

## A VICTIM'S CULTURE

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### I. Introduction

In earlier ages, life was simpler. Communities and societies were smaller, the reach of government more limited, and business more direct and personal. Yesterday's world however, has been replaced by today's reality. Balances of power are matched, if not exceeded in some instances, by balances of trade wealth, and all are highly integrated in a newly formed matrix of global interconnection. Where wrongful conduct once may have affected only an individual or a small number of individuals, today's misconduct is of greater magnitude and international in scope.

Societies enact or adopt laws to prescribe rules of behavior. Governments and citizens alike must know what conduct is permissible and what is not. Actions outside of legal parameters are offensive both to society and to the individuals injured. Just as criminal law holds perpetrators accountable to society for their transgressions, civil law must do the same for those actually harmed. Both forms of justice are necessary: societies must have a means of enforcing their laws in order to impose appropriate punishment and to deter future misconduct. Individuals, likewise, must have a means of pursuing and receiving restitution or compensation for the economic and/or personal consequences of others' wrongs. The absence of one or the other, or of both, eliminates one of the key elements of the justice system—the ability and right to restore integrity to society and well-being to its citizens.

Where the law is intended and expected to be applied equally, it must do so for the rich as well as the poor, for the weak as well as the powerful, and for the masses as well as individuals.

Unlawful conduct cannot be exempted from principles of justice because it causes more, not less damage. Justice must be for all, not just for a few, one at a time, some of the time.

Are there wrongs which create mass injuries? If so, how should a justice system respond? If there is no mechanism for access to justice by all persons commonly and similarly affected by illegal behavior, does society create a victim's culture—a perpetual state of passive resignation to being preyed upon; to submitting to an inevitable fate of injury without remedy—wrongs without rights?

## **II. The Modern Mass Wrong**

Mass wrongs are illegal acts, often perpetrated by governments or corporate entities, that cause large-scale, widespread harm to masses of individuals at the same time and in similar ways. They exert this magnitude of impact because the misconduct is directed at or affects entire markets or communities. These types of wrongs involve violations of universal and national laws that are generally intended to protect the public against abuses and grant enforceable protective rights. They include breaches of customary international human rights, market manipulation and fraud,<sup>1</sup> employment discrimination, and environmental contamination. They can, and do, affect hundreds, thousands, or even millions of people.

While the precise nature of such wrongs may differ, what the victims have in common is their need for some means of access to justice by which they can seek the redress to which they

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<sup>1</sup> Corporations must increasingly determine how to deal with such misconduct when it is uncovered. For example, the New York Times recently reported that the chief executive officer (CEO) of the large German engineering company Siemens admitted that the company is conducting an internal investigation into bribery and other misdeeds at the same time that German, Swiss, Italian and U.S. authorities are investigating more than \$5 million in “suspicious transactions over the last seven years—many of them apparently involving bribery abroad.” Mark Landler & Carter Dougherty, *Scandal at Siemens Tarnishes Promising Results*, N.Y. Times, Feb. 27, 2007, at C1. While it has been reported that Siemens' CEO claims that he can “make Siemens a model for corporate ethics in five years”, he still denies that the scandal plaguing the company reflects “a broader German problem or a basic flaw in the corporate culture of Siemens” as some have claimed. *Id.*

are entitled. However, any system in which individuals suffering similar, common injury must each alone pursue their rights against the same wrongdoer is cumbersome, redundant, inefficient, and costly. A responsible and effective system must account for the modern reality of mass victimization. In order to provide justice, the system must be capable of addressing the unique problems endemic in the perpetration of mass wrongs in a world of increasing integration. In order to be effective, the system must hold the wrongdoers accountable to all of their victims so that they publicly face and acknowledge the enormity of their harm and are not able to profit from it to the detriment of social and individual welfare.

**A. Cartels**

Companies manufacture and sell commodity products and services globally to thousands of businesses and tens of millions of consumers annually. Cartels are combinations of sellers that conspire together to fix, raise, stabilize or maintain prices for products or services at levels that would not prevail in a competitive market. They therefore interfere directly with the free operation of the markets in which these products or services are sold. Price-fixing cartels are the ultimate “evil”<sup>2</sup> and “scourges”<sup>3</sup> of competition. They are universally condemned as inimical to consumer welfare. By definition, these cartels distort entire markets, injuring *all* market players, large and small. Cartelists are the modern equivalent of pirates, looting open trade worldwide.

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<sup>2</sup> U.S. Supreme Court Justice Antonin Scalia in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (“[The] supreme evil of antitrust . . . [is] collusion.”).

<sup>3</sup> Neelie Kroes, Competition Commissioner, Press Release, European Commission, *Competition: Commission Imposes Fines of €344.5 Million on Producers of Acrylic Glass for Price Fixing* (May 31, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/698&format=HTML&aged=0&language=EN&guiLanguage=en> (“Cartels are a scourge. . . [they] cannot and will not be tolerated.”).

As observed by the Director General of the British Chamber of Commerce, cartelists are simply thieves operating on a grand scale.<sup>4</sup>

The increasing integration of markets has brought with it an increase in the number and frequency of global cartels, effecting economies worldwide. Recent statistical analysis found that the 283 international cartels discovered between 1990 and 2005 adversely affected more than one quarter of the world's business.<sup>5</sup> In 2005 alone, sales affected by cartels were about \$2.1 trillion in real U.S. dollars.<sup>6</sup> Of the 283 known cartels, 47% were active only in Europe (compared to 16% in North America and 12% in other continents) and another 25% operated globally, thus indirectly affecting Europe.<sup>7</sup> In fact, in the European Union ("E.U.") alone, 24 industries have been fined by the European competition authority in the last four years, and over 250 investigations are still under way.<sup>8</sup>

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<sup>4</sup> David Lennan, *Cartel Crooks Belong in Jail The Government is Right to Impose a Heavy Sanction on Managers Who Collude Against Customers, Believes David Lennan*, Financial Times UK, Nov. 2, 2001, at 19.

<sup>5</sup> John M. Connor & C. Gustav Helmes, *Statistics on Modern Private International Cartels 1990-2005*, (Dep't of Agric. Econ. Purdue Univ., Working Paper #06-11, Nov. 2006) ("Connor Working Paper") at Summary.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Press Release, European Commission Memo/07/29, *Competition: Commission Action Against Cartels – Questions and Answers* (Jan. 24, 2007). Examples of industries that have most recently faced significant fines by the European Commission are those manufacturing elevators and switch gears. In the market for the installation and maintenance of lifts and escalators in Germany, Belgium, Luxembourg and the Netherlands, E.U. regulators imposed record fines totaling over €992 million on five manufacturers for their cartel participation. The largest fine of €479 million was imposed on ThyssenKrupp because the company was determined to be a price-fixing recidivist. In addition, Otis was fined €225, Schindler €144 million, Kone €142 million, and Mitsubishi's Dutch subsidiary €1.8 million. See Press Release, Schindler, *European Commission Drops Accusations of Pan-European Collusion* (Feb. 21, 2007), [http://www.schindler.com/group\\_kg\\_mr\\_news?news=88264](http://www.schindler.com/group_kg_mr_news?news=88264). In the switch gears industry, Siemens was recently fined a total of €418 million, including €396 million its Power Transmission and Distribution (PTD) division and €22 million against Siemens Austria. See *Siemens to Take EU Fine to European Court of Justice*, EU Business, Jan. 24, 2007, [http://www.eubusiness.com/news\\_live/1169643624.79/](http://www.eubusiness.com/news_live/1169643624.79/).

