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MASS TORTS: AN INSTITUTIONAL EVOLUTIONIST PERSPECTIVE

Peter H. Schuck†

INTRODUCTION

With the benefit of twenty-five years' experience of mass tort litigation, it is time to assess what we have learned. Torts scholars have already arrived at a consensus as telling as it is rare: Although courts have demonstrated considerable resourcefulness in struggling with mass torts issues, the overall performance of the litigation system in this area has been remarkably poor. Some proceduralists have voiced similar criticisms; generally speaking, however, procedure scholars seem to be more confident than torts scholars that reform can be ac-

† Simeon E. Baldwin Professor of Law, Yale Law School; Visiting Professor, New York University School of Law (Fall 1994). The author thanks Richard Marcus, Geoffrey Miller, Judith Resnik, Paul Rheingold, and the participants at a faculty workshop at NYU and Yale Law Schools for their comments on an earlier version.

1 A recent article emphasizes three distinctive features of mass tort litigation: "the large number of claims associated with a single 'litigation'; the commonality of issues and actors among claims within the litigation; and the interdependence of claim values." Deborah R. Hensler & Mark A. Peterson, Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis, 59 BROOK. L. REV. 961, 965 (1993). Such definitions usually stress the difficulty of establishing causal responsibility in most, but not all, mass tort actions. This difficulty may arise for any of a number of reasons: claimants' injuries are separated in time and space from their exposures; a number of possible natural and human causes of the injuries exist; particular defendants are not clearly linked to particular plaintiffs; the claims have contacts with a variety of jurisdictions; and other complicating factors. For one taxonomy of mass torts, see JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 16-17 (1995).

2 This consensus extends beyond academic tort scholars to analysts at non-academic research organizations such as the RAND Institute for Civil Justice and the Manhattan Institute. See, e.g., Hensler & Peterson, supra note 1, at 962-65, 1061 (arguing that the legal system has not responded well to the challenge of mass torts); see also PETER W. HUBER, GALILEO'S REVENGE: JUST SCIENCE IN THE COURTROOM (1991); WALTRR K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991). It even includes scholars such as John Siliciano, who has condemned other critiques of mass tort law both for employing crisis rhetoric and for failing to specify more precisely their benchmark tort system. See John A. Siliciano, Mass Torts and the Rhetoric of Crisis, 80 CORNELL L. REV. 990 (1995). By contrast, only a few scholars wax optimistic about the possibilities of modifying tort law to accommodate the special difficulties posed by mass tort litigation. E.g., Glen O. Robinson & Kenneth S. Abraham, Collective Justice in Tort Law, 78 VA. L. REV. 1481 (1992); David Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 HARV. L. REV. 849 (1984).
accomplished within the basic tort paradigm.\(^3\) In law as in life, familiarity seems to breed contempt.

Torts scholars charge that mass tort litigation often produces arbitrary results; that it fails to deliver the right compensation to the right victims when it is most needed; that it misallocates risk among consumers, corporations, and governments; that it generates unconscionable waste; and that it does not achieve corrective justice. They argue that the legal actors in the mass tort drama—self-serving, entrepreneurial plaintiffs' lawyers; foot-dragging defense counsel; and overwhelmed, desperately improvising judges—have subordinated important public goals and the needs of individual claimants to their own interests. Notoriously convoluted proceedings enrich lawyers, consultants, and expert witnesses while demoralizing, and often impoverishing, the law's supposed beneficiaries.

Indeed, most torts scholars regard the notion of a mass tort "system" as a misnomer, a convenient but fundamentally misleading rubric for academic conferences, journal commentaries, and occasional texts or courses. Rather, in the dominant view, the field known as "mass torts" comprises a melange of discrete disputes with little in common besides their prodigious procedural complexity, stratospheric transaction costs, and abject dependence on uncertain science.\(^4\)

Many of these criticisms seemed perfectly valid when the first generation of serious mass torts scholarship appeared about a decade ago,\(^5\) and some of these criticisms remain valid today—especially those concerning the risks of injustice when plaintiffs seek essentially unlimited compensatory and punitive damages from sympathetic juries for serious injuries on the basis of changing, easily manipulated scientific evidence. The recent settlement of the silicone gel breast implant settlement\(^6\) and the flood of even weaker claims filed in the


\(^6\) There, Dow Corning and other manufacturers agreed to pay silicone gel breast implant claimants $4.23 billion for connective-tissue and other diseases, even though these companies knew that their causal responsibility for these diseases could not be proven. Indeed, the best studies yet conducted on this question, released almost before the ink was dry on the settlement agreement, failed to demonstrate a causal relationship between breast implants and these illnesses. *See* Marcia Angell, *Do Breast Implants Cause Systemic Disease?*, 330 NEW ENG. J. MED. 1748 (June 16, 1994) (discussing Gabriel et al. study and others); Gina Kolata, *Study Finds No Implant-Disease Links*, N.Y. TIMES, June 16, 1994, at A18.
wake of that settlement provide anecdotal but dramatic support for the continuing force of these first-generation critiques.

