who has signed up to speak. We’ll give everyone ten minutes. We’ll continue for as long as we can and if need be, we’ll continue tomorrow.”⁴²

It seems, then, that in this particular setting where most formal boundaries of participation are removed, the main limitation on participants was the time frame for each account. It should be noted, though, that while the Agent Orange and Holocaust Assets hearings took all day, the Welfare Case hearing lasted less than two hours.

Once the rules of participation were set, it is interesting to examine the manner of their enforcement. We find throughout the hearings 25 instances in which a judge asked a particular speaker to end his account because time had expired. Interestingly, although lawyers were speaking significantly more than litigants, in terms of words per speaker (see Table 1), only 6 of these 25 instances were directed towards lawyers.⁴³

In the Holocaust Assets hearing there was practically no enforcement of time limits. In the Welfare Case hearing there was a single instance of enforcement of time limits. Additionally, after nine class members had testified and as others were waiting for their turn to speak Judge Kravitz said, “Hopefully we can begin to bring this to an end at some point.”⁴⁴ It is interesting to see that while Judge Kravitz set the shortest time limit for each account, he was the judge with the largest number of interactions with participants (see Table 1, Table 7).

Twenty-four of the time enforcement instances took place within the Agent Orange hearing (Table 7), perhaps because it was the hearing with the greatest number of speakers and lasted the longest. Additionally, and

41. Transcript of Record at 4-5, *In re Agent Orange Product Liability*, Fairness Hearing, August 23 and 24, 1984, San Francisco (file with author) [hereinafter Agent Orange hearing].

42. Transcript of Record at 3, *In re Holocaust Victims Asset Litigation*, Fairness Hearing, November 29, 1999, Brooklyn, New York (file with author) [hereinafter Holocaust Assets hearing].

43. This ratio is not that significant if we consider the total number of lawyers speaking compared with the number of litigants.

44. Welfare hearing, *supra* note 39, at 47.

this might be a result of the audience's reactions in this hearing, the Agent Orange hearing was also the only one in which we find enforcement of other rules of participation. Throughout the hearing the crowd kept applauding different speakers. The first few times there was applause, the judge tried to stop them, "I know this is a highly emotional matter for many of you, but, please, this is a courtroom, not a public meeting."⁴⁵ But applause would often continue without further reaction from the court. Another example of Judge Weinstein's need to address participant behavior was when a woman, who had already testified in the Chicago hearing, insisted on speaking again. The judge refused to allow it. "This is a courtroom. I will control my court," Weinstein said repeatedly.⁴⁶ When the woman refused to sit down, the judge warned her that she would be held in contempt of court.

Challenges concerning the relevancy of speakers' accounts were very few. Overall, it seems that most of the speakers in all hearings could speak freely about any issue without being interrupted by the judge. As Judge Weinstein told a veteran who asked whether it would be permissible to read from a newspaper article during his account, "you can use your time anyway you wish."⁴⁷ This lack of enforcement regarding the subject matter of individuals' accounts is not surprising given the broad and somewhat vague definition of what is "fair, reasonable, and adequate" from a legal perspective. Even though more than one-quarter of the speakers (41 speakers, table 2) did not disclose their personal stance vis-à-vis the settlement, there were only a few instances in which speakers were directly asked by the judges to express their opinion. Only Judge Kravitz, in the middle of the Welfare Case hearing, asked speakers to comment "on the terms of the settlement agreement, if I could focus attention on that, the task that I have today is to decide whether this particular settlement agreement is a fair and reasonable one for the lawsuit that was brought."⁴⁸

There were only seven instances of challenges to relevance—three in the Welfare Case hearing and four in the Agent Orange hearing. All of these challenges referred to speakers' talking about topics beyond the scope of the case. For example, Judge Kravitz's reply to a class member who was speaking about the question of the level of welfare benefits was, "Many individuals wrote to me about their concerns about overall levels of benefits, and I am certain that that is an important concern. This

45. Agent Orange hearing, *supra* note 41, at 35.

46. *Id.* at 167.

47. *Id.* at 276.

48. Welfare hearing, *supra* note 39, at 36-37.

particular lawsuit was not about that issue.”⁴⁹ Another example is Judge Weinstein’s reply to an attorney who was speaking about a need for an injunctive relief to stop the use of dioxin. “That’s beyond the scope of this litigation. You know that as a lawyer. This is not a political statement. . . . That problem has to be addressed to the Congress and to other regulatory agencies. This is a court.”⁵⁰

None of the three judges ever raised the issue of relevance with regard to personal experiences and feelings. At times, though, it seems that a formal boundary was used to end a highly personal story, as the following example shows. “Class member: [. . .] The effect that it’s had on me has been devastating, in terms of in three years I probably made love three times to my wife. Court: Could you bring your statement to a conclusion?”⁵¹

The lack of enforcement regarding the relevance of speech resulted in many accounts that were highly personal yet unrelated to the settlement. Such accounts might not facilitate the court’s mission of evaluating the settlement, but this expanding of the boundaries of relevant discourse is nonetheless revealing. It reveals the real concerns of the litigants,⁵² and how they interpret the case and the role of the court in adjudicating it.

IV. THE FUNCTION OF THE HEARINGS I: DIALOGIC VERSUS LEGITIMIZING EFFECT

All three hearings had a similar structure: the first to speak were class counsel, who presented the settlement and arguments for its approval. Only then did the class members’ testimony begin along with the testimonies of lawyers who directly represented individual class members.

At the Welfare Case hearing, both Ms. Bergert, class counsel, and Mr. Barber, representing the defendant, provided accounts that were aimed at defending the agreement itself as well as the process through which it had been achieved. Reading their accounts, it seems as though they were addressing two distinct audiences at the same time: the judge

49. *Id.* at 46.

50. Agent Orange hearing, at 376.

51. Agent Orange hearing, at 311.

52. When litigants speak about details that are not legally relevant, it seems that they do so not because they do not care about legal relevancy, but because they have different, broader perceptions of what counts as legally relevant. Conley and O’Barr make a similar observation in their study of small claims court litigants. “The most significant practical question faced by informal court litigants” they write, “is whether their accounts will satisfy the court. The strategies that they employ in their efforts to meet this burden reflect their varied understandings of the law.” Conley & O’Barr, *supra* note 28, at 44.

and the class members. To the court, they focused on evaluating the settlement according to the legal factors for review of a settlement in a class action. To the public, they presented the original goals and scope of the lawsuit, and they highlighted the benefits of the settlement against the alternatives and consequences of not accepting it. The message to the audience was that the accomplishments of the settlement should be measured against the limited scope of the case and not against the broad range of failures and problems they had encountered with the DSS or difficulties faced by people with disabilities in general. Judge Kravitz himself conveyed a similar message in his closing statement, explaining his decision to approve the settlement:

This agreement does not solve every problem that exists in the state or every problem that exists for disabled people or, indeed, every problem that exists in DSS as an agency.

But this lawsuit was about accommodation and access . . . and I think everybody can be satisfied that this settlement is going to go a long way to enhancing that.⁵³

Put differently, attorneys, as well as the court, used the hearing to enhance the legitimacy of the settlement by introducing to the class members the realities of what can be achieved through this specific litigation. Another way of demonstrating the legitimacy of the settlement, demonstrated by the judge himself, was to highlight the efforts and credentials of the attorneys. The judge congratulated the lawyers on their work in this case on four different occasions throughout the hearing.

The Holocaust Assets hearing also started with the testimony of class counsel. Their accounts were aimed mainly at the audience while defending the settlement in different ways. The first speaker, Mr. Ratner, emphasized the worldwide interest in the settlement and the widespread support therein. He provided figures indicating that very few comments and objections were received from members of the class.⁵⁴ The second speaker, Mr. Swift, who literally turned his back to the judge in order to face the audience, also talked about the “overwhelming support for the settlement and the great good that this settlement can accomplish.”⁵⁵ Voicing a pragmatic approach, which characterized many of the accounts in this hearing, he concluded: “[h]ad we not settled this case, survivors and their heirs were in jeopardy of receiving nothing.”⁵⁶

53. Welfare hearing, *supra* note 39, at 56.

54. Holocaust Assets hearing, *supra* note 42, at 7.

55. *Id.* at 7.

56. *Id.* at 8-9.