Perhaps the most notorious contemporary cartel involved the bulk vitamins industry. Nearly every vitamin manufacturer participated in fixing the prices of a basic food ingredient. Thousands of businesses and tens of millions of consumers on nearly every continent were cheated. The cartel blatantly disregarded the law. Members regularly conducted in-person meetings at which they agreed to fix and hold an equilibrium price for vitamins in all regions, to divide markets and allocate customers as between themselves in their own self-interests. They policed their agreements by punishing “cheaters” through retaliation, and celebrated their success in raising the cost of vitamins to consumers around the globe.<sup>9</sup> They acted deliberately to conceal their conspiracy by meeting in secret and by destroying incriminating documents.

In the U.S. alone,<sup>10</sup> the sales affected by the cartel totaled approximately \$7.4 billion (21% of worldwide sales). Affected sales in Europe are estimated at approximately €6.3 billion

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<sup>9</sup> See *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, No. 99-197, MDL No. 1285 (D.D.C. 2005) (Exhibits admitted into evidence at 2003 public jury trial before Chief Judge Hogan: BASFAG0014513 -- Vitamins Organization Chart; BASFAG0033336-48—BASF EC Submissions; BASF 30(b)(6) Statement; Defendant BASF AG’s Objections and Answers to Plaintiffs’ Joint Discovery Requests to All Defendants; ER 001-003—Expert Report and Rebuttal Expert Report of B. Douglas Bernheim).

<sup>10</sup> Other modern cartels provide similar examples. For example, in the electronics industry, several defendants have been investigated by authorities in both the U.S. and E.U. for their participation in multiple cartels affecting millions, if not billions, of dollars in sales across multiple continents. Manufacturers of DRAM, a variety of random access memory component that stores digital information and provides high-speed storage and retrieval of data used in personal computers, printers, digital cameras, wireless telephones, and other electronic devices, have been the subject of price-fixing investigations by both the United States Department of Justice (“D.O.J.”) and the European Commission (“E.C.”). Several companies have already pled guilty in the United States and have paid hundreds of millions of dollars in fines.

Many of the same defendants were involved in a cartel in the SRAM market as well, which had an enormous impact on the European market. During the conspiracy period from 1999 through 2005, total European sales of SRAM are estimated to be €3.93 billion. SRAM Market Study Q4, 2004 (2005 sales are projected numbers). This represents approximately 20% of worldwide SRAM sales during this period. The impact of the conspiracy on SRAM prices was particularly dramatic in 2000, when average selling prices increased over 37% from \$3.93 per unit in 1999 to \$5.31 per unit in 2000. While prices later dropped in 2002, the SRAM manufacturers’ cartel continued to maintain prices above what they otherwise would have been.

(24% of worldwide sales).<sup>11</sup> During the period of the conspiracy, worldwide vitamin sales of the cartel members totaled approximately \$30 billion. The estimated world-wide overcharge damages totaled approximately \$18 billion adjusted for real present value.<sup>12</sup>

**B. Securities Law Violations**

It is estimated that there are over 200 public exchanges worldwide on which thousands of companies trade.<sup>13</sup> There are over 2,750 companies traded on the New York Stock Exchange alone and over 3,200 traded on the London Stock Exchange. Millions of people invest in these companies either directly or through their pensions. Misconduct in one of the major publicly traded corporations will injure masses of investors. Since investment markets are so closely tied with one another, the ripple effect of a single fraud may affect investors in multiple markets, unrestricted by geography. The integration of markets worldwide was clearly demonstrated by the February 28, 2007 plunge in Chinese stocks of nearly nine percent, which caused the U.S. market, in turn, to plummet as well. The Dow Jones industrial average in the United States fell approximately 416 points and the Nasdaq Index dropped approximately 96.6 point, the steepest one-day fall in the market in nearly five years, making painfully clear just how drastically

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The cartel in the polymethyl-methacrylate (“PMMA”) market had a similarly massive impact. The number of E.U. purchasers of the PMMA affected by Defendants’ conspiracy is likely in the thousands. The EC, in its investigation, found that the PMMA cartel covered the whole of the European Economic Area (“EEA”) and that the 2000 EEA market value for the PMMA products involved was €665 million.

<sup>11</sup> See Brief of Professors Bush, et al. as Amicus Curiae in Support of Respondents at 4, *F. Hoffman-La Roche, Ltd., v. Empagran S.A.*, No. 03-724, 2004 WL 533933 (S. Ct. Mar. 15, 2004).

<sup>12</sup> See Brief for Certain Professors of Economics as Amicus Curiae in Support of Respondents at 10, *F. Hoffman-La Roche, Ltd., v. Empagran S.A.*, No. 03-724, 2004 WL 533930 (S. Ct. Mar. 15, 2004).

<sup>13</sup> Bloomberg Professional Service, (last visited Mar. 5, 2007).

investors in one market could be affected by an adverse event in another.<sup>14</sup> This degree of integration means that, where a fraud is committed in any one market, its effects can thereby ripple across other markets. Although investors may be injured in different degrees with different life-affecting outcomes, they are all united by a single common predominating fact—they are all victims of the same fraud.

The corporate lies that toppled Enron, once one of the U.S.'s most dominant energy traders, provides a stark example of how corporate misconduct stripped thousands of investors of their life savings, pensions and children's college funds. Enron was once a world-renowned company that attracted investors from around the globe. Its popularity and reputation were so great that most of its employees welcomed the opportunity to invest their future in the company's continued prosperity. But Enron's rapid growth in size, power, and prestige led it to engage in increasingly complex contracts and undertakings, which it facilitated by using illegal, off-the-balance-sheet transactions, partnerships and illegal loans which it concealed from the investing public. As a consequence, the company's inflated estimates of income and failure to include all its debts in reports to investors forced it to announce that it was actually worth \$1.2 billion less than it had previously reported. The announcement led to Enron's filing for bankruptcy. Approximately 21,000 employees and over a million investors were left holding a worthless shell.<sup>15</sup>

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<sup>14</sup> See Jeremy W. Peters & David Barboza, *Dow Average Falls 416 Points After China Sell-Off*, N.Y. Times, Feb. 28, 2007, at Business, <http://www.nytimes.com/2007/02/28/business/28stox.web.html?ex=1330318800&en=43b57471df276976&ei=5088&partner=rssnyt&emc=rss>.

<sup>15</sup> See Amelia H.C. Ylagan, *Corporate Watch; Obituary of a Corporate Man*, Business World, July 17, 2006; Jeanie Wyatt, *More Than Money; Patience is an Asset in Claims on Enron*, Aug. 29, 2005, at State & Metro.

U.S. corporations have no monopoly on investor fraud and harm. Indeed, in the world of global markets, corporate fraud knows no national boundaries. As the current Chairman of the U.S. Securities and Exchange Commission noted:

For more than a year after Enron, the WorldCom, Health South, Global Crossing, Qwest, and Tyco scandals made it appear that financial fraud was a uniquely American problem. But this dubious distinction was shattered when the Vivendi, Royal Dutch Shell, Parmalat, and other European frauds emerged.<sup>16</sup>

The Italian company Parmalat committed what the U.S. Securities and Exchange Commission has described as “one of the largest and most brazen corporate financial frauds in history.” In what seemed like the blink of an eye, Parmalat went from being the corporate crown jewel of Italy to one of the largest financial scandals in European history.

