

The Paradox of Individualized Justice

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The ongoing trend in legislation and adjudication is towards discretionary, “individualistic” resolution of disputes, in which “intuitionistic” reasoning leads to remedies that arise from particular circumstances of the parties rather than from general application of established rules and principles. Unfortunately, this trend has not developed a less litigious society in which parties work out their differences in a creative way outside the courtroom. Thus, the paradox of individualized justice: the more courts individualize their decisions, the less likely that future litigants will develop such solutions themselves. In theory, the risk of losing is supposed to be one reason for litigants to settle. However, when parties understand that the outcome of their case is difficult to predict, they look to the uncertainty of the courtroom as an opportunity instead of a danger. A system based upon individualized justice leads to greater reliance upon judicial resolution, not less. Parties are apt to want to go to court because the party who will ultimately lose did not know defeat was likely. The ability of lawyers and mediators to resolve disputes without the help of judges is correspondingly diminished. In order to encourage parties to negotiate creative, nuanced solutions, courts must not shy away from their job of declaring a winner for clear, consistent, and if necessary, harsh reasons. When they resort to individualized justice to benefit the litigants before them, they do so at the expense of other citizens and create a system in which no one is quite sure what the rules are.