Still, contemporary mass tort litigation has changed a great deal since the torts scholars first returned this indictment. Although some others have noted many of these changes, I hope to bring them into a somewhat sharper, more comprehensive focus. Only by abandoning outdated views of our subject can we come to a fresh understanding of it.

(discussing Gabriel et al., Hochberg, and other studies); Gina Kolata, Tissue Illness and Implants: No Tie is Seen, N.Y. Times (National), May 29, 1994, § 1, at 16 (discussing Schottenfeld et al. study); see also Phillip J. Hilts, 2 Studies Find No Breast-Implant Tie to Connective-Tissue Illness, N.Y. Times (National), Oct. 26, 1994, at A23 (discussing Hochberg study); Gina Kolata, A Case of Justice, or a Total Travesty?, N.Y. Times, June 13, 1995, at D1 (reviewing dispute); FDA Says Risk Minimal From Breast Implants, Wall St. J., June 30, 1995, at B8 (follow-up study).

In deciding to settle, the breast implant defendants apparently dreaded the prospect that juries, outraged by internal corporate documents that jurors might interpret as showing corporate irresponsibility or illegality, might award ruinous judgments despite the weak evidence of causation and thereby destroy the firms' goodwill in the consumer products market. Presumably, this reaction by the defendants partly reflected the fact that the breast implant litigation was still "immature" in the sense discussed infra part I, but "mature" enough to have produced enormous punitive damage awards. See Barnaby J. Feder, 3 Are Awarded $27.9 Million in Implant Trial, N.Y. Times, Mar. 4, 1994, at A16; $5 Million for Implant Leak, N.Y. Times, Feb. 16, 1995, at A20; $6 Million Award in Implant Suit, N.Y. Times (National), Feb. 5, 1995, § 1, at 18. Professor Coffee suggests that the size of this settlement was also affected by the rules and procedures governing the settlement process. Their key significance, he argues, was to reduce the opportunity for defendants' and plaintiffs' counsel to collude in a cheap settlement, which he views the asbestos global settlement to be (mistakenly, in my view). See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. (forthcoming 1995).

The fiscal viability of this settlement, and hence its continued existence, are far from assured. The court recently found that the volume and amount of the existing and future class claims will far exceed the $4.23 billion fund created by the settlement. Under a provision of the settlement authorizing a renegotiation of the amount and structure of the settlement under these conditions, the parties and the court are seeking to come up with additional funds for the present claimants, perhaps by reducing the funds payable to future claimants. The outcome of these negotiations will strongly affect the number of claimants who decide to opt out of the settlement, which in turn will affect the defendants' decisions about whether or not to terminate the settlement, as the settlement permits them to do under certain circumstances. See Thomas M. Burton, Implant Fund Is Too Small to Cover Claims, Wall St. J., May 2, 1995, at A3. Responding to these uncertainties and creating new ones, the major defendant in the case is seeking relief under Chapter 11 of the bankruptcy law, which would stay all breast implant litigation against the company, barring new claims and increasing pressure on the plaintiffs to accept a settlement. See Barnaby J. Feder, Dow Coming in Bankruptcy Over Lawsuits, N.Y. Times, May 16, 1995, at A1.

The Bendectin litigation constitutes another recent example of continuing plaintiff successes—in this instance, at trial—despite very weak causal evidence, adverse rulings in the appellate courts and exoneration of the product by other safety-conscious governments including Britain and France. See Peter H. Schuck, Multi-Culturalism Redux: Science, Law, and Politics, 11 Yale L. & Pol'y Rev. 1, 7-10 (1993). For other examples, see PHANTOM RISK, supra note 4, and Schuck, supra note 5.

Interview with Paul D. Rheingold, Esq., in New York, N.Y. (November 24, 1994) [hereinafter Rheingold Interview]. Rheingold, a prominent member of the mass tort plaintiffs' bar, represents breast implant litigation plaintiffs.
Important questions naturally arise out of this redescription of mass torts: If today's mass tort litigation truly differs from earlier versions, what factors produced these changes? Have these changes been for the better? How does the current mass tort regime compare with other possible approaches? The task of addressing these daunting questions is exacerbated by the difficulties inherent in constructing an empirical test of any answers that might be proposed: No sharp generational line divides yesterday's mass tort litigation from today's, and both are still too recent to afford the scholar much perspective. Accordingly, this Article offers only preliminary answers.