The now-infamous collapse of the Italian dairy company, which had over 35,000 employees in 30 countries, began in mid-November 2003 when it defaulted on a \$185 million bond payment. People began to ask questions. After barely scratching the surface, evidence of massive accounting misstatements quickly came to light. Within a month, the company’s chief executive and founder, Calisto Tanzi, resigned in disgrace. Four days later, the world discovered that a \$4.9 billion Bank of America account of a Parmalat subsidiary in the Cayman Islands was a fake. Days later, Italian investigators revealed that Parmalat had used dozens of offshore companies to report non-existent assets to off-set at least \$11 billion in liabilities.

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<sup>16</sup> Christopher Cox, Chairman of the U.S. Sec. and Exch. Comm’n, Remarks at the Video/Tele Conference on Intn’l Sec. Regulatory and Accounting Issues of the Am. Bar Ass’n (Oct. 6, 2006). England’s Bank for Credit and Commerce International (BCCI), which collapsed in 1991 with £7 billion of undeclared debts, provides yet another example of a massive securities fraud in Europe. The fraud there injured approximately 800,000 investors in the bank worldwide. See Donna Edwards, *The Bank of Credit and Commerce International Scandal: A Warning for Bank Regulators*, 24 Law and Policy in International Business, (1993).

Parmalat, whose securities are traded among others, on the Luxembourg Stock Exchange, the Milan Stock Exchange, the Mercato Telematico Azionario, the Uruguayan stock exchange and in the United States, acknowledged that it had misled investors for over a decade through its corporate insiders, as well as outside accountants, banks, and counsel. In combination, all of these activities deceived investors by grossly falsifying Parmalat's financial statements and misportraying the company's financial strength. Following its rapid collapse, Parmalat announced that its audited financial statements had been understated by nearly \$10 billion and that shareholder equity had been overstated by \$16.4 billion. The extent of the fraud perpetrated by Parmalat executives and officers was so great that tens of thousands of investors lost over €14 billion, nearly the entire value of their investment in the company.<sup>17</sup>

**B. International Human Rights Violations**

Between the years of 1939 and 1945, over twelve million civilian victims of Nazi persecution were compelled to work as slaves for German companies that profited from the use of their forced or slave labor. These individuals were physically removed from their home countries, subjected to abusive treatment, and compelled to work under the constant (and frequently carried out) threat of execution in brutal conditions for no compensation. The immense, unprecedented scope of the crimes committed against humanity at the hands of the German government and German corporations was painfully revealed at the Nuremberg Trials:

The truth remains that War Crimes were committed *on a vast scale, never before seen* in the history of War. . . Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian

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<sup>17</sup> Unfortunately, Parmalat is not the only European company recently involved in an Enron-like scandal. Recent years have seen well-established European companies such as Royal Dutch Shell, Royal Ahold and Convergium succumb to the same type of fraudulent mismanagement.

populations in occupied territories suffered the same fate. *Whole populations* were deported to Germany for the purposes of slave labor upon defense works, armament production and similar tasks connected with the war effort. Hostages were taken in *very large numbers* from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. *Cities and towns and villages* were wantonly destroyed without military justification or necessity.<sup>18</sup>

When the criminals who perpetrated these atrocities were tried, the world confirmed the principle that certain human rights are so fundamental that they cannot be violated by anyone, anywhere, at any time.<sup>19</sup> Yet, the history of the world reflects the continuance of these types of abuses.

During the era of “white rule” apartheid in South Africa, tens of thousands of victims were murdered, tortured, raped and wrongfully imprisoned. The conduct of the Apartheid government and those who knowingly assisted in furthering its atrocities, violated fundamental principles of human rights and included the very kinds of crimes against humanity denounced by the world at Nuremberg. Apartheid itself has been recognized as a crime against humanity and a violation of international law by the world community.<sup>20</sup>

The complicity of business in the perpetuation of these crimes was noted by South Africa’s Truth and Reconciliation Commission (“TRC”). It wrote that “[b]usiness was central to the economy that sustained the South African state during the apartheid years” and that certain business, like the mining industry, aided in designing and implementing the Apartheid

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<sup>18</sup> *United States v. Goering*, 6 F.R.D. 69, 112 – 113 (1946) (emphasis added).

<sup>19</sup> *See generally id.*

<sup>20</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, at Article 7.

policies.<sup>21</sup> The businesses that knowingly aided and abetted the Apartheid regime were not only instrumental in the implementation of the abuses, but were so integrally connected to the abuses inherent to the fate of an entire nation that apartheid would probably not have occurred in the same way without their knowing participation.<sup>22</sup>

In Chile, under the violent rule of Augusto Pinochet, nearly 3,000 dissidents were murdered and 30,000 or more tortured between 1974 and 1990. At the time of his death in 2006, Pinochet, who was incarcerated in the U.K., was facing more than 300 pending criminal charges for human rights abuses. In considering whether to permit extradition of Pinochet from the U.K. to Spain to stand trial for his crimes, the House of Lords described the “torture, murder and the unexplained disappearance of individuals” committed under Pinochet’s rule as “appalling acts of barbarism” carried out “all on a large scale,”<sup>23</sup> in violation of customary international principles of human rights.<sup>24</sup> Accordingly, the House of Lords denied Pinochet

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<sup>21</sup> TRC Final Report Vol. 4, Ch. 2, ¶ 161 (Oct. 29, 1998), <http://www.stanford.edu/class/history48q/Documents/EMBARGO/VOLUME4.HTM> (follow “Chapter 2 Institutional Hearing: Business and Labor” hyperlink).

<sup>22</sup> Brief of Commissioners and Committee Members of South Africa’s Truth and Reconciliation Commission as Amicus Curiae in Support of Appellants, at 15, *Khulumani v. Barclays*, No. 05-2141; *In re South African Apartheid v. Sulzer AG*, No. 05-2326, (2d. Cir. Aug. 30, 2005).

<sup>23</sup> *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others v. Ex Parte Pinochet*, 24 March 1999.