If in the Welfare Case hearing we saw how the court was complimenting the attorneys on both sides for their work, here we see class counsel and defense counsel complimenting themselves and each other. For example, leading class counsel Burt Neuborne related the requirement that there be arm's-length adversarial bargaining, saying "I have bruises on my body that will demonstrate the arm's-length and adversarial bargaining that went on in this case. We bargained for 18 months, as vigorously as I have ever seen negotiations carried out."⁵⁷ Mr. Witten, the defense attorney, addressed the class members in the audience to say that "these lawyers . . . have given you a set of champions that could not be matched in any other courtroom, in any other case."⁵⁸

The Agent Orange hearing in San Francisco began similarly with two attorneys from the plaintiffs' management committee. Both of them talked directly to the veterans and provided a very detailed review of the legal questions brought up by the case and the difficulty to legally prove the veterans' claims. Interestingly, Judge Weinstein interrupted both of them, asking them to end their statements so that the class members could be heard. The second speaker, class counsel Mr. Moyer, stated as follows:

I come here today to spell out for the Court and for the veterans in particular who have gathered here, some of the real world considerations, the cold, hard facts which have led to this proposed settlement, and the realities, and based upon these realities to urge that this settlement be approved.

[. . .]

I think it is important that you, the veterans, understand the risks of our case, the risks both of the law and of the facts of the lawsuit which make this settlement the only rational course to follow.⁵⁹

There were shared themes in the accounts of class counsel in all the three hearings. They all used the hearing to generate legitimacy for the settlement among class members themselves. All three judges in these cases were considerably involved in the course leading towards the creation of the settlement agreements.⁶⁰ Given such involvement on behalf of judges, it is not surprising that class counsel focused their efforts on convincing the class members themselves, rather than the judge, that the settlement was indeed fair and reasonable, and that it was in the best

57. *Id.* at 35.

58. *Id.* at 38.

59. Agent Orange hearing, *supra* note 41, at 13-17.

60. *See supra* notes 17, 22, and 28 and accompanying discussion.

interest of the class that it be approved by the court.

In a sense, and again given the involvement of judges in the creation of the settlements, the hearings could be thought of as taking place in a post-law state. It seems that on the eve of the approval of the settlement, all legal actors had given up on a trial and had given up in fact on adjudication in its traditional sense. It could be argued, therefore, that the fairness hearings make use of a participatory framework in order to legitimize controversial or unpopular outcomes. It could also be argued that by doing so, the hearings convey the actual lack of participation and lack of party control, which in fact characterizes the class action process.⁶¹ Such sentiments are expressed, for example, in one Vietnam veteran's description of the hearings in the Agent Orange case as a traveling circus.⁶² Or, to quote another speaker, the hearings were "a sleight of hand designed to convince veterans that they had a voice in the out-of-court settlement."⁶³

Fairness hearings are mandated by law and judges must hold them. Yet judges do have a lot of discretion in deciding how to conduct the hearings. It seems clear that in the Agent Orange case, the need to legitimize a controversial settlement before the class played a role in Judge Weinstein's decision to hold the hearings across the country. Ken Feinberg (who was special master in the case) mentioned in an interview several reasons leading to Weinstein's decision, among them the notion that in such a case it would be appropriate to allow people the opportunity to unburden their hearts and participate. But there were also political reasons—seeing the hearing as a way of legitimizing the settlement before the class members (as well as before the United States Court of Appeals for the Second Circuit). Additionally, according to Feinberg, Weinstein believed that by holding the hearings he would minimize the number of people who would opt out.⁶⁴

Another explanation for the decision to hold the hearings, and perhaps also for the manner in which they were held, is provided by Judge Weinstein himself. In an article he wrote ten years after the Agent Orange hearings, he stated as follows:

61. This argument echoes a more general concern that a focus on procedural values might help authorities legitimize decisions that are not substantially fair or just. See, for example, Bryant G. Garth & Austin Sarat, *Justice and Power in Law and Society Research: On the Contested Careers of Core Concepts*, in *Justice and power in Sociolegal studies* 1, 10 (Bryant G. Garth & Austin Sarat, eds., 1998).

62. Gerald Nicosia, *Home to War: A History of the Vietnam Veterans' Movement* 569 (2001).

63. Fred A. Wilcox, *Waiting for an Army to Die: The Tragedy of Agent Orange*, at xx (1989).

64. Interview with Ken Feinberg, New York, May 8, 2008.

Agent Orange presented similar problems [to asbestos litigation]. People were deeply affected—perhaps physically and certainly psychologically—by exposure to the chemical. Many of the veterans in the Agent Orange case chose not to marry, and when they did marry they chose not to have children, because they were concerned that their children would be afflicted. The medical evidence did not justify these fears. But it is fear, as much as medical evidence, that brings plaintiffs into courts; we must deal with perceptions as well as facts.⁶⁵

We should ask, therefore, whether these features of the hearings imply that a priori the hearings could have no real impact on the outcome? And furthermore, do they trump any possibility for a meaningful dialogue to develop throughout the hearings? In other words, we should ask ourselves whether dialogic and defensive (or legitimizing) features are exclusionary of each other. In order to address this question, one should take a closer look both at the opinions expressed in the hearings, their impact on the outcome, and their impact on the kind of dialogue that developed therein.

While all three hearings eventually led to an approval of the settlement by the court, the three cases significantly varied with regard to participants' opinions about the settlement. In the Holocaust Assets hearing, 35 speakers supported the approval of the settlement and 9 speakers opposed it. In the Agent Orange hearing, only 16 speakers supported the settlement, 47 opposed it and 34 did not disclose an opinion regarding approval of the settlement. Finally, in the Welfare Case hearing, 7 speakers supported the settlement, 1 opposed it and 6 speakers (almost half the participants) did not disclose their opinion. (See table 2, figures include lawyers and litigants). Only in the Agent Orange hearing, therefore, was there actually a significant amount of opposition to the settlement voiced throughout the hearing.

When we distinguish between the question of whether a speaker was for or against the approval of settlement and the separate question of his or her opinion of the settlement itself, we reveal that participants' attitudes towards the settlement were more complex than simply being for or against it. There was often a discrepancy between the participants' view of the settlement and their ultimate opinion whether to support or oppose it. Approximately one third of the speakers in all hearings (50 speakers, table 3) were ambivalent in their evaluation of the settlement. Only 25 of the speakers who supported the approval of settlement (examined in all

65. Jack B. Weinstein, *An Introduction to Who's Who in Mass Toxic Torts*, 80 Cornell L. Rev. 845, 846 (1995).

cases) were also favorable towards the settlement. Another 25 speakers who supported the settlement were actually ambivalent in their evaluation of it. Ambivalence was less common among those who opposed the settlement (11), and those who did not disclose an opinion of it (14). This reveals a complexity in individuals' opinions, which transcends the need for a decisive binary outcome at the end of the hearing. Whether a settlement had to be approved or disapproved and whether it was fair or just, were viewed as separate issues altogether.

A prototypical manifestation of this complexity would be the pragmatic approach that typified the opinions of many of the speakers at the Holocaust Assets hearing. Across the board, every speaker—lawyer or litigant—who supported the Holocaust Assets settlement explained it in pragmatic terms. They acknowledged the fact that the settlement was not perfect, rather far from it, and that it could not be viewed as fair. “[S]o this is not a fair deal, considering for how many people they did it,”⁶⁶ or just “[W]e certainly cannot ask at this point for justice.”⁶⁷ But despite these reservations, the settlement was to be accepted for practical reasons, mainly because of the condition of many of the survivors who were mostly elderly and poor, and delay was not in their best interest.⁶⁸ The notion that was shared by a great number of speakers was that the settlement was to be approved because this was the most that reality and the law could offer them:

The words fair, just, reasonable, equitable have no real meaning when applied to the Holocaust. There needs to be a new terminology, a new set of words, a new definition that could adequately comport to what the Holocaust means to our time and to the history of mankind. But until that is created, having to live with the terminology that exists, we endorse this proposal as being real, even if it is not the ideal.⁶⁹

Going back to the question of the impact of participation on the outcomes of the cases, manifestations of the complexity of participants' views could be meaningful, because while judges were to decide whether or not to approve a given settlement, they could also order its modification. In this respect, opinions and views of speakers could have

66. Holocaust Assets hearing, *supra* note 42, at 119.

67. *Id.* at 108.

68. The practical concerns were real and acute. “By the time the first payments went out in late 2001, many of the survivors who joyously hailed the settlement in mid-1998 had died while waiting for their check. Others just gave up, exasperated not only by the numerous delays but also with the complicated forms they were made to fill out in order to receive the settlement proceeds.” Bazyler, *supra* note 20, at 30.