In developing these answers, this Article takes a view of mass torts litigation that differs from the canonical view summarized above. I call this view "institutional evolutionism." The evolutionist emphasis draws attention to, and treats in a more consistent fashion, three distinct but related features of mass torts litigation: (1) incremental system-building, (2) common-law process, and (3) selection by judges and other policymakers among competing institutional designs.

Before detailing the institutional evolutionist view, I wish to define the scope of my analysis. First, I offer it tentatively rather than tendentiously. On a spectrum of persuasiveness, I believe that the institutional evolutionist view lies somewhere between plausible and convincing; only more and better empirical research can determine its exact location.

Second, the term "evolutionist" is meant only to be suggestive, not rigorously scientific. I do not claim that biological metaphors furnish powerful explanations of complex legal phenomena. I claim only that these metaphors evoke gradual processes of conflict, change, differentiation, complexity, and selection in nature which have rough counterparts in the lives of legal systems and sub-systems. These natural processes may therefore have some modest heuristic value in illuminating the character of systems.

Third, while the institutional evolutionist view treats mass tort litigation more charitably than most previous accounts (including my

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8 See generally Judith Resnik, From "Cases" to "Litigation," 54 LAW & CONTEMP. PROBS. 5 (1991) (discussing changes in attitude and practice in mass torts from the 1960s to the 1990s). Even if such a line could be drawn, distinguishing parents from progeny is harder in litigation than in life. Agent Orange, the Ur-case of mass tort class actions, was not finally resolved until early 1994. In re "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994). Asbestos litigation—which preceded the Agent Orange class actions by nearly a decade—shows no signs of petering out, notwithstanding the pending settlement by some asbestos defendants of their future claims. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994).

own earlier work), it by no means endorses the status quo. Mass tort litigation continues to yield lower social benefits at a higher social cost than it should. In the world of mass torts, therefore, a Dr. Pangloss is unwelcome. The evolutionist perspective should encourage mass torts scholars to debate the system's character not merely on the basis of old facts and assessments but also in light of the improvements wrought by incremental system-building, common-law process, and selection among competing institutional designs.

Finally, the institutional evolutionist perspective is primarily backward-looking; it seeks to expose the merits and demerits of our current system and to explicate the choices and defaults that have shaped it; it does not support strong prescriptive claims. Nevertheless, this analysis naturally leads to a consideration of alternative ways of handling mass personal injury claims. This consideration is the subject of Part III.

This Article is organized into three parts that track the three distinct aspects of institutional evolutionism: Part I will address incremental system-building. Part II will discuss common-law process. Finally, Part III will describe selection from among competing policy approaches.

I BUILDING A SYSTEM

Imagine that it is the summer of 1969. The term "mass tort" has not yet been coined, although it has been loosely applied to airline crashes, large fires, and other single-event accidents that happen to affect numerous claimants. Congress has not yet established a compensation program for coal miners suffering from black lung (although it will do so before the year is out). Clarence Borel has not yet filed his soon-to-be paradigmatic mass tort action against the manufacturers of asbestos insulation materials. With the blessing of

11 One promising reform is the development of a market in mass tort claims. See discussion infra part III.B.
12 E.g., HENRY S. COHN & DAVID BOLLIER, THE GREAT HARTFORD CIRCUS FIRE: CREATIVE SETTLEMENT OF MASS DISASTERS (1991). As Professor Robert Rabin has noted, empirical studies of aviation litigation demonstrate that more than "massness" is required to produce the high transaction costs and other difficulties associated with the mass tort litigation problem. See Robert L. Rabin, Some Thoughts on the Efficacy of A Mass Toxics Administrative Compensation Scheme, 52 Md. L. Rev. 951, 953-54 (1993). To underscore this distinction, Professor David Rosenberg has referred to the newer phenomenon as mass exposure litigation. See generally Rosenberg, supra note 2.
14 Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1086 (5th Cir.), cert. denied, 419 U.S. 869 (1974). There were precursors, such as the MER/29 litigation, which ante-
the Food and Drug Administration (FDA), physicians routinely pre-
scribe Diethylstilbestrol (DES) to prevent miscarriages. The newly-designed Dalkon Shield is being heralded as a safe, effective contraceptive. Bendectin is still considered to be a wonder drug by the FDA and by tens of millions of women suffering from morning sickness. Silicone breast implants have been on the market for only a few years; two decades will elapse before the FDA begins to warn women about them. Although the federal government has long engaged in nuclear testing, no one seriously believes that it would knowingly expose soldiers or civilians to dangerous levels of radiation. Repetitive-strain disorders and electro-magnetic field syndromes are not even a gleam in the eye of the most resourceful and creative plaintiffs' lawyers. Cigarette manufacturers have won the first wave of litigation against them by a "knockout," causing the wave to retreat and discouraging further suits by smokers until the 1980s.