<sup>24</sup> Similar large scale human rights violations have happened elsewhere as well. In The Bosnian genocide committed between 1992 and 1995 was responsible for the systematic murder of over 200,000 Muslim civilians, the disappearance of over 20,000 who are feared dead, and the fleeing of over two million refugees. See United Human Rights Council *Bosnia Genocide*, [http://www.unitedhumanrights.org/Genocide/bosnia\\_genocide.htm](http://www.unitedhumanrights.org/Genocide/bosnia_genocide.htm) (last visited Mar. 5, 2007). In addition, in Cambodia, as Amnesty International has recognized, “Total impunity for human rights violations continues to be the norm .... To date, perpetrators of recent human rights violations, including extrajudicial executions, torture and arbitrary detention—as well as those who committed acts of genocide, crimes against humanity and war crimes between 17 April 1975 and 7 January 1979 while the Khmer Rouge was in power—have not been brought to justice ... le[ading] led to a climate where further human rights violations continue unabated in a self-perpetuating cycle.” See 1999 UN Commission on Human Rights, *Making Human Rights*

head of state immunity for his misconduct, confirming that even a head of state should not be insulated from accountability for such atrocities.<sup>25</sup>

#### **D. Employment Discrimination**

In 2005, the employment rate in the E.U. was approximately 63.8%.<sup>26</sup> To protect the rights of the millions of individuals this statistic represented, the European Commission issued four Directives aimed at curbing discrimination in employment and other sectors:

- Directive 2000/43/EC of 29 June 2000 implements the principle of equal treatment between persons irrespective of racial or ethnic origin.
- Directive 2000/78/EC of 27 November 2000 established a framework for equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation in employment and occupation.
- Directive 2002/73/EC of 23 September 2002 amends Directive 76/207/EEC, implementing the principle of equal treatment for men and women regarding access to employment, vocational training and promotion, and working conditions.
- Directive 2004/113/EC of 13 December 2004 implements the principle of equal treatment between men and women in the access to supply of goods and services.

All four directives prohibit both direct and indirect discrimination. All four were issued in response to mounting evidence of unrest about the problem of workplace discrimination in the E.U. In fact, a recent study confirms that 64% of Europeans are of the opinion that “discrimination is widespread in their country.” Fifty-four percent believe that “not enough effort is being made in their country to fight discrimination and they would like to see this change.”<sup>27</sup> The twenty-seven E.U. Member States have recognized the magnitude of this

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*Work: Time to Strengthen the Special Procedures Appeal Case*,  
<http://web.amnesty.org/library/print/ENGASA230031999> (last visited Mar. 5, 2007).

<sup>25</sup> *Id.*

<sup>26</sup> Press Release, European Commission Memo/06/404, *Employment in Europe 2006* (Nov. 6, 2006).

<sup>27</sup> Press Release, European Commission Memo/07/24, *European Year of Equal Opportunities for All-Eurobarometer on Discrimination* (Jan. 23, 2007).

problem, and launched a European Year for Equal Opportunities for All, which will commence on January 30, 2007 with an “Equality Summit” in Berlin.

Discrimination by large multinational corporations victimizes large numbers of persons. In the United States, for example, Wal-Mart employs approximately 1.4 million workers, two-thirds of whom are hourly. Of those hourly workers, two-thirds are women. Yet, only one third of Wal-Mart’s managers are women. Wal-Mart’s discrimination against its female retail employees in pay and promotions has been so widespread that the class certified and upheld on appeal<sup>28</sup> includes more than 1.6 million current and former female employees in America alone, the largest class of civil rights victims to pursue their claims in the aggregate in United States history.

Where *Wal-Mart* demonstrates the potential breadth of systematic workplace discrimination, *Roberts, et al. v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. Sept. 11, 1997) reveals how deeply it still pervades corporate culture. *Texaco* illustrated that, even in a modern world where anti-discrimination laws have sought to govern corporate behavior, racial animus remains a factor inhibiting equal opportunity. Top *Texaco* company executives were recorded *on tape* using disparaging slurs to refer to African Americans, calling them “black jelly beans”<sup>29</sup> among other, far worse, racial epithets. The tape also revealed a conscious effort to destroy documents demanded in a nationwide litigation alleging widespread discrimination against Texaco’s African American employees designed to restrict their corporate placement and advancement. Thousands of African American employees, and tens of thousands of potential applicants, were confined by glass walls and ceilings because of one common characteristic—the

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<sup>28</sup> *Dukes, et al. v. Wal-Mart Inc.*, Nos. 04-16688, 04-16720, 474 F.3d 1214 (9th Cir. 2007).

<sup>29</sup> See Affidavit of Cyrus Mehri, submitted in *Roberts v. Texaco*, Mar. 28, 1996.

color of their skin. Their talents, skills, and abilities could never advance them in the face of this prejudice.

Regrettably, massive civil rights violations like those perpetrated by Wal-Mart and Texaco occur in other countries as well. Recent reports issued by national and multi-national organizations, such as the European Monitoring Centre on Racism and Xenophobia, the United Kingdom's Trade Union Congress, and the United Kingdom's Women and Work Commission reveal equally disturbing patterns of unlawful discrimination in European job markets. The European Monitoring Centre's report, for example, described the emergence of European labor markets segmented by race or national origin, and noted various examples of blatant and systemic discrimination in the employment sector.<sup>30</sup> In a survey conducted by the United Kingdom Trade Union Congress, it was revealed that the number of ethnic workers who have risen to management positions has actually *decreased* in the last ten years even though the number of ethnic workers has increased. In addition, the Women and Work Commission reported that women in the U.K. are estimated to be paid seventeen percent less than their male

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<sup>30</sup> It is reported that changes in the European labor market and the resulting surge in immigration and unprecedented racial, ethnic, and religious diversification has led to hostility to immigrants, particularly against those from African and Arab nations. *See, e.g.,* Kelly Whiteside, *Concerns Raised Over Racism During Cup*, USA Today, June 1, 2006, available at [www.usatoday.com/sports/soccer/worldcup/2006-06-01-intolerance-cup\\_x.htm](http://www.usatoday.com/sports/soccer/worldcup/2006-06-01-intolerance-cup_x.htm) (citing "a growing resistance to immigration from African and Arab nations in several European countries," as one source of the rise in the use of racial slurs during European soccer games); *Italy Declares State of Emergency*, CNN.com, Mar. 20, 2002, <http://archives.cnn.com/2002/WORLD/europe/03/20/italy.immigrants/index.html> (discussing Italy's decision to declare a state of emergency in response to a surge in illegal immigrants). Recent riots in suburban Paris that lasted more than a week—following the accidental electrocution of two Black immigrant teens thought to be fleeing police—brought racial and ethnic tensions in France to the forefront. *See, e.g., Many Held As French Riots Spread*, BBCNews, Nov. 5, 2005, <http://news.bbc.co.uk/2/hi/europe/4407688.stm>. Furthermore, a recent BBC "employment testing" survey revealed discriminatory practices in the U.K. job market. *See 'Shocking' Racism in Jobs Market*, BBCNews, July 12, 2004, <http://news.bbc.co.uk/2/hi/business/3885213.stm>.

counterparts.<sup>31</sup> The pay differentials were reported as being even more striking in the professional fields where, for example, female medical practitioners are estimated to earn twenty-three percent less, and female legal professionals are estimated to earn twenty-one percent less. The population of the workforce, both actual and potential, affected by these inequities is estimated to be in the millions in the E.U.

#### **E. Environmental Mass Torts**

Environmental mass torts put at risk the health and livelihood of families, children and workers around the world. Victims are exposed to chemical contamination in their communities, schools, and workplaces. Exposure comes in many forms, from the slow and silent leaking of toxins into a water supply to catastrophic releases by tanker spills or malfunctioning of nuclear plants. Air, water, and land become pathways for cancers, birth defects, the destruction of ecological systems or the disruption of life and livelihood.