69. Holocaust Assets hearing, *supra* note 42, at 59-60.

been incorporated into the settlement by having it amended. This was done, though, only in the Holocaust Assets case, where we actually find the one single clear indication of a fairness hearing having a direct impact on the final outcome of the case with regard to the question of the rights of owners of looted works of art.⁷⁰

There was one other example throughout the hearings of a hearing having a practical impact on the litigation process: towards the middle of the second day of the Agent Orange hearing, and after many speakers had complained that members of the class were not properly informed of the case and of the settlement or of their own rights with regard to the settlement, Judge Weinstein announced that he would postpone the deadline for filing the forms to be included in the settlement, a statement which elicited applause from the audience.⁷¹

Occurrences of a direct impact of the hearing were certainly infrequent. At the same time, these two examples provide an important demonstration of the actual, as well as potential, benefit of the public hearing. These examples show how the participation of class members can help in bringing before the court new information that was not before it prior to the hearing and new information that members of the class have better access to. Participation also helped in raising issues that were overlooked by the negotiating attorneys who created the settlement.

If meaningful participation is to be assessed solely according to its actual impact on the outcome, then the findings presented here are limited. If we examine meaningful participation, however, according to levels of interaction and dialogue with the decision maker, the data reveals interesting insights. The degree of meaningful interaction with the judge was assessed using three different criteria: the number of words spoken by the judge towards the speaker, engagements over substantive matters, and acknowledgments of other persons' points of views (OPOV).

Examining the impact of speakers' attitudes towards the settlement on the judges' reactions (table 9), we see that judges spoke significantly

70. During the hearing, several lawyers brought up concerns regarding claims for looted works of art still kept in Switzerland, claiming that the settlement, unintentionally, deprived the legal rights of the rightful owners of these works of art. For example, see accounts of Mr. Goldstein and Ms. Weber, who represented a European body dealing with all matters relating Nazi looted art and cultural property. Holocaust Assets hearing, at 66-82. During the hearing, judge Korman discussed this matter with the lawyers and promised to consider it seriously. Hearing transcript at 81. Following the hearing, at the order of the court, the parties amended the settlement in order to address this problem. The modifications that were made to the original settlement in that regard (and other modifications as well) are stated in an amendment to the settlement, which can be found at: http://swissbankclaims.com/Documents/DOC_20_Amendment2.pdf

71. Agent Orange hearing, *supra* note 41, at 317.

more with speakers who were against the settlement than with speakers who were for the settlement (83 words versus 27 words). Judges mostly spoke with those who had not disclosed their opinion on the settlement (92 words). In addition, there were significantly more acknowledgments of OPOV towards those who were against the settlement or did not disclose their opinion. Discussions over substantive matters were similar with speakers who were for or against the settlement, yet significantly higher with speakers who did not disclose their opinion. One might conclude that those in favor of the settlement required less attention from the judge. It could further be deduced that judges did not shy away from disagreement with speakers. Considering the fact that the opinions of those who opposed the settlement were never actually accepted, it is nevertheless meaningful to recognize that these speakers had the opportunity to engage in conversation with the decision maker over their views.

V. THE FUNCTION OF THE HEARINGS II: THE RELATIONAL EFFECTS

The three hearings significantly differ with respect to the degree of interaction between judges and participants (tables 1, 7). Judge Korman, at the Holocaust Assets hearing, did not say much throughout the day and had but a few interactions with speakers. He engaged in conversation with class members only where clarifications were necessary and spoke with some of the attorneys who brought up objections to the settlement. The few interactions Judge Korman did have were engagements over substantive matters, whereas he had almost no expressions of OPOV (table 7). The two other judges, however, were much more dominant throughout the hearing, often conversing with speakers and demonstrating in general a high degree of involvement and responsiveness to litigants' accounts.

At the Welfare Case hearing, Judge Kravitz was highly attentive to the personal narratives: when a speaker recounted a recent improvement in her condition, the judge responded by saying that it was "very very good to hear."⁷² Likewise, when another speaker concluded her remarks declaring, "I am a disabled American and I have not received any acknowledgement," the judge answered: "Let's see if we can get you some acknowledgement then."⁷³ Judge Kravitz repeatedly affirmed that the concerns brought up by the speakers were very important (even if not always within the scope of the case), and would engage with the speakers'

72. Welfare hearing, *supra* note 39, at 29.

73. *Id.* at 36.

accounts by saying “right” every once in a while.⁷⁴ The judge also made a point to thank the speakers for taking the time to come speak with him, to write to him, and to comment about the case. Moreover, throughout the hearing, Judge Kravitz tried to provide practical solutions to the specific needs of the speakers. Whenever a speaker would mention a personal condition requiring assistance from the DSS office or another authority, the judge would urge the speaker to turn to the plaintiffs’ lawyers, explaining that they agreed to meet with individuals, hear their complaints, and see if they “can assist in any way and help with the processing.”⁷⁵ He urged the DSS representative to use the jury room to meet with those who needed personal advice: “they don’t need to meet in the hallway – with some privacy.”⁷⁶

Reading the court transcripts provides the impression that the court itself has become an extension of the DSS office. So much so that when one woman told the judge “I hope you will make sure that somebody does get back to me,” the judge had to reaffirm his role explaining that “I can’t sort of go out and get lawyers and tell them to go find you, okay? I’m supposed to [be] an independent impartial decision maker. What I have asked of both sides was [. . .] to make themselves available, to listen to any complaints that people have.”⁷⁷

Judge Weinstein, at the Agent Orange hearing, was similarly highly dominant and interactive throughout the hearing. Given the strong level of opposition to the settlement and the highly emotional nature of many of the accounts in that hearing, it is interesting to examine how the judge dealt with the pain, needs, and hopes of the veterans, when these were addressed directly to him. It is interesting to observe the strategies employed by the judge when he was confronted with demands and hopes that were beyond his professional capacity. Weinstein’s involvement in the formation of the settlement renders the interaction between him and the numerous class members who opposed the settlement all the more interesting. Weinstein could, of course, let the veterans speak up and just listen, but he chose in many instances during the hearing to engage, communicate, and confront their accounts.

For one thing, Judge Weinstein was very clear and open about the limits and limitations of the law. He kept explaining that many of the

74. Conley and O’Barr observe that in the informal courts they studied judges seldom provided any cues, such as “yes”, or “I see”, while witnesses were speaking, which leaves witnesses without guidance as to how long to continue their account. Conley & O’Barr, *supra* note 28, at 42.

75. Welfare hearing, *supra* note 39, at 27.

76. *Id.* at 26.

77. *Id.* at 41-42.

veterans' concerns and demands were beyond what could be achieved in this lawsuit. "This court is very limited in what it can do," Weinstein said, "It's a court of law. It can only handle a specific litigation."⁷⁸ Facing the objections regarding the level of participation by veterans, Weinstein openly admitted: "You understand as well as I that the class action is basically one that denies many aspects of due process [. . .] The class action is basically an undemocratic way of deciding practical litigation."⁷⁹

While he was willing to listen to legally irrelevant accounts, Weinstein did stress that his decision would be based on the legal merits and according to the demands of the law. He spoke clearly and openly in relation to the court's capabilities and limitations and was equally honest about what he himself would and would not do in making the decision:

I am here to decide in accordance with the law and the facts as I have stated it, and I may make a mistake, I am only human. But I will do the best I can in a decision, but I will not promise you anything. You go away from this courtroom with no promises and anyone who is in here who thinks I promised them anything should get that clear.⁸⁰

Finally, he stated unequivocally that he was not able to solve all of the veterans' problems.⁸¹ But he did offer them something else in return.

Judge Weinstein flew across the country to meet with the veterans (a fact that did not go unnoticed by the veterans, as one of them said "it certain meant a lot to me to know that someone could care enough to come 3,000 miles to hear my two or three minutes worth"⁸²); he would sit as long as it would take to provide each of them with an opportunity to be heard. He expressed respect to the veterans and their experiences: "I must say that it's a great privilege to have had this opportunity to meet all these people."⁸³ He acknowledged their suffering: "I know that you have been through a very, very difficult period following the excruciating years that you've had," he said to one veteran's wife.⁸⁴ The judge was utterly engaged in their personal accounts: he listened and seemed truly interested in what they had to say. Francis Hamit wrote about the hearing in Chicago:

Throughout the day, Judge Weinstein remained calm, attentive, and kindly. He was always interested, and never came down on a speaker. Some of the speakers were souls in torment who had never said anything

78. Agent Orange hearing, *supra* note 41, at 256.

79. *Id.* at 130.