Consider further the social and technological changes that will affect the management of public health risks in the future. Industry and government will develop thousands of new chemicals, processes, and technologies. Scientific measurement technology will advance to the point at which even an undergraduate chemistry student can determine human exposures to potential toxins at levels of a few parts per trillion—levels far lower than those at which science could confidently determine actual toxicity. Public fear that these toxins cause cancer and other diseases will intensify, influencing the agendas of legislators, regulators, insurers, corporations, environmentalists, consumerists, and other political interests. In response, many new regulatory agencies will be created to tame and prevent the
torrent of newly-revealed risks, but their capacity to regulate these risks rationally and effectively will swiftly be overwhelmed. Political and legal decisions will require convincing scientific evidence that even the most sophisticated scientific techniques cannot provide and that the legal system cannot readily process.\textsuperscript{23}

A. The Emergence of a New Legal Regime

Tort litigation over occupational, environmental, and product risks burgeoned after 1969—much of it displaying features sufficiently distinctive and recurrent to constitute a discrete legal phenomenon deserving of its own moniker—the "mass tort." This litigation raised novel and complex legal, factual, and policy questions in such diverse legal subdisciplines as civil procedure, choice of law, liability doctrine, evidence, professional ethics, governmental immunity, insurance, bankruptcy, risk assessment and regulation, and court administration.

The volume of mass tort litigation grew in response to the expansion and transformation of tort liability in favor of plaintiffs—particularly in the area of products liability, where strict liability became the dominant rule.\textsuperscript{24} Courts recognized new categories of compensable harms, including some merely incipient ones.\textsuperscript{25} The level of compensatory damage awards increased, largely but not exclusively due to the rising cost of health care. Moreover, the possibility of punitive damages, seldom awarded in earlier products liability cases, became an important factor in mass tort litigation.

At both the federal and state levels, dramatic procedural and institutional innovations reshaped mass tort litigation. Individual tort actions led to the technique of bringing groups of similar cases, which in turn encouraged more extensive use of multidistrict litigation and case consolidations, certification of class actions, coordination (both formal and informal) of state and federal litigation, and negotiation of global settlements. Congress liberalized the Bankruptcy Code,\textsuperscript{26} and many large corporations sought protection in Chapter 11\textsuperscript{27} from expanded tort liabilities, among other claims. The personal injury bar

\textsuperscript{23} See Schuck, supra note 6.


\textsuperscript{25} Important examples include compensation for the fear of future injury, for medical monitoring costs, and for non-impairing conditions such as pleural plaques due to asbestos exposure. See Schuck, supra note 10, at 574.


\textsuperscript{27} In the asbestos field alone, fourteen companies had done so as of July 1991. See Schuck, supra note 10, at 555 n.56 (listing companies).
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itself underwent major changes, with the traditional slip-and-fall claimant's lawyer giving way to a highly sophisticated plaintiffs' bar supported by extensive information exchanges, collaborative techniques, and long-term financing. As the likelihood of having to satisfy enormous judgments increased, liability insurance for many important environmental risks became unavailable, unaffordable, or subject to broad coverage restrictions.

To anticipate these developments would have required a clairvoyance seldom vouchsafed to politicians—or, indeed, to anyone else.\textsuperscript{28} Having had little experience with mass exposure torts, legal policymakers probably assumed, like the rest of us, that the future would be rather like the present, only more so. This assumption of continuity, of course, proved to be stunningly false.