In March 1989, the Exxon Valdez ran aground on Bligh Reef in Prince William Sound. Over 10 million gallons of crude oil were spilled into one of the planet's most pristine environments. The spill devastated the environment and wildlife off the coast of Alaska and gravely threatened the livelihood of over 40,000 fishermen and Alaska Natives.<sup>32</sup> Exxon acknowledged it was aware of the risk of a grounding by one of its

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<sup>31</sup> The Women and Equality Unit of the UK Government reports a 13% pay gap between the average hourly rate of men and women. *See* [www.womenandequalityunit.gov.uk/pay/index.htm](http://www.womenandequalityunit.gov.uk/pay/index.htm) (last visited Feb. 14, 2007). The growing number of sex-discrimination claims filed in the UK further evidences rising concerns about gender discrimination. *See* Kerry Capell, *Sex-Bias Suits: The Fight Gets Ugly*, *Business Week*, Sept. 6, 2004, at International Business: Europe.

<sup>32</sup> Other such oil spills have occurred in the years since with similarly devastating effects-in December of 1999, the Erika spilled 13,000 tons of heavy diesel oil off the coast of Brittany; the Sea Empress spilled about 72,000 tons of crude oil near the port of Milford Haven in Wales in 1996; and in 1993, the Braer grounded off the Northern coast of Scotland resulting in a spill of 85,000 tons of oil, to name but a few.

tankers. However, it had, unilaterally, found the risk acceptable. What may have been acceptable to Exxon was unacceptable to the tens of thousands of Alaskans who suffered the consequences of the spill for over a decade after the disaster.

In 2006, a slick of, “highly toxic cocktail of petrochemical waste and caustic soda [was dumped in the Ivory Coast.] . . . It came from a Greek-owned tanker flying a Panamanian flag and leased by the London branch of a Swiss trading corporation whose fiscal headquarters are in the Netherlands.”<sup>33</sup> The likely reason: the cost of disposal in the Ivory Coast was a fraction of the estimate for European disposal. As of recent reports, eight people have died, dozens have been hospitalized and 85,000 have sought medical attention.

Catastrophic damage has also been inflicted on the environment and human health as a result of other chemical tragedies. Tens of thousands of residents of Bhopal, India were injured or killed as a result of Union Carbide’s release of toxic groundwater pollution and contamination from an explosion at a pesticide plant. Twenty years later, conservative figures indicate that the explosion and its effects resulted in the death of at least 20,000 people.<sup>34</sup>

Similarly, in 1986, as a result of disregarding numerous safety procedures, a chain reaction in one of the reactors at the Chernobyl nuclear power plant in the former Soviet Union spiraled out of control. The resulting explosion released massive levels of radioactive material into the environment. A recent Greenpeace report concluded that the full consequences of the Chernobyl disaster could top a quarter of a million cancer cases and nearly 100,000 fatal

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<sup>33</sup> Lydia Polgreen & Marlise Simons, *Global Sludge Ends in Tragedy for Ivory Coast*, N.Y. Times, Oct. 2, 2006, at A1.

<sup>34</sup> Lisa McDonald, *Nightmare in Bhopal* (Dec. 3, 2004), <http://www.greenpeace.org/international/news/nightmare-in-bhopal>.

cancers.<sup>35</sup> Based on demographic data, the report finds that during the last 15 years, an additional 60,000 people have died in Russia because of the Chernobyl accident, and estimates of the total death toll for the Ukraine and Belarus could reach another 140,000.<sup>36</sup>

### **III. Aggregated Access to Justice**<sup>37</sup>

Without a means of aggregated access to justice for victims of mass wrongs, a remedy for their injuries is, at best, significantly impeded and, at worst, unattainable. Individual adjudication of thousands, sometimes millions, of individual victims' claims is not an answer, it is a failure.

While promises of “providing justice for all” have become axiomatic features of modern legal systems, they are all too often empty ones. Too frequently, as a result of either

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<sup>35</sup> *Chernobyl Death Toll Grossly Underestimated* (Apr. 18, 2006), <http://www.greenpeace.org/international/news/chernobyl-deaths-180406>.

<sup>36</sup> *Id.*

<sup>37</sup> Though the authors emphasize the need for a means to address the mass wrongs described above, it should be recognized that no one particular form of access to justice is being advocated as the exclusive solution to the problem of mass wrongs. For example, one possible solution currently being considered is that of “collective redress.” See George Parker, *Commissioner Proposes Class Action Redress System to Protect Consumers*, Financial Times, Mar. 5, 2007, at 2. E.U. Consumer Affairs Commissioner Meglena Kuneva has recognized that such a form or aggregate litigation “is important because it would be a more powerful sanction against one or another company,” a particularly important function given that the “increase in e-commerce means that consumers are buying more from other EU countries and that they need an effective mechanism for getting their money back if things go wrong.” *Id.* The increasing prevalence of this view is demonstrated both by the Green Paper and by the comments of E.U. Competition Commissioner Neelie Kroes and her officials at the IBA/Commission Conference on Private Enforcement in Brussels on 8-9 March 2007, where they indicated that the European Commission is seriously considering the need for a consumer representative device in the competition and consumer areas. See *EU to Promote Lawsuits in Battle Against Cartels*, International Herald Tribune, Mar. 9, 2007, at Finance 11. This idea that, used responsibly, aggregate mechanisms for litigation can be quite effective in consumer, competition and other litigation, is further illustrated by the recent filing of a lawsuit in the Competition Appeals Tribunal in the United Kingdom by the Consumers' Association, WHICH, against JJB Sports plc for price-fixing certain replica football kits. The lawsuit, brought on behalf of over 130 individual consumers, alleges price-fixing under section 47B of the Competition Act 1998.

procedural hurdles or other economic realities associated with pursuing mass litigation against wrongdoers, victims are denied meaningful access to justice that would otherwise hold wrongdoers accountable. While modern legal systems are built on the principle of justice for all, they must be adjusted, where appropriate, to accommodate access by all.

A class action mechanism is one potential solution. Class actions, or other forms of comparable representative or group actions, provide a means of redress for large numbers of similarly aggrieved claimants who would otherwise be denied effective access to justice because of their inability to join together their common claims in a single action.<sup>38</sup> The class action device is simply a procedural vehicle allowing for such an aggregation of similarly-situated individuals or entities commonly wronged by the same defendant or group of defendants. The substantive rights of the defendants and the underlying claim remain the same as if the matter were pressed in one action by one person or entity.

The class device allows representatives or “named plaintiffs” to file their claim on behalf of themselves and of all other similarly-situated individuals or entities. Each such individual or entity may choose to opt-in and join together in the litigation or opt-out, to withdraw from participation in the class and pursue his or her own claim separately. The object

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<sup>38</sup> For litigation to proceed as a claim action, the plaintiffs in the litigation must show:

- (1) [T]he class is so numerous that joinder of all members is impracticable,
- (2) [T]here are questions of law or fact common to the class,
- (3) [T]he claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) [T]he representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23. In addition, for a class action to be maintained, a Plaintiff must show that prosecution of separate actions would create a risk of inconsistent adjudication and that a class action does not impede the ability of absent class members to protect their interests; that the defendant has acted on grounds generally applicable to the class; and that questions of law or fact common to the class predominate over individual questions. *Id.*

of the device is to provide a mechanism where as many, if not all, of the same claims by the same types of victims of the same wrong committed by the same defendants can be litigated in the same proceeding.<sup>39</sup>

This procedure is particularly useful when, even though certain illegal conduct may have a massive impact on an entire market or community, the relatively small level of damages recoverable by any one individual victim is outweighed by the enormous time and expense required to litigate a claim against a large, sophisticated defendant or group of defendants. Though entitled to access, victims who would be unlikely to pursue their claim individually may be inclined to join a class or representative action where their individual litigation costs are shared across an entire group. Thus, the class type mechanism increases access to justice in appropriate matters by enabling victims of mass wrongs to pool their resources and claims, and thus level the judicial playing field. As recently observed:

Class actions amalgamate many similar but small complaints into one big one. By allowing individuals with a common grievance to share costs, they make the law more affordable for the little guy. Such an improvement in justice is in itself a powerful argument for class-action suits.<sup>40</sup>

Class-type devices also eliminate the redundant adjudication of similar issues similarly impacting numbers of similarly situated persons. By aggregating such individuals and claims, judicial economies are achieved by avoiding unnecessary duplication in and relitigation of fact-finding and legal analysis on issues such as liability and general causation that do not vary across class membership. This diminishes or eliminates exposure to the imposition of conflicting duties, standards of conduct or rights:

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<sup>39</sup> See *Manual for Complex Litigation* (Fourth) at 305 (2006).