80. *Id.* at 117.

81. *Id.* at 149.

82. *Id.* at 208.

83. *Id.* at 144.

84. *Id.* at 109-110.

about the war to anyone. Weinstein could have dismissed such meanderings as not germane to the issues. He did not. He reacted with compassion.⁸⁵

At the end of the day, though, the judge decided to approve the settlement even though the majority of speakers were against it (in view of the size of the class, it was still easy to dismiss those speaking at the hearings as not representing the majority of ‘silent’ veterans who presumably supported the settlement). Was compassion enough, then, to make up for that final decision? Did Weinstein’s relational approach have any positive impact on participants? Further research is required to empirically address these questions and the post-litigation perceptions of litigants. Anecdotally, we saw that some veterans thought that the hearings were a fixed game, while others were certainly touched by what they deemed as the court’s willingness to listen: “I thank you, for just being able to be here and hear all this testimony,⁸⁶ and to help.” And, another stated, “I’m glad, your Honor, to know that your court is trying to gain some help for the suffering.”⁸⁷

Comparing the accounts of litigants in the three hearings based on their content (table 6) suggests that litigants in the Agent Orange hearing provided relatively more personal accounts, yet, the findings cannot indicate whether this was in any way a result of the Judge’s conduct.

Furthermore, comparing the three hearings, the study does not show a positive correlation between the degree of interaction between participants and the decision maker and the degree of legal effectiveness of participation. Judge Korman, in the Holocaust Assets case, who was the least interactive of the three judges, was nonetheless the most responsive and open to objections and to the consequent amendment of the settlement accordingly.

VI. DELIBERATION: BY WHOM AND OVER WHAT? COMPARING THE ROLES OF LAWYERS AND LAY PARTICIPANTS

The fairness hearing provides an opportunity for direct participation of lay litigants. At the same time, lawyers do play a significant role in these hearings. In this study, 33 out of 156 speakers were lawyers. Furthermore, lawyers were found to provide significantly longer accounts than did litigants, and to have more interactions with the court (table 1). Judges engaged more with lawyers when it came to substantive matters

85. Francis Hamit, *Blood Money: the Agent Orange Settlement Fairness Hearings* 10 (1984).

86. Agent Orange hearing, *supra* note 41, at 219.

87. *Id.* at 78.

yet showed more acknowledgment of OPOV towards litigants (table 8). This finding raises questions as to the roles that different types of participants played in the hearing and the importance of lay participation therein.

Comparing the accounts of lawyers and litigants along the features categorized in the data (tables 4 and 5), yields mixed results. Quite surprisingly, we find that the frequency of all of the following features was similar regarding both lawyers and litigants: using direct speech towards the judge, being ambivalent about the settlement, speaking about the group, about the future and about the importance of voice. Significant differences were found, however, with respect to use of legal discourse (only 7% of litigants and 73% of lawyers); generating legitimacy for settlement (only 4% of litigants, and 33% of lawyers); speaking about the past (97% of litigants and 85% of lawyers) and speaking about oneself, which was found in 89% of litigants' accounts and only 45% of lawyers' accounts. A close reading of the transcripts reveals further differences with respect to participants' approaches, perceptions, and understandings of the questions at the heart of the hearing. It also reveals significant differences between the accounts of class counsel to those of lawyers who were directly representing litigants. Examining and comparing participants along the lay versus professional axis is not enough, therefore, and one should further distinguish the roles of class counsel and other attorneys.

Starting with the Welfare Case hearing, it is clear from the transcript that this hearing was not a grand social or public event, especially compared with the Agent Orange or the Holocaust Assets hearings. The Welfare Case did not generate the same public attention and did not carry the same kind of historical disposition as the two other cases. The hearing seems to lack the drama or high emotions that characterized the hearings in these two other cases. This is not to say, of course, that the speakers did not raise significant and emotional issues, nor does it mean that the concerns brought up in this hearing did not have public consequences. Some speakers talked about their own personal problems and experiences, ones that are also relevant to other individuals living with disabilities. Others made general claims about the way people with disabilities are treated in American society. They spoke also of discrimination and justice. And yet, the event did not seem to transcend the personal dimension of the problems at hand.

Perhaps it was the relatively small number of participants, only twelve speakers, or the fact that many of them presented a solely personal account, rather than group-oriented or general accounts (only 67% of

speakers related to the group in their accounts, compared with 94% of the speakers in the Agent Orange hearing). It could also be the pragmatic, problem-solving approach that seems to have characterized this litigation all along. People came to the court to speak about their problems, about the great difficulties in living with disabilities, about the inaccessibility of the Social Service offices and the mistreatment by its workers. Notably, the one factor that was hardly ever mentioned throughout the hearing was the law.

Speakers in this hearing can be described along a scale according to how personal or general their accounts were. Personal stories told in the hearing included, for example, that of Mr. Rivera, whose papers constantly got lost by the DSS office;⁸⁸ the account of Mr. McLaughlin, suffering from psychiatric illness, who complained about the benefits that were insufficient to make ends meet;⁸⁹ and that of Ms. Corso, a sixty year old woman who spoke about her difficulties in finding a job, to name a few.⁹⁰

The more general or group-oriented accounts were also diverse; some being more related to the legal matter at hand than others. By general and group-oriented accounts I refer to statements that related to issues, demands, or concerns that went beyond the personal condition of the speaker—issues concerning disabled persons or the welfare system more generally. A clear example would be that of Ms. Goldshin, the representative of a veterans' group, who asked the court "to address to the State that they cannot continue to retaliate against disabled people."⁹¹ But class members speaking on their own behalf were also making general claims: from the history of the welfare system⁹² through general claims regarding discrimination⁹³ and accessibility⁹⁴ to arguments concerning the level of benefits and even a call for civil disobedience.⁹⁵ One example is the account of Ms. Albert. Her following words are very personal, but they echo deep concerns regarding the welfare system:

A lot of changes need to happen because the Americans with Disabilities Act passed in 1990 . . . and it's like, hello, human being here. . . . I am a human being, deserving of dignity, humanity and respect. I deserve trust

88. Welfare hearing, *supra* note 39, at 30.

89. *Id.* at 45.

90. *Id.* at 36-37.

91. *Id.* at 33.

92. *Id.* at 39.

93. *Id.* at 44.

94. *Id.* at 47.

95. *Id.* at 46.

in helping agencies run by this agency as every human being.

My experiences with DSS has been frustrating, full of anxiety, and anger provoking. It's also been debilitating, a.k.a. disabling, revictimizing, and restigmatizing.

Thank you very much for listening.⁹⁶

In the Welfare Case hearing, one could compare lawyers and class members as two distinct groups; whereas, in the Holocaust Assets hearing it is important to acknowledge the existence of different sub-groups of participants. With regard to the attorneys in the Holocaust Assets hearing, there was a clear distinction between class counsel, who were all supporting the settlement and using the settlement to promote its legitimacy, and those attorneys directly and independently representing class members or groups of class members, who presented various views regarding the settlement.

As for class members themselves, we should note that the Holocaust Assets class itself was comprised of many different sub-groups with varying interests. In the hearing, there were litigants representing organizations which were involved in the settlement process and were mostly supportive of it. There were speakers representing different survivors' groups, a speaker who represented the Association of Roma in Poland, speakers from Israel, and speakers from Europe. Some speakers had accounts in Swiss banks or were the heirs of individuals who had such accounts, while others did not. Some were children during the Holocaust, and others were children of Holocaust survivors born after the war. It is only natural in such an immense class action and within such a diverse class to have diverse views and feelings among class members regarding the settlement or the lawsuit itself. This was apparent in all hearings examined here, but the Holocaust Assets hearing was the only one in which we find clear conflicts emerging among class members themselves. This was apparent with respect to the question of distribution, as it was with respect to the question of participation of Jewish organizations in the management of the case.