B. The Evolution of a Mass Tort System

Once courts began to realize that they were confronting a new, quite different phenomenon,\textsuperscript{29} they entered a period of desperate improvisation that has only recently congealed into a system. Compared with the law's traditionally glacial rate of change, some of these innovations in mass tort law occurred with lightning speed.\textsuperscript{30} Nevertheless, courts have viewed most of these innovations—including some of the most controversial ones—as incremental, not radical departures from past practices.\textsuperscript{31}

The core problem driving the evolution of mass tort litigation was uncertainty. Uncertainty typically surrounds the procedural law governing such disputes: questions of choice of law, evidence (especially evidence of general and specific causation), claims aggregation, and the number and nature of present claimants and anticipated future

\textsuperscript{28} This is not to say, of course, that there were no foreshadowing or prophetic voices. See, e.g., Samuel D. Estep, Radiation Injuries and Statistics: The Need for a New Approach to Injury Litigation, 59 Mich. L. Rev. 259 (1960) (suggesting legal reforms to facilitate resolution of anticipated litigation involving nuclear energy torts); Irving J. Selikoff et al., Asbestos Exposure and Neoplasia, 188 JAMA 22 (1964) (linking asbestos to lung cancer). A federal program to compensate black lung victims would be enacted in the last days of 1969. See infra notes 123-28 and accompanying text.

\textsuperscript{29} This dawning consciousness can be glimpsed in Judge Weinstein's assumption of the Agent Orange litigation from Judge Pratt in 1983. See \textsc{Schuck}, supra note 5, at 111-42.

\textsuperscript{30} For example, Professor Coffee dates the appearance of certified settlement class actions to 1989 (in the Dalkon Shield case), only six years ago. Coffee, supra note 6.

\textsuperscript{31} Perhaps the most controversial current example is the use of settlement class actions in "immature" tort cases such as the Ford Bronco II litigation discussed in Coffee, supra note 6, and the certification of class actions for settlement that could not have been certified for litigation, a practice that was recently rejected by a panel of the Third Circuit. \textit{In re} General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., Nos. 94-1064, 94-1194, 94-1195, 94-1198, 94-1202, 94-1203, 94-1207, 94-1208, 94-1219, 1995 WL 223209 (3d Cir. Apr. 17, 1995) [hereinafter \textit{In re GMC}]. For the distinction between mature and immature torts, see infra notes 33-36 and accompanying text.
claimants. Uncertainty also shrouds the applicable substantive law of mass torts, whether it be negligence, strict products liability, or governmental liability. Finally, various factors influencing the relief will be uncertain, in particular: the potential compensatory and punitive damages; the availability and extent of insurance coverage; and in some cases, the continuing economic viability of defendants. These multiple uncertainties increase the cost of filing and litigating claims, discourage meritorious claimants, threaten horizontal equity among victims, enlarge the discretion of judge and jury alike, and raise the deadweight costs of insurance.\textsuperscript{32}

Although these uncertainties were greatest in the early stages of mass tort litigation, they diminished over time due to the gradual "maturation" of the mass tort system through litigation and settlements, as well as the practical adaptations made by all participants in the mass tort system. Francis McGovern introduced the "maturity" concept into the mass tort lexicon in the late 1980s.\textsuperscript{33} In his terms, litigation matures after there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions. At the mature stage of mass tort litigation, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted.\textsuperscript{34} Only at this stage, McGovern contends, can a large number of similar but discrete, high-cost disputes be consolidated into groups of similar cases to facilitate settlement en masse.

His leading example of mature mass tort litigation involves asbestos. In its early years, asbestos litigation was so fragmented, chaotic, costly, and unpredictable that it resembled an unruly, erratic adolescent.\textsuperscript{35} During that period, relatively few asbestos cases went to trial,\textsuperscript{36} but those that did, coupled with the numerous settlements, created patterns that the lawyers discerned and used. Asbestos litigation crossed a kind of developmental threshold in the early 1990s; thereaf-

\textsuperscript{32} Uncertainty, of course, is the raison d'\'etre of insurance. But where the uncertainty surrounding a risk exceeds the level that can be underwritten on a sound actuarial basis, the excess constitutes a cost that the insurer bears at its peril. Howard Kunreuther et al., insurer Ambiguity and Market Failure, 7 J. Risk & Uncertainty 71, 82-83 (1993).


\textsuperscript{34} McGovern, supra note 33, at 659.


\textsuperscript{36} Galanter, supra note 33, at 390 n.30.
ter cases could be resolved more readily in a more systematic, inexpensive, predictable—and therefore equitable—fashion.

Some disagree with McGovern's advocacy of a maturity criterion as a judicial standard, but the dynamic that this criterion describes seems undeniable. A course of litigation and a pattern of settlements determines the legal consequences of individual torts; this greater determinacy in turn makes it easier to exploit aggregative procedures to refine and establish claim values. It is characteristic of mass torts that their claim values tend to be highly interdependent; establishing the value of claim A helps to determine the value of claim B. If claim values can be established within a relatively narrow range of uncertainty, the wholesale settlement of cases can proceed.