<sup>40</sup> *Accepting the Ambulance Chasers*, *The Economist*, Feb. 17, 2007, at 16.

[B]usinesses also have something to gain. At a stroke, companies can avoid wasting time and money on endless petty lawsuits and escape years of damaging legal uncertainty. It is far more efficient for everyone, including the corporate defendant, to deal with one big case than many small ones.<sup>41</sup>

Moreover, the class device ensures that all victims of similar misconduct have access to equivalent remedies for equivalent wrongs.

The class device, in its respective forms, has been an enormously successful vehicle to address the challenges of access to justice for victims of mass wrongs in an orderly and efficient manner in the United States, Australia, and Canada. The U.S. Supreme Court has commented that “[c]lass actions serve an important function in our system of civil justice.”<sup>42</sup> Canadian courts, likewise, have recognized that, in cases where injury is inflicted across borders and resulting claims are multijurisdictional, permitting claimants to combine their efforts in litigation, “is not oppressive or unfair to the defendants” in a given jurisdiction, but instead, “is consistent with important policy objectives, such as—*facilitating access to justice, judicial efficiency and behavior modification.*”<sup>43</sup> A class device, as a means of access to justice to victims of mass wrongs, enables restitution, promotes deterrence of further wrongful conduct and fosters proper corporate governance.

As was recently remarked: “[m]any plaintiffs in American class actions have suffered a genuine injury and deserve their compensation.”<sup>44</sup> The availability of a class mechanism has achieved mass justice in proper circumstances. In jurisdictions permitting class litigation, mass victims of price-fixing cartels, for example, have recovered far more of their losses than

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<sup>41</sup> *Id.*

<sup>42</sup> *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981).

<sup>43</sup> *See Ford, et al. v. F. Hoffman-LaRoche Ltd., et al.*, Sup. Ct. Justice File No. 771/99 (Ontario, Canada), Justice Cumming’s Reasons for Decision ¶ 49 at 13 (Jan. 26, 2001) (emphasis added).

<sup>44</sup> *Accepting the Ambulance Chasers*, *The Economist*, Feb. 17, 2007, at 16.

identical victims in other parts of the world. While thousands of U.S. victims of the vitamins cartel recovered approximately \$2.4 billion through civil proceedings, less than ten victims in the E.U. have recovered under €7.6 million. Similarly, a Canadian vitamins class recovered a settlement amount of over €107 million from one defendant, F. Hoffman-La Roche, the largest settlement for price-fixing in Canadian history. In Australia, a vitamins class recovered €23.3 million from three defendants, Roche Vitamins, BASF Australia and Aventis Animal Nutrition, whom the Australian Competition and Consumer Commission found had been inflating the price of vitamins by up to seventy-five percent since 1992.<sup>45</sup>

The disparities in recovery between jurisdictions providing a class mechanism and those that do not are even more stark in light of the fact that in developing countries, where private enforcement itself is non-existent, another \$50 billion in ill-gotten profit remains uncollected.<sup>46</sup> As a result of such selective enforcement and recovery, the vitamins cartel members retained more in net profit, approximately \$13 billion worldwide, than they returned to the market they victimized. For the vitamins cartel, crime paid handsomely.<sup>47</sup>

In the securities area, the class device has allowed investors to use the economies of scale to promote access to the legal system that would otherwise not have existed for them. As one U.S. Court has stated:

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<sup>45</sup> Accordingly, the Commission also fined the three companies \$26 million. *See \$30.5 Million "Vitamins" Cartel Class Action Approved* (Oct. 27, 2006), [http://www.mauriceblackburncashman.com.au/news/press\\_releases/vitamins%20class%20action%20approved.asp](http://www.mauriceblackburncashman.com.au/news/press_releases/vitamins%20class%20action%20approved.asp).

<sup>46</sup> See Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 *Antitrust L.J.* 3, 801-852 (2004).

<sup>47</sup> See *Amicus Curiae of Professors Bush. et al.*, at 4 (noting that the profit retained by the vitamin cartellists is more than double the fines and damages they have paid to date in all proceedings worldwide).

A fundamental goal of the federal class action rule—approved by the Supreme Court and not objected to by Congress, is to promote access to the legal system “[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages.”<sup>48</sup>

In the last ten years, British, Dutch, Belgian, French, German, Austrian, Italian, Greek, Irish, and Swiss investors have all sought to lead restitution efforts. There is an apparent increasing realization in the field of investor rights of the advantages and benefits of a class-type device, which relies on a system of private enforcement on behalf of all harmed. The Parmalat litigation, for example, is co-led by European institutional investors, who are also acting as lead or co-lead Plaintiffs in class actions involving companies such as Vivendi (France), Lemont & Hauspie (Belgium) and Converium (Switzerland).<sup>49</sup> Additionally, class-type litigation involving securities violations has offered new ways in which to change or influence corporate governance:

[Investor class suits display] a higher purpose: to improve behaviour. On top of the usual payouts, pension fund plaintiffs increasingly insist that companies reform their governance: bringing in more independent directors, reforming executive-pay schemes, splitting the roles of chairman and chief executive, and even . . . creating a chief governance officer.<sup>50</sup>

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<sup>48</sup> *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1413-14 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 1295 (2d Cir. 1990) (quoting *Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980)).

<sup>49</sup> *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158 (S.D.N.Y. 2003); *In re Lernout & Houspie Sec. Ling.*, 138 F. Supp. 2d 39 (D. Mass. 2001); *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449 (S.D.N.Y. 2005); *In re Converium Holding AG Sec. Litig.*, No. 04 Civ. 7897 (DLC), 2006 WL 3804619 (Dec. 28, 2006).

<sup>50</sup> See *Securities Lawsuits: Classier Actions*, *The Economist*, Feb. 17, 2007, at 76 (noting that class action plaintiffs have been successful in “increasingly insist[ing] that companies reform their governance.”).