Keeping in mind the above-mentioned caveat concerning sub-groups within the group of lawyers and that of class members, there is still a lot to be learned from examining, side by side, the accounts of lawyers and class members. The two groups brought into the hearing entirely different types of issues and accounts. Lawyers speaking at the hearing did acknowledge in some ways the non-legal (e.g., historical and moral)

96. *Id.* at 50-53.

implications and meanings of the case, but they mostly tried to concentrate on the legal ones. As Burt Neuborne observed, “[A] negotiated settlement was the best possible way to deal with what is after all a lawsuit, not a moral question. The moral question is going to be dealt with outside of this courtroom. We did the best we could, dealing with the legal claims.”⁹⁷ It was evident to all participants in the hearing—lawyers and non-lawyers alike—that the moral questions concerning the alleged wrongs on the part of the Swiss banks during the Holocaust could not be answered through a monetary settlement. Yet lawyers seemed to accept this dichotomy—between law and morality, or law and justice—as a working premise and focused on doing their best dealing with the legal questions. Class members, on the other hand, did not limit themselves to the legal questions, and many actually used the hearing in order to voice the very same issues that were beyond the legal scope of the case. It was clear that class members related to the case in broader terms and ascribed to it a variety of meanings and goals. In fact, many non-lawyer speakers experienced discomfort with the legal terminology used by the lawyers with regard to the settlement. Class members resisted the use of the terms “fair, reasonable, and adequate,” used by attorneys following the language of Rule 23. A similar resistance was raised also with respect to the term “closure,” mentioned a few times by the defense attorney, who repeatedly stated that the settlement “brings about complete closure” to the issues raised by the lawsuit.⁹⁸ In response, Mr. Rechter, who was in favor of the settlement, said:

It hurt me this morning very much when one attorney after another was talking about fair, reasonable and adequate. Fair, reasonable and adequate? And the Swiss lawyer was telling us complete closure. You want complete closure? Bring me back my father, bring me back my uncle, bring me back my whole family in Poland. . . . This is a settlement, but by all means, don't call it fair or adequate. It can never be complete closure.⁹⁹

Many speakers chose to present their own personal history as Holocaust survivors or descendants of Holocaust survivors. They spoke about the ghettos and concentration camps, about survival, and about those who had perished. Reading the transcripts, one would find moving

97. Holocaust Assets hearing, *supra* note 42, at 33.

98. *Id.* at 49.

99. *Id.* at 101-102. The headline of the New York Times report on the hearing echoes Mr. Rechter's words as well. The reporter writes: “An American lawyer for the Swiss banks hit a nerve when he used the overworked word ‘closure’ to describe the settlement.” See Clyde Haberman, *Maybe a Settlement, Never Closure*, N.Y. Times, Nov. 30, 1999, B1.

personal accounts, very detailed at times, describing what had happened to the speakers and their families during and after the war. Speakers depicted the different concentration camps where they were imprisoned, the last time they saw their parents, and how they themselves were saved. Some were speaking about their lives before the war. Overall, the section of the hearing devoted to class members' accounts could be described as highly personal and emotional.

Monetary issues frequently came up during the hearing, such as the adequacy of the sum settled upon or the right way to distribute the money. Yet at the same time, many speakers emphasized that the case was not only about the money. One speaker described the sufferings of the victims, saying, "It is impossible to estimate it in monetary form."¹⁰⁰ Another speaker resented the mere attempt to treat these events in monetary terms: "We don't see how we could agree that somebody could buy off and say, we give you so much and forget about it and no claims, nothing, nothing happened. We [are] erasing the Holocaust."¹⁰¹ A pro-bono attorney representing a group of seventy survivors argued, "A lot of what this case is about is not just the money; it's trying to restore individual dignity to survivors. . . ."¹⁰² Others saw the lawsuit as restoring historical justice: "For me, as a Holocaust survivor, what we are doing here, it is not a question of money. It's a question that history had proven right now that Switzerland will no longer be known as a country of cuckoo clocks, skiing and neutrality."¹⁰³

Another speaker mentioned the therapeutic benefit of the case, which "brought survivors together to speak with one another, give each other support, which I think has been remarkably cathartic."¹⁰⁴ In that respect it was not only the lawsuit in itself that was significant. Some participants talked specifically about the fairness hearing as serving important historical and moral purposes. One speaker said, "I'm sure today's hearing will be entered in the history of jurisprudence. I, as a Second World War veteran, listening to these speeches today, felt like I'm listening to the Nuremberg process all over again."

Nevertheless, it is important to note that the hearing did not serve only symbolic or historical purposes. Many speakers took advantage of the opportunity to directly address the court in order to present practical difficulties, concerns, and questions regarding the litigation process. One

100. at 128.

101. at 137.

102. at 163.

103. at 21-22.

104. *Id.* at 167.

speaker complained that the questionnaires sent to class members were too long and too complicated, which was why many potential class members did not even bother filling them out and sending them back.¹⁰⁵ Another class member complained about the level to which the class members were actually involved in the negotiations over the settlement, expressing the importance of voice: “During the war, we had no voice over what was happening to ourselves. Now we have amongst us, as you know, doctors, professors, chairs of Holocaust studies. . . and we think that the Holocaust survivors should have been involved far more in all the negotiations than they actually were.”¹⁰⁶

Many speakers related to the question of distribution, although legally the court was to determine the allocation of the funds only after the approval of the settlement. For class members, this order of things did not seem reasonable. The way by which the fund was going to be allocated seemed inseparable from the question of whether they should support the settlement, as well as from the question of whether it was in fact a fair and adequate one. How can individuals actually form an opinion on a settlement without knowing what the level of the compensation might be? “A billion sounds very high, very, very much to me, who lives today in Boston, in subsidized housing,” said Ms. Beer, one of the first to bring up claims against the Swiss. “But how is it going to be distributed? Who is going to think about the human beings who are here, who have been fighting for years?”¹⁰⁷

Other than distribution, another question that seemed to occupy many of the speakers was the question of legal fees, which were also to be determined only after the approval of the settlement. Many lawyers were working pro-bono, but there were a few who asked to be paid for their work. This generated strong reactions from class members, and many speakers did not think it was appropriate for attorneys to ask for legal fees in such a case—especially not the high fees they had demanded.¹⁰⁸ Concerns regarding lawyers and their role were sometimes deeper than the monetary question and related to the very ability of lawyers to understand, and moreover, represent the class members’ causes. One example is the Holocaust survivor who said in the hearing, “There are many lawyers who were never exposed to life in concentration camps, but

105. *Id.* at 23.

106. *Id.* at 105.

107. *Id.* at 54.

108. This question actually continued to generate controversy long after the settlement was approved. See Menachem Z. Rosensaft, *Profiting from the Holocaust*, L.A. Times, Nov. 19, 2006; Burt Neuborne, *What Profit? I Gave up \$10 Million*, L.A. Times, Nov. 19, 2006.

they write briefs about it. They are very eager to represent us and to make millions of dollars in the process. This cannot happen. This must not happen.”¹⁰⁹

The Agent Orange hearing presented the highest rate of opposition towards the settlement. The disappointment many veterans felt when the settlement was announced and the tension between veterans’ hopes from the litigation and its actual resolution were bound to manifest themselves in the hearing. Many of the Vietnam veterans expressed their sense of anger and pain. They relived the experience of being betrayed by their country. It is hard to summarize—or even select from the many testimonies heard during these two days—stories about physical illness, emotional distress, mistreatment by the Veterans Administration, ruined marriages, miscarriages, and disabled children. Veterans did not shy away even from the most personal and painful of details. More than a few speakers broke into tears.

Despite the varied testimony, it is nevertheless possible to identify several repeating themes and concerns. Some of these themes were similar to those described in the Holocaust Assets hearing above: differences between attorneys from the management committee and attorneys who represented individual class members, or the dissatisfaction of class members with the management committee and the sense that there was not enough participation and involvement on the part of class members both in managing the case and in negotiating the settlement.