McGovern's analysis regarding the maturation of an individual mass tort can be usefully extended to mass tort litigation more generally. The array of mass torts litigated during the last twenty-five years reveals recurrent patterns of litigant behavior, judicial decisionmaking, and institutional change. Whether the tortious agent is asbestos, DES, Agent Orange, breast implants, Dalkon Shield, repetitive stress disorders, Bendectin, or heart valves, the claims are litigated and resolved in strikingly similar ways. Most of these ways are calculated to reduce uncertainty.

The propensity of a maturing mass tort system to reduce uncertainty reflects more than an unfolding, cumulating litigation process; it also reflects relentless efforts by litigants, lawyers, insurers, and judges to manage both risk and compensation in order to achieve transactional efficiency, horizontal equity, and greater predictability. These efforts can be analyzed into five elements: (1) "lawyerizing" mass tort risks; (2) improving loss- and risk-spreading arrangements; (3) adopting new modes of judicial management; (4) making claim values more predictable; and (5) negotiating global settlements. Together, these elements constitute an increasingly coherent legal regime that transcends the particularities of any single mass tort.

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37 For a strong critique of McGovern in this regard, see David Rosenberg, Comment, Of End Games and Openings in Mass Tort Cases: Lessons from A Special Master, 69 B.U. L. Rev. 695, 707-11 (1989). Rosenberg does not attack the notion that tort claims can mature over time, but instead criticizes McGovern's argument that maturity should be a prerequisite to the use of collective procedures.

38 The value of a claim equals its expected return, which is a function of the legal and factual contingencies affecting the liability and damages issues, the time and costs needed to liquidate the claim, the risk of defendants' insolvency, and so forth. But even where the liability issues remain murky and outcomes are therefore difficult to predict, the types of injury are relatively fixed; hence, if liability is established future damage awards can be more accurately predicted over time on the basis of damage awards rendered in cases already litigated in the same jurisdiction involving similar injuries.

39 Hensler & Peterson, supra note 1, at 967-68.

1. "Lawyerizing" Mass Tort Risks

Many regulatory agencies established during the 1960s and 1970s were designed to mobilize technical expertise, identify significant public health risks, and then act to reduce them. Such regulatory schemes were intended to render private tort lawyers ancillary, if not superfluous, to the regulators engaging in risk management.

Alas, as has frequently been the case in the history of the administrative state, this promise proved to be false, or at least vastly exaggerated. Environmental, occupational, and product risks are actually identified through complex processes in which many actors, endowed with different resources, responding to different incentives, and employing different methodologies, play a role. Often, these risks are first revealed by research scientists, public health and environmental organizations, specialized science and health journals, and other private groups. These risk monitors then communicate their research findings to those who are in a position to act upon this information—mass media, industry-specific newsletters, labor unions, policymakers, and services that publish and distribute this information to lawyers.

Sometimes, plaintiffs' lawyers are alerted to litigation-worthy conditions by an accumulation of workers compensation awards, consumer complaints, public health agency reports, or media coverage. This information flow triggers a "lawyerization" of risk. Defense lawyers huddle with their corporate clients to decide how to respond to this information. Meanwhile, plaintiffs' lawyers assess their options: They conduct legal and factual research, contact scientific experts, estimate transaction costs, troll for potential clients, consult with col-

41 The Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Consumer Product Safety Commission (CPSC), the National Regulatory Commission (NRC), and the Mine Safety and Health Administration (MSHA) are among the health and safety regulatory agencies established during the 1960s and 1970s. The Food and Drug Administration (FDA) was established in 1906 or so.

42 The precise role of the tort bar turned on whether the regulatory statute preempted or preserved private tort remedies. Cf. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) (holding that certain tort claims were preempted by the federal cigarette package labelling act).

43 Repetitive stress disorders and auto safety defects are examples. See Edward Felsenthal, An Epidemic or a Fad? The Debate Heats Up Over Repetitive Stress, WALL ST. J., July 14, 1994, at A1 (over 3,000 lawsuits filed; over 1200 newspaper and magazine stories reported in the last year). The causal influence of media reports and plaintiffs' lawyers activity, of course, can be mutually reinforcing. With some consumer products, the media's mention of a dangerous defect can cause reputation-minded manufacturers to act swiftly to remove the product from the market. See Hensler & Peterson, supra note 1, at 1015-16 (citing other examples).