Such class-type litigation accommodates the use of the more “knowing and demanding kind of plaintiff.”<sup>51</sup>

Similarly, in the field of human rights, U.S. class action lawsuits have proved to be an essential vehicle to achieve otherwise unattainable outcomes for the victims of some of the world’s most horrific mass wrongs. The groundbreaking settlement achieved in litigation on behalf of forced and slave laborers was only possible because they had the ability to pursue justice through a class type device. There, survivors of World War II era forced and slave labor sued the German government and companies that had profited at their expense. The result: a \$5.2 billion settlement achieved through multinational negotiations involving the defendant corporations, plaintiffs’ counsel, and the governments of the United States, Germany, Israel, the Republic of Poland, the Czech Republic, Ukraine, Belarus, and the Russian Federation.<sup>52</sup> A Foundation was established to compensate an estimated two million survivors in 192 countries. Similar resolutions were subsequently reached with the government of Austria and Austrian companies. No individual victim of these atrocities could have achieved such significant, widespread relief without a means of access for all.

Class enforcement of civil rights in the face of systemic discrimination provides a striking example of how, when addressed by aggregate litigation, mass wrongs can be remedied to achieve systemic change within a workplace, culture, or nation. Aggregate adjudication has the capacity to create tangible change that either directly prevents or, at the very least, discourages recurrences of illegal discriminatory behavior. African Americans and women, for example, have altered the complexion of the American workforce as a whole and

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<sup>51</sup> *Id.*

<sup>52</sup> See Anne-Marie Slaughter & David Bosco, *Plaintiffs’ Diplomacy*, Foreign Affairs, Sept./Oct. 2000, at 102 (citing the German slave labor case as an example of a successful class litigation responsible for not only compensating victims, but also shaping foreign policy).

inexorably changed the face of equal opportunity in the U.S. Glass ceilings and walls have been shattered and entire workplace cultures changed by the success of classes of victims fighting against systemic discriminatory practices.<sup>53</sup> As in securities cases, class actions have provided a means to improve corporate governance. Significant judgments and settlements requiring industry-changing behavior have created new working environments while repairing old injuries.

Private plaintiffs have frequently negotiated settlements, for example, that require companies to take substantive steps to redress discrimination throughout their companies. In *Beck v. Boeing*, No. CO 0-0301 P (W.D. Wa.), the plaintiffs alleged their employer had engaged in a pattern and practice of discrimination against approximately 26,000 women related to compensation and promotion opportunities. The parties entered into a consent decree which included substantial institutional reform requiring that Boeing:

- a. conduct a review of its job descriptions for non-union positions and to revise them, if necessary, to assure they adequately identify the abilities and other characteristics required by each job;
- b. conduct an annual performance evaluation exercise in order to provide employees constructive feedback and guidance and to document the extent to which employees have achieved their goals and objectives;
- c. consider a manager's failure to conduct annual performance evaluations as a factor in its assessment of that manager's own annual evaluation and for salary review purposes;
- d. develop improved tools for identifying an acceptable range for newly hired employees' starting salaries;
- e. conduct annual salary monitoring;

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<sup>53</sup> See e.g., Press Release, Texaco, *Texaco Announces Settlement in Class Action Lawsuit* (Nov. 15, 1996) (African-Americans received \$176 million in settlement), <http://www.texaco.com/sitelets/diversity/> (follow "November 15, 1996 announcing settlement in class action Lawsuit" hyperlink).

- f. establish a formal mechanism for distributing overtime opportunities to employees;
- g. put in place a new structured interview process for promotions; and
- h. modify its process for addressing equal employment opportunity complaints.<sup>54</sup>

Similarly, in *Texaco*, the settlement agreement included establishment of a task force to oversee implementation of and adherence to institutional changes to the operation of the company for a five year period.<sup>55</sup> Such institutional changes in the practices of a large, transnational corporation would have been impossible to achieve by any one discrimination victim pursuing his or her own individual claim.<sup>56</sup>

Complete private enforcement of rights by victims of mass wrongs associating their claims together also contributes to deterring the recurrence of similar misconduct. Absent significant civil consequences for their illegal conduct, wrongdoers apparently find little reason to comply with governing laws. So long as the total benefits of wrongful conduct exceed the costs, mass wrongdoers have a powerful economic incentive to continue to inflict injury to increase profits.<sup>57</sup> Public enforcement alone is insufficient to deter materially this misconduct:

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<sup>54</sup> Court-Approved Consent Decree, *Beck v. Boeing*, No. C00-0301P (W.D. Wa.), [www.beckvboeing.com/consentdecree.pdf](http://www.beckvboeing.com/consentdecree.pdf) (last visited Feb. 14, 2007). *See also* Consent Decree, *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, Case Nos. 03-2817 SI, 04-4739 and 044731 (N.D. Ca.), [http://www.afjustice.com/pdf/20050422\\_consent\\_decree.pdf](http://www.afjustice.com/pdf/20050422_consent_decree.pdf) (last visited Feb. 14, 2007) (providing for similar programmatic relief); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 687-88 (N.D. Ga. 2001) (same); Amended Consent Decree, *Ridgeway v. Flagstar Corp. and Denny's Inc.*, Civ. Nos. 93-20208-JW, 93-20202-JW (N.D. Ca.).

<sup>55</sup> Notably, the chairperson of the committee, Devall Patrick, later went on to become the first black governor of Massachusetts.

<sup>56</sup> Courts have been unwilling to implement far reaching injunctive relief for individual complainants. *See, e.g., Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766-67 (4th Cir. 1998) (limiting prevailing non-class plaintiffs to individualized relief), *vacated on other grounds*, 527 U.S. 1031 (1999).

<sup>57</sup> *See* Brief of Economists Joseph E. Stiglitz and Peter E. Orszag as Amicus Curiae in Support of Respondents at 3-5, *F. Hoffman-La Roche, Ltd., v. Empagran S.A.*, No. 03-724, 2004 WL 533934 (S. Ct. Mar. 15, 2004). (“If that aggregate expected punishment is smaller than

A possible civil action for compensation for damages, alongside the fine and independently from it, can *undoubtedly increase the deterring effect*. . . .<sup>58</sup>

The lure of profits to be realized in a world where access to justice is limited to some is a danger to all.<sup>59</sup> Companies, for example, will enter price-fixing conspiracies as long as profits offset potential liabilities. Justice for all, then, requires an available means of recovery by all, everywhere.<sup>60</sup>

#### IV. What Response Is Appropriate in Europe?

The European Commission, for example, has already recognized that “improve[d] access to justice” is a “key priority for the Commission and the Member States.”<sup>61</sup> This recognition is significant given the contemporaneous acknowledgement in a key report for the

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the sum of the profits garnered in each nation, deterrence of the global cartel is inadequate and consumers everywhere will be harmed.”).

<sup>58</sup> *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, Combined proceedings C-295/04, C-296/04, C-297/04 and C-298/04, Conclusions of the Appeal Court Lawyer (Jan. 26, 2006), at 65 (emphasis added). Many cartelists are often repeat offenders engaged in illegal conduct in multiple product markets. Recent analysis reveals that more than 170 companies were price-fixing recidivists during 1990-2005. Of these companies, eleven repeatedly fixed prices ranging from ten to twenty-six times. Connor Working Paper at 38. Full accountability should diminish recidivism.

<sup>59</sup> See Margaret Levenstein & Valerie Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 *Antitrust L.J.* 3, 801-852 (2004), at 818 (emphasizing the impact that cartel activity has on developing nations: “[I]nternational cartels have adversely affected a not-insignificant portion of the trade and, therefore, the trade balance and consumption, of developing countries.”).