There were many different reasons provided by veterans for their opposition to the settlement: some of the reasons had to do with the terms of that specific settlement, others had to do with the veterans’ wish to have the case litigated to its end and to have their day in court. Some veterans thought there was not enough research-based data about Agent Orange to allow for an informed resolution of the lawsuit. One veteran stated that “if studies are unfinished and open-ended I feel it foolish to finalize a settlement of this magnitude.”¹¹⁰ Others referred to the injustice inherent in the terms of the settlement, pursuant to which not all veterans would end up being compensated. “Is it also fair that not every person suffering from dioxin poisoning will be compensated? Who is going to be the person that is not compensated? Why will he be chosen and who is going to tell him why?”¹¹¹ Many also thought that the sum of \$180 million was not high enough in view of the size of the class and the severe damages

109. Holocaust Assets hearing, *supra* note 41, at 24.

110. Agent Orange hearing, *supra* note 40, at 356.

111. *Id.* at 29.

suffered by many of them.¹¹² Others opposed the mere notion that their suffering could be translated into monetary terms. One veteran, Mr. Kalama, said, “On the question of whether the fund is fair, reasonable, how do you put a monetary value on the miscarriage of a child that you will never be able to hold and love or a marriage that has fallen apart?”¹¹³

While some veterans raised concerns regarding the specific terms of the settlement, many others said that they would have opposed any settlement. Like Mr. Taylor who said, “It’s my personal opinion, your Honor, if you were to award me the whole \$180,000,000 personally, I would not accept it. I want to see the Vietnam veterans in this country to get their day in court, to get their chance for justice.”¹¹⁴ Veterans and their attorneys kept repeating their request that the case go to trial, that they have their day-in-court: “We would like to have our day in court, I believe, and we know we run the risk of losing the whole show, but we would like our day in court. Thank you.”¹¹⁵

Vietnam veterans, like other tort litigants, sought many things from the lawsuit other than monetary compensation. They wanted recognition of their sufferings; they demanded the truth about Agent Orange; they wished the government would take responsibility and even ask for their forgiveness; they wanted revenge and justice; and they wanted their outcry to be heard. No settlement could meet those needs. “We don’t know,” a veterans’ organizer said is what veterans tell him when he asks why they oppose the settlement, “we don’t know, and now we’ll never know the answers.”¹¹⁶ Another veteran said, “I felt great about the settlement . . . until I realized that the proof isn’t there. I cannot be a whole man today unless I have that proof. I don’t want a damned dime if my little girl dies.”¹¹⁷ And another veteran stated: “The issue is not adequacy of settlement. The issue is, and always has been, whether Agent Orange causes birth defects, skin diseases or any type of internal disorders and

112. Indeed, once the settlement was approved most veterans did not receive any compensation, and the ones suffering the most serious conditions received very low compensations. The distribution of the fund was made through two separate programs. The first was a payment program that provided cash directly to veterans who were totally disabled or to survivors of deceased veterans (averaging about \$3,800). The second program was a class assistant program, which provided money to veterans through social services organizations. \$74 millions were distributed through that program to over 80 organizations working with veterans. The fund closed on September 1997, having exhausted all its assets.

113. Agent Orange hearing, *supra* note 40, at 53.

114. *Id.* at 91-92.

115. *Id.* at 155.

116. *Id.* at 95.

117. *Id.* at 236.

cancer.”¹¹⁸

It seems that many veterans had no faith in the attorneys on the plaintiffs’ management committee. Veterans’ dissatisfaction with their legal representation was closely related to their desire to be more involved in the litigation and to have more control over decisions that had to do with their lives. Veterans felt that “they have lost their voice” in the settlement process, and that the hearing was the “only opportunity to express our views.”¹¹⁹ Indeed, the hearing itself was deemed and appreciated by many of the participants as an important opportunity to speak up and have their input regarding the case. “I welcome this opportunity here today,” said Mr. Gage, “after waiting 18 years to tell part of my story on the results of my exposure to Agent Orange in Vietnam. . . .” And then, repeatedly, “I thank you for the opportunity, this is the first time those veterans have had a chance in an orderly manner to present their problem to the country . . .”¹²⁰

The hearing was meaningful for the sake of both the personal and collective voices. “I am proud to have served my country in Vietnam and I am proud of my brethren also who have served. We are brothers. Don’t make us adversaries. We are already divided on this issue of settlement.”¹²¹ Many of the veterans’ accounts were group-oriented, raising concerns about the problems veterans were facing coming back home from war, speaking, for example, about the unique problems suffered by female veterans,¹²² discrimination in employment, or the high rate of suicide among veterans. Throughout the hearing, veterans applauded speakers who talked about their painful experiences and illnesses, they applauded speakers who said they would not give up until the issue of Agent Orange was brought to court, and they applauded veterans who talked about the debt of the American government towards them.

Although various speakers had different perceptions and hopes from the case, the key word, “justice,” was frequently used by most of them. They voiced general notions of justice and injustice, fairness, and right and wrong. Mainly they used the term justice as a synonym for accountability. Justice, in this respect, meant that the country would respect, recognize, and properly treat its soldiers, the ones the country was poisoning while they were fighting its war. “We served this country as

118. *Id.* at 34.

119. *Id.* at 34.

120. *Id.* at 352.

121. *Id.* at 33.

122. *Id.* at 197.

they asked us to and I feel that they owe this to us,”¹²³ said one veteran. And one of the lawyers said, “We as people and as a government placed these veterans in an area of danger and we are obligated to help them as fully as we put their lives at risk.”¹²⁴

Perhaps the most poignant account about the injustice inherent in the settlement was that of Maureen Ryan, who testified with her daughter Kerry sitting in a wheelchair next to her:

The reality of justice would have included the integrity of a president who acknowledged Agent Orange as war incurred. The reality of justice would have found a place in the Washington Vietnam veterans memorial for the veterans who have died of cancer and the children lost through miscarriages from this war agent [. . .] so let us not kid each other about the fairness of the settlement.

[. . .]

How do we put a dollar figure on a young veteran’s terminal cancer or a child’s twisted body? It is not an easy task, but in America it is the system we use. This is how Americans settle their differences in a civilized manner. This is our way of justice.

[. . .]

Kerry, with 22 congenital birth defects, who forever lives in a wheelchair, who is denied the right to design her own destiny, who will never know the beauty of making love or marrying some great guy, who will never know the satisfaction of going to M.I.T. or Harvard, but must settle for a special education setting gets \$14,000 and you talk about justice?¹²⁵

This review of the different accounts of litigants and lawyers in the hearings breaks down the categories used in analyzing the data—speaking about the “self” and the group, speaking about past and future, speaking directly to the judge—into actual stories and details. It reveals the abundance of opinions, experiences, and emotions expressed throughout the hearings. Additionally, this review discloses the seriousness and sincerity with which the speakers approached the court. These litigants, most of them probably unaccustomed to public speaking, provided accounts that were for the most part significant and meaningful. Interaction of litigants with judges over substantive issues, however, was limited, and such was the actual impact of litigants’ accounts on the

123. *Id.* at 227.

124. *Id.* at 46.

125. *Id.* at 101, 109.

outcome. Moreover, we see that judges interacted more with attorneys when it came to substantive issues.

This may raise the question of whether lawyers eventually dominate the fairness hearings, designed, *inter alia*, to overcome agency problems within a class action. This is certainly a valid concern, though we should also recognize that not all lawyers spoke with one voice. While evidently all class counsel supported the settlement, other attorneys expressed a range of opinions and interests. From a class action point of view, this dynamic reveals the potential of incorporating more attorneys in the management of class actions and assigning official roles to attorneys who are outside the management committee. Lawyers who worked directly with class members were able to bring their clients' interests before the court and to present a voice different from that of the management committee. This demonstrates that it is possible to overcome some of the agency problems raised by collective litigation through the incorporation of more lawyers in the process (which might seem counter-intuitive) so that they can better protect the interests of specific class members.

VII. THE FUNCTION OF THE HEARINGS III: OVERCOMING LEGAL LIMITATIONS THROUGH A DAY IN COURT

The three cases studied here vary significantly from one another: they vary in the type of legal claims raised, the personal stories that are at their background, and the characteristics of the class and of the class members. One important feature that differentiates the Welfare Case from the other two cases, for example, is that this lawsuit was not about monetary compensation, but rather, plaintiffs sought to generate institutional reform to better address the needs of the class members. This fact may explain both the role taken by the court in this hearing, the reactions of class members, and the public nature of the hearing.

The court in the Welfare Case adopted the role of a problem solver, and from the accounts of the speakers in that hearing, it seems that this was also the way that they themselves viewed the court's role. When compared with the Agent Orange case, there seems to be much less disappointment, or quarrel with the law, and there was much less opposition, almost none actually, to the settlement itself. As mentioned above, half of the speakers in this hearing did not reference the settlement in their accounts. One possible explanation for that difference could be that class members in this case, defined as all disabled recipients of welfare services in Connecticut, were less organized as a group and probably less informed (legally) when compared with class members in

the other two cases. Class members in the Welfare Case also did not retain their own lawyers, as did some of the class members in the other cases.