44 See Philip J. Hilts, Cigarette Makers Debated the Risks They Denied, N.Y. TIMES, June 16, 1994, at A1. In some industries, product recalls are more feasible because detailed records of purchases and identifiable end-users exist. See, e.g., Warren E. Leary, Remedy Sought for 22,000 Heart Patients With Risky Pacemakers, N.Y. TIMES, Jan. 16, 1995, at A9 (describing voluntary recall).
leagues about possible cost-sharing arrangements, and perhaps generate additional media attention. At some point, plaintiffs' lawyers may contact potential defendants to propose informal settlements, and if the parties cannot come to terms, mass tort litigation may ensue. The plaintiffs' lawyers' powerful "investment engines" propel the process forward toward the settlement conference and perhaps even to the courthouse.\textsuperscript{45} Only seldom does formal regulatory agency action spawn mass tort litigation; in cases as diverse as asbestos, Dalkon Shield, DES, Agent Orange, auto safety, and tobacco, the enforcement agency took action only years later, if at all.\textsuperscript{46}

Despite the very large volume of mass tort claims, the number of lawyers who undertake long-term commitments to represent mass tort claimants and to litigate on their behalf is relatively small. Tort litigation has become remarkably specialized.\textsuperscript{47} The same elite group of plaintiffs' lawyers turns up on the management committees of one mass tort litigation after another. Much the same is true on the defendants' side. This "repeat player" phenomenon creates a high degree of informal coordination, continuity, and learning across different mass torts. It also causes litigators to devote much effort to building and maintaining their reputations and credibility. This further facilitates the lawyerization of mass tort risks.\textsuperscript{48}

In sum, an intricate and increasingly efficient private system generates, processes, disseminates, coordinates, and deploys most of the risk information that lawyers need to initiate mass tort litigation. Personal, organizational, and professional incentives fuel this system—a blend of material gain, professional prestige, and ideology. Contrary to the original regulation schemes fashioned in the 1960s and 1970s, government agencies tend to play a subsidiary role in this system. They may sponsor research that aids in risk identification and may gather (or passively receive) evidence that can help personal injury lawyers (and eventually regulators) establish that a significant public


\textsuperscript{46} For a discussion of some of the regulatory weaknesses that contributed to the rise of mass torts litigation, especially in the area of medical devices, see Hensler & Peterson, \textit{supra} note 1, at 1017-18; see also JERRY L. MASHAW & DAVID L. HARFST, \textit{The Struggle for Auto Safety} (1990) (documenting that the agency's standard-setting efforts were so sluggish that tort litigation and negotiated recalls became far more significant sources of pressure for enhanced auto safety).

\textsuperscript{47} See \textit{infra} notes 66-67 and accompanying text.

\textsuperscript{48} According to Professor Coffee, the diffusion of legal knowledge is rapid within the interconnected defense bar, but not within the far more fragmented plaintiffs' tort bar. Coffee, \textit{supra} note 6. This claim is doubtful given the high degree of coordination and specialization among mass tort plaintiffs' lawyers. See, \textit{e.g.}, Hensler & Peterson, \textit{supra} note 1, at 1025-26; McGovern, \textit{supra} note 45, at 1026; Glenn Collins, \textit{A Tobacco Case's Legal Buccaneers}, \textit{N.Y. Times}, Mar. 6, 1995, at D1 (reporting that a consortium of plaintiffs' lawyers involving almost 60 law firms has amassed a war chest of almost $6 million).
health risk exists. But it is the private plaintiffs' lawyers who usually do most of the heavy lifting.

2. Improved Loss- and Risk-Spreading Arrangements

Like so many other complex systems in advanced societies, mass tort litigation depends on practices and institutions that distribute risks and losses. The particular risks at issue here include the liability of those who create dangerous conditions, the losses suffered by those exposed to such conditions, and the risk of economic loss to private lawyers whose profit-driven investments make the mass tort system possible in the first place.

The current system of insurance for potential mass tort liabilities evolved out of the unprecedented, apparently unanticipated environmental liability insurance crisis that crested in the 1980s. Writing in 1988, a leading academic analyst of insurance law summarized the sources of this crisis:

The new environmental liability tests the limits of insurance in three ways. First, it has created new forms of statutory liability against which it is difficult to insure. Second, judicial strategies of interpretation have made it difficult for insurers to rely on the meaning of insurance policy language designed to avoid covering uninsurable risks. Third, the distinct threat of other, common-law expansions of liability creating additional uninsurable risks that cannot be reliably excluded by policy language renders the scope of an insurer's future obligations uncertain.

Similar developments contributed to analogous upheavals in the products liability insurance market.

Widespread concern about these conditions, heightened through intensive lobbying by the affected industries, produced swift political responses. Legislators in many states enacted tort reform measures designed to increase the availability and reduce the cost of insurance.