<sup>60</sup> The importance of providing access to justice worldwide (not just in the U.S. and E.U.) is not hyperbole. The effect of cartel activity around the globe is illustrative. It has recently been estimated that “the total value of potentially ‘cartel-affected’ imports to developing countries is \$51.1 billion. . . To put this number in perspective. . . [i]f the price of these imports increased an average of 10 percent. . . then without adequate enforcement against international cartels, producers in industrialized, high income, countries could take from developing country consumers in higher prices approximately 15 percent of what their governments donate in foreign aid.” *Id.* at 813, 816.

<sup>61</sup> European Commission on Access to Justice, [http://ec.europa.eu/consumers/redress/acc\\_just/index\\_en.print.htm](http://ec.europa.eu/consumers/redress/acc_just/index_en.print.htm), (last visited Mar. 1, 2007).

Commission that procedural obstacles prevent claimants from pursuing litigation against corporate law violators.<sup>62</sup>

What prevents meaningful access to justice in such circumstances from prevailing in Europe? While there are many litigation hurdles potential claimants in the E.U. must overcome, one clearly is an inability to pursue claims in the aggregate in appropriate circumstances. Providing such a procedural vehicle would allow such access and give full effect to the rights conferred as protection to E.U. citizens through substantive law.<sup>63</sup>

It is fundamental to the idea of private damages actions that the victim of a violation of the law is entitled to compensation for the loss suffered as a result of the violation in question. If competition law is to better reach consumers and [businesses] and enhance their access to forms of legal action to protect their rights, it is desirable that victims of competition law violations are able to recover damages for loss suffered.<sup>64</sup>

As recently commented:

[C]ollective or representative actions can improve the efficiency of the litigation process by consolidating a potentially large number of different actions into one action. This saves time and cost and avoids the risk of tactical litigation. . . . Moreover, some form of organised collective action can be important in balancing the resources and bargaining position of otherwise diffuse claimants against well-organised and potentially resource-rich defendants.<sup>65</sup>

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<sup>62</sup> Ashurst Firm, *Comparative Report: Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules* (Aug. 31, 2004) (“2004 Ashurst Report”).

<sup>63</sup> The right of victims of cartel activity to bring an action for breach of EU antitrust rules is well established in EU law. As noted in the Green Paper: “The obligation for national courts to provide a remedy in damages was established by the European Court of Justice (ECJ) in its ruling *Courage v. Crehan* which specifically concerned the enforcement of the rights and obligations created by Article 81 EC.” See Commission of the European Communities, *Annex to the Green Paper, Damages Actions for Breach of the EC Antitrust Rules*, at 9, COM (2005) 672 final (Dec. 19, 2005).

<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Id.* at 53 (emphasis added).

There are many critics of the class device who often claim that such a system creates “abuses” in jurisdictions like the U.S. that should not be transported to Europe. These critics claim, for example, that because of class actions, the legal system in the United States is plagued by the pursuit of frivolous claims by over-zealous attorneys against unsuspecting corporate defendants held hostage to the constant threat of abusive litigation.<sup>66</sup> These criticisms are directed at what are highlighted as the “excesses”<sup>67</sup> of the American legal system. Yet, the “excesses” are not necessarily a product of the class device, but other aspects of the American system that are not part of the European system and are not likely to be either.

Moreover, wholesale adoption of that device “as it stands” is not, however, what is “on offer,” given the “differences in the legal systems on the two sides of the Atlantic:”<sup>68</sup>

To begin with, judges in many European countries can oblige the losing party to pay the other side’s costs. Disciplined by such a weighty potential liability, European plaintiffs are likely to pursue only the strongest cases. What is more, juries do not determine damages in Europe, and punitive awards tend to be much lower, if indeed they exist at all. Most European countries do not permit lawyers to keep a slice of the takings for themselves, making actions harder for ambulance chasers to pay for. In America class actions are often certified by elected lower-court judges (who pander to popular will); in Britain “group actions” need the go-ahead from an unelected High Court judge. Around 60 such cases have been launched since Britain allowed

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<sup>66</sup> See, e.g., John Heaps & Simon Jackson, *You Say Sue, We Say Perhaps*, *The Times* (London), Feb. 6, 2007, at Law 6, available at <http://business.timesonline.co.uk/tol/business/law/article1331727.ece> (recognizing that “[U.S.] Courts often hit the headlines for company-crippling awards of damages; plaintiff lawyers command media attention for the sums they garner by acting in these cases on contingency fees; and ‘litigation tax’ is viewed by many companies as one of the costs of doing business, with some products failing to reach the market at all for fear of litigation and with claims sinking substantial companies.”).

<sup>67</sup> See also *See Class Actions: If You Can’t Beat Them, Join Them*, *The Economist*, Feb. 17, 2007, at 66, (noting that Europe’s System is insulated from some of the “abuses” claimed of the U.S. System because, “[t]here are no juries in civil actions. . . nor are heavy punitive damages’ normally awarded. . . [and] American—style contingency fees are also rare.”).

<sup>68</sup> *Accepting the Ambulance Chasers*, *The Economist*, Feb. 17, 2007, at 17.

them in 2000—without any egregious examples of abuse; and the experience in the Netherlands, Scandinavia and Germany has been relatively benign as well. . . . Until proven otherwise, class cautious deserve a cautious welcome.<sup>69</sup>

The response to deficiencies in a system where abuses appear is not to abandon the system altogether but to tighten it. Excesses can be controlled by safeguards without foreclosing the rights of the abused.<sup>70</sup>

Determining the precise form that a system providing access to justice for mass victims must take is appropriately left to those closest to the problem and responsible for crafting the legal rules that give effect to the rights of citizens in their own jurisdictions. Ultimately, the more difficult decisions as to exactly which procedures will be adopted as improvements to the justice system, and which will be rejected as likely to usher in new problems, will be the subject of much debate and continued reevaluation as changes are made and successes and failures measured. Europe must develop a practice that fits its own systems, legal traditions and culture. The issue that needs to be decided is what form of representative device best fits Europe, rather than whether there should be any device at all.

## **V. Conclusion**

In an ever-changing world, principles of justice cannot change. To provide justice, however, there must be meaningful access to achieve it. Justice must not only be equal for all, it must be equally available to all.

Modern globalized life, with its complexities and integration, binds people, societies and cultures as never before. Incidents of individual injury caused by individual wrongs are now matched by massive injuries caused by massive wrongs. Where a pick-pocket used to rob

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<sup>69</sup> *Id.*

<sup>70</sup> The abuses committed by government and business are more prevalent and more virulent than those cited in connection with class or group action systems, yet no one realistically advocates doing away with government or business because they abuse.

one, two or three individuals at one time, white collar criminals now have the means and desire to pick the pockets of, or cheat, hundreds, thousands or tens of thousands of people at the same time. We live in a world and time in which a few can, and do, cause much misery to many.

Providing a mechanism to associate like claims of similarly situated people commonly wronged is a necessary adjustment of justice to reality. In such situations, an aggregate procedural device, whether a class, group, or representative action, fulfills the expectation and promise of the right to justice. Failure to provide such a means of access in the face of mass wrongs promotes injustice. Whether committed by governments, businesses or individuals, the denial of such access breeds a culture of victims helpless in pursuing justice and hopeless in achieving it.