However, notwithstanding these differing characteristics of the Welfare Case class, I believe that the significant distinction between the Welfare Case and the two other cases was that the Welfare Case represented a nonmonetary claim for institutional reform. It is the attempt to convey human harm and suffering in monetary terms, which the law does so routinely—and which was so dominant in the Holocaust Assets and Agent Orange cases—which fails to take into account and respond to the great variety of needs and expectations of lay class action litigants. A case such as the Welfare Case, which attempts—and succeeds—in bringing about actual changes in the welfare system, seems to resonate better with class members because it addresses directly some of their real-life problems.

Within this context, the added value of the hearing could be that it provided class members—who were marginalized both by their disabilities and by being poor¹²⁶—an opportunity to actively and directly voice their own concerns before an official decision maker. Considering concerns regarding how a system of welfare benefits fails to acknowledge the dignity of its recipients and fails to better their conditions in the long run, but, instead, renders them passive, dependent, and stigmatized,¹²⁷ the opportunity provided in this hearing for individuals to speak for themselves seems particularly significant. The effects of this interaction with class members seems to manifest itself in Judge Kravitz's concluding remarks:

[A]t the end of the day, I think as everybody who spoke today made clear, this is all about individuals and one could have the best system in the world but it really is a commitment to individuals, the recognition, as Ms. Albert said, that she is a human being, that she's deserving of dignity, humanity and respect and she deserves to trust in the agencies of the State to help her and every other human being as human beings. That that's the mission that we all have, who are engaged in government

126. The Two are of course closely related: According to the American Community Survey, 26% of people in the US who identified themselves as having a disability were living under the poverty line in 2017. Disability Statistics, *Online Resource for U.S. Disability Statistics*, Cornell University, <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=7> [https://perma.cc/TB38-KTK5]. Last visited, February 27, 2019.

127. See Sagit Mor, *Disability and the Persistence of Poverty: Reconstructing Disability Allowances*, 6 N.W. J. L. & Soc. Pol'y 178 (2011); Doris Zames Fleischer & Frieda Zames, *The Disability Rights movement: From Charity to Confrontation* (2003); Samuel R. Bagenstos, *The Future of Disability Law*, 114 Yale L. J. 1 (2004).

service, including meFalse¹²⁸

In the Holocaust Assets case, by contrast, the gap between the kind of human experiences at the background of the suit and what the law could do about them was so vast that it seems that all participants acknowledged that there was no way of overcoming it. Participants repeatedly made the distinction between legal issues and moral issues, but also seemed to accept the fact that the case was about the legal questions and could not do much regarding the related moral and historical ones. The law, in that case, could offer nothing but compensation, and people were fine with getting the money (indeed most speakers supported the settlement). At the same time, they intentionally used the hearing itself to achieve some of the other goals they were interested in. The hearing seemed to serve as a public forum in which people could speak about the Holocaust, the families they lost, and their tremendous sufferings. Class members could talk about historical justice and morality and about a host of other issues while recognizing such issues would not be part of the legal outcome. Put differently, this hearing allowed litigants to have a public conversation about issues that they thought of as publicly and historically—even if not legally—significant.

The pragmatic attitude that characterized many of the speakers in the hearing can be found in Judge Korman's final decision, where he cited another court decision stressing that "it must be understood that the law is a tool of limited capacity. Not every wrong, even the worst, is cognizable as a legal claim. Indeed, a number of obstacles stand in the path of plaintiffs' claims in this case."¹²⁹ The Judge chose to open the decision with the words of Ernest Lobet, a Holocaust survivor who spoke at the hearing. Words that, according to the judge, provided the best summary to his conclusion:

I have no quarrel with the settlement. I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure tried their very best, and I think they deserve our cooperation and . . . that they be supported and the settlement be approved.¹³⁰

The Agent Orange case presents yet a different picture. Vietnam veterans had great expectations and great demands from the legal

128. Welfare hearing, *supra* note 39, at 58.

129. *Id.* at 141.

130. *Id.*

process—they saw the case as being about all the wrongs they suffered by the government and society. They wanted their day in court; they wanted the government to say it did them wrong; and they wanted to have answers regarding the real affects of Agent Orange. They wanted the court to make all those things happen. Theirs was the story of the ideal of the American legal system and tort system. But the story of the law was different—it evolved around risk allocation, burden of proof, causality, and statute of limitations, and it ended in a settlement.

The gap between their perceptions of the case and the legal issues on which it was determined seemed unbridgeable. This was a case in which there was a real collision between lay demands and legal realities. Interestingly though, what many of the litigants actually wanted was to have their day in court. This indicates the veterans' belief that, in a court of law, their cause would prevail. It additionally reveals a refusal on veterans' part to accept the limitations of the law and, in particular, a refusal to accept the fact that their case, albeit morally strong, was legally weak. In some ways, though, the veterans' expectations and perceptions of the legal process were not completely unrealistic. While litigation could not achieve all of their hopes nor fix all of the wrongs inflicted upon them, it could theoretically provide them with better answers than a settlement. The disappointment of the veterans was because the law did not live up to its own aspirations, and it failed to provide the basic legal function of an open, adversarial discussion of the merits. Settlement is an inseparable part of our legal reality.¹³¹ It has many advantages, and it could certainly be that this particular settlement was the most that the veterans could realistically achieve. What the Agent Orange hearings reveal, however, is that what most lawyers consider to be a necessary compromise could be upsetting to many litigants. At the same time, that the class members' demand for a trial is rejected by their own lawyers as well as the court reveals how some very basic lay perceptions of the law are similarly unacceptable to many legal actors.

What Judge Weinstein did that was significantly different from the two other judges was openly deal with that tension and acknowledge the non-legal concerns of the class. Of the three judges, Judge Weinstein was the most honest regarding the constraints of the law in its ability to deal with the veterans' claims. He was the most open about the limits of his own capacity as a judge to actually help the veterans. Like Judge Kravitz

131. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stanford L. Rev. 1255 (2004).

in the Holocaust Assets case, Judge Weinstein did not shy away from interacting with the class members or displaying empathy. The hearing, in this case, provided a venue through which the court would address the perceptions of the class members. This venue seems important, especially in a case in which, as Weinstein himself wrote in his final decision, the law was too limited to deal with what were, probably in the judge's eyes too, the just demands and needs of the group.

Vietnam veterans and their families desperately want this suit to demonstrate how they have been mistreated by the country they love. They want it to give them the respect they have earned. They want it to protect the public against future harm by the government and chemical companies. They want a jury 'once-and-for-all' to demonstrate the connection between Agent Orange and the physical, mental and emotional problems from which many of them clearly suffer. The court has been deeply moved by its contact with members of the plaintiffs' class from all over the nation and abroad. Many do deserve better of their country. Had this court the power to rectify past wrongs – actual or perceived – it would do so. But no single litigation can lift all of plaintiffs' burdens.¹³²

VIII. CONCLUSION: BETWEEN LEGAL EFFECTIVENESS AND LEGAL MEANING, BETWEEN PAST AND FUTURE

The inclusion of non-legal perceptions within legal procedures may raise various difficulties and concerns. One significant concern is that the inclusion of lay perceptions in the form of extra-legal evidence (i.e., evidence that is typically or traditionally defined as legally irrelevant) might have an undesirable effect on the process, in general, and on the decision maker, in particular. Such evidence may divert the legal discussion from its rational, facts-and-norms-based nature to include irrelevant, irrational, and emotional influences. The participation of lay class members in fairness hearings, as found in this study, may raise very different concerns. While class members indeed recount stories which are emotionally powerful and make claims that are morally strong, this study shows that the hearings have very little impact on the actual legal outcome of cases. While judges might be moved by such testimony, the complexity of collective litigation and of the legal claims involved in such litigation as well as the investment of lawyers and judges in the proposed settlements all make it virtually impossible to significantly alter the outcome of a settled class action in a fairness hearing. This distinctive

132. In re Agent Orange Product Liability, 597 F. Supp. 740, 747 (E.D.N.Y. 1984).

combination of a procedure which, on one hand, allows for the significant presentation of non-legal accounts, but, on the other hand, does not allow these accounts to meaningfully impact the outcome, displays its own unique concerns and objections. The issue is not whether certain evidence or lay perceptions should be allowed into the legal process, but rather, the value of incorporating such extra-legal perceptions into a legal procedures in which decisions are made, at the end of the day, according to the law. What is the value of what some may refer to as “symbolic” participation of individuals within mass litigation procedures?

Based on the findings presented in this study, I want to suggest several different ways in which I find this type of participation meaningful rather than symbolic. Considering the social, cultural, and historical dimensions of adjudication, participation in the hearings should be viewed as meaningful as long as it satisfies the requirements of respect towards participants and relatively free expression. In addition to satisfying individuals’ psychological need to be included and heard and allowing participants to take part in procedures that affect their lives, such lay participation in legal procedures is meaningful in that it presents an opportunity for reclaiming legal space and legal discourse. Lay expression within legal settings is meaningful in that it becomes part of the various social meanings and narratives that the legal process generates and transmits.

Examining the value of participation within legal procedures exclusively through the prism of an actual impact on the final decision denies the fact that procedures have an array of outcomes, only one of which is the final decision of the judge. It denies the central role of procedures in both reflecting and constructing our social world. It ignores the significance of the social and cultural domains of litigation and of law. With respect to class actions, it is in the nature of such cases that they often deal with widespread, common, and often significant social phenomena (mass torts, institutional reform, discrimination). At the same time, it is also in the nature of class actions that they often end in a settlement. It is, therefore, in these cases that deal with significant social problems—cases that could influence the lives of many individuals and that involve norms and values—it is in these cases that we often waive adjudication with all its implications, including truth-seeking, lawmaking, norm-generation, precedent, public debate, consideration, and reflection over questions of public significance and interests.¹³³ The fairness hearings are significant because they partly make up for that “loss.” In an

133. See generally Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

era that does not offer many such deliberative opportunities, the hearings provide a forum for public discussion;¹³⁴ they allow people an opportunity to speak up and to listen to one another; they bring to the open stories and facts; they let litigants criticize their lawyers, the courts, and the justice system. In all of these ways, the hearings fulfill some of the functions of adjudication—functions that are often abandoned in favor of settlement.

It could be argued that the court is not the suitable arena in which to hold such non-legal deliberation regardless of its value. Such an argument, however, relies on a narrow definition of legal process and ignores a host of functions that courts could and should fulfill. Taking the Agent Orange case, for instance, it is not surprising it has become “the trial” of the Vietnam War. The law has this capacity to capture the public attention and the hopes of those who are hurt. It holds promises and creates high expectations for those who turn to litigation as a way to remedy social injustice. It could be the unique role that courts play in the American culture, or it might also be the deficiency in other public institutions and forums that could provide opportunities for meaningful public deliberation and redress. The Agent Orange litigation can be viewed as a major disappointment for veterans. The hearing itself, however, attained its purpose: it granted the veterans their day in court—a priceless opportunity to communicate freely and openly with state authority and other legal and non-legal actors about the horrors of war and its horrendous effects.

The underlying assumption of this work has been that the law is a tool of limited capacity in its ability to accurately and faithfully represent human reality. The gap between concept and reality is indeed unavoidable and mostly irreconcilable. At the same time, the law is also an ongoing, developing project. Legal definitions and categories change and should indeed continue to change with social and technological developments. To this end, the boundaries between the legal and the extra-legal should remain open and flexible. The fairness hearing permits precisely that by making these boundaries visible and, through challenging them, enlarging the sphere of interaction between legal and non-legal perceptions, thus creating opportunities for reciprocal influence of these two spheres.

We have seen that participants attend the fairness hearings to tell their stories and to voice their views and expectations. These stories are often irrelevant in mere legal terms, and the participants’ expectations often go well beyond the limits of the case and the judge’s authority.

134. Carrie Menkel-Meadow, *Scaling up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress*, 74 L. & Cont. Prob. 1 (2011).

Those participants, however, do bring the outdoors into the courtroom. Although this may not alter legal outcomes, the inclusion of the external perspective, nonetheless, invests the hearings with significant meaning. It is this inclusion that reveals the tension between what the law *is* and what it is *not*. It creates a dialogue, in other words, between lay actors and legal actors about the meaning of law, about what belongs to the legal process and what does not, and about what should and should not take place in a courtroom. This dialogue forces the court to face lay perceptions and lay demands. At the same time, it confronts the individuals who participate in the hearings, perhaps even the public in general, with the realities and limitations of the legal process. Thus, the dialogue helps to question the boundaries set by the law. It may present both sides with a new insight and understanding in relation to the legal process and new possibilities for what adjudication is and what it could do.

Finally, I wish to address one additional capacity of the legal process. It is a forum through which private and social history and memory are constructed. Legal procedures often deal with various versions and presentations of events of the past in order to produce legal outcomes that will affect the future. In doing so, legal procedures create a public arena in which different accounts of history are presented and through which a social memory is fashioned. “[M]emory, private and individual, as much as collective and cultural is constructed, not reproduced . . . [T]his construction is not made in isolation but in conversations with others that occur in the contexts of community, broader politics, and social dynamics.”¹³⁵ When examining the fairness hearings, a significant finding emerges: all speakers chose to speak about the past. Presenting one’s own personal history, or a universal history, seems to have been a desire shared by all those who participated in the hearings (lawyers and litigants alike). The accumulation of the various testimonies contributed to the commemoration of the historic events at the heart of these lawsuits and to the redefinition of certain events in the collective memory and consciousness.

The historical potential of the legal process and of the public hearing was actually mentioned by a few of the speakers at the Holocaust hearing, but it is true of any legal procedure. The participation of Vietnam veterans in the Agent Orange hearing and of Holocaust victims in the Holocaust Assets hearing, as well as the participation of disabled people in the

135. Austin Sarat & Thomas R. Kearns, *Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, in: Austin Sarat & Thomas R. Kearns, eds. *History, Memory, and the Law*, 11 (1999).

Welfare Case, leaves behind a transcribed record which may be revealed, read, and studied. In doing so, the participation in these hearings fulfills the very basic need of so many litigants, which is the need to be heard—presented so powerfully in the words of Vietnam veteran David McMurry during the Agent Orange hearing: “For many of us this is the only forum to say we hurt emotionally, socially, spiritually and physically. [. . .] We say to you, please at least hear us and continue to hear us and let everyone hear us.”¹³⁶

136. Agent Orange hearing, *supra* note 41, at 97.

INDEX: TABLES

Table 1: Summary speech statistics

Case	Speaker type	Words by speaker	Exchanges with judge
Agent Orange	Class Counsel	2,668	4
	Counsel	1,773	9
	Litigant	687	5
Holocaust	Class Counsel	946	0
	Counsel	1,063	3
	Litigant	687	1
Welfare	Class Counsel	1,620	12
	Litigant	367	7

Table 2: Summary of attitudes towards settlement by case

Case	for	against	ND
Agent orange	16	47	34
Holocaust	35	9	1
Welfare	7	1	6

Table 3: Attitudes towards settlement

Opinion						
for/against	Ambivalent	Favorable	ND	Negative	Neutral	
against	11	0	8	38	0	
for	25	26	7	0	0	
ND	14	0	21	4	2	

Table 4: Lawyers vs. Litigants

	Ambivalent	Use legal speech
Lawyer	36%	73%
Litigant	31%	7%

Table 5: Lawyers vs. Litigants

	Legit	Group	Self	Direct	Past	Future	Importance
Litigant	4%	89%	89%	46%	97%	88%	38%
Lawyer	33%	97%	45%	52%	85%	79%	39%

Table 6: Summary by case (litigants only)

	Legit	Group	Self	Direct	Past	Future	Importance
Agent Orange	1%	94%	94%	46%	98%	94%	37%
Holocaust	13%	87%	80%	47%	97%	77%	47%
Welfare	0%	67%	83%	50%	92%	75%	25%

Table 7: Summary of judge reactions by case

	Engage Subst	Acknowledge OPOV	Bound Subst	Bound Formal
Agent Orange	33%	25%	4%	25%
Holocaust	16%	2%	0%	0%
Welfare	79%	93%	21%	7%

Table 8: Judge reaction to lawyers vs. litigants

		Overall	Direct speech	Use legal speech
Words spoken by judge	Lawyer	117	157	121
	Litigant	66	107	116
Acknowledgement of OPOV	Lawyer	18%	6%	21%
	Litigant	26%	35%	44%
Engagement over substantive issues	Lawyer	42%	47%	40%
	Litigant	29%	39%	39%

Table 9: Impact of attitude towards settlement (litigants only)

	For	Against	Not disclosed
Words spoken by judge	27	83	92
Acknowledgement of OPOV	17%	31%	31%
Engagement over substantive issues	24%	27%	39%