49 Indeed, the role of regulatory standards in the mass tort system is even more attenuated than this. Although defendants' non-compliance with a regulatory standard certainly strengthens plaintiffs' claims in court, the reverse is not necessarily true. Under prevailing tort principles, defendants' compliance with such standards is not binding upon the jury, which ordinarily is permitted to make its own assessment of the challenged conduct. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 283 (5th ed. 1984). Pending legislation would modify this rule, at least with respect to punitive damage claims challenging products whose safety has been certified by the FDA. See H.R. 917, 104th Cong., 1st Sess. § 6(d) (1995) (the "Common Sense Product Liability Reform Act").


against environmental and product-related mass tort liabilities. 52 Congress moved, albeit haltingly, 53 to improve the Superfund litigation morass. 54 Courts stemmed and then reversed many of the earlier judicial expansions of tort liability. 55 The insurance industry modified its liability policies and marketing practices to eliminate unprofitable lines, reduce moral hazard and uncertainty, and otherwise manage its underwriting risks more effectively. 56 It also established administrative mechanisms to negotiate and coordinate the resolution of its enormous coverage disputes both within the industry itself and with its corporate clients. 57 Nevertheless, some of these coverage disputes could only be resolved through satellite litigation which was very costly and complex in its own right. 58

Many corporations also took steps to spread their mass tort liability risks and losses through mechanisms other than conventional liability insurance. In the asbestos litigation, for example, some defendant corporations formed consortia to share expenses, reduce transaction costs, and present a united negotiating front with the plaintiffs' lawyers. 59 More commonly, companies such as Johns-Manville Corp. (in the asbestos litigation) and A.H. Robins Co. (in the Dalkon Shield litigation) filed for protection under the bankruptcy laws, 60 which allowed them to redistribute their past losses and future

52 There is evidence that these efforts succeeded in achieving at least some of their objectives. See, e.g., Glenn Blackmon & Richard Zeckhauser, State Tort Reform Legislation: Assessing Our Control of Risks, in Tort Law and the Public Interest: Innovation, Competition, and Consumer Welfare 272 (Peter H. Schuck ed., 1991).

53 See infra note 154.


56 See, e.g., Priest, supra note 51, at 1570-76 (describing liability insurers' movement to claims-made policies, coverage exclusions, lower policy limits, larger deductibles and coinsurance, and "retro-date" provisions); Thorn Rosenthal, Esq., Remarks at Mass Torts Seminar, Yale Law School (Apr. 21, 1994).


59 The Center for Claims Resolution, a not-for-profit organization established by a group of asbestos manufacturers to process asbestos-related claims, is an example. For a description of the Center, see Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 264 (E.D. Pa. 1994).

It must be noted, however, that such cooperation and coordination is atypical. Many mass tort cases, such as Dalkon Shield and Albuterol cases, are brought only against a single defendant. Even where there are multiple defendants, such as in the DES and breast implant litigation, conflict and finger-pointing is far more common than cooperation. See Rheingold Interview, supra note 7.

risks by reorganizing their capital structures and limiting their vulner-
ability to litigation.

These recent risk-spreading efforts have produced many of the
desired results. Mass tort liability is once again an insurable risk.61 
Although new crises may well occur, 62 the liability insurance market,
which is essential to the mass tort litigation and compensation systems,
appears to have matured into a more sustainable form.

More efficient risk-spreading and risk-reduction mechanisms for
workers and consumers exposed to mass tort risks have also been de-
vised, although the effects of these mechanisms are more indirect and
therefore more difficult to measure, than those aimed at corporate
liability risks. On the deterrence side, federal and state right-to-know
laws have increased the amount and quality of information available
to workers and consumers who are at risk of exposure to toxic sub-
stances.63 Environmental and public health standards, most of which
have been adopted since the early 1970s, should in time reduce the
incidence and severity of long-latency harm such as asbestos-related
disease and of traumatic harm such as auto-related injury.64 Finally
Medicaid, Medicare, and disability programs have expanded rapidly
during the past decade, effecting a substantial redistribution of health
care costs which constitute a major component of mass tort
damages.65

Plaintiffs' lawyers have also improved their risk-bearing capacity,
and hence their ability to act as both the gatekeepers to and the entre-
preneurs of mass tort litigation.66 In recent years, the plaintiffs' mass

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61 See, e.g., Greg Steinmetz, Insurers Discover Pollution Can Bolster Bottom Line, WALL ST. 
J., August 19, 1992, at B4 (noting the growing availability and profitability of environmen-
tal liability insurance).

62 The liability insurance industry is notoriously cyclical, although the reasons for this
volatility remain controversial. See Scott E. Harrington, Liability Insurance: Volatility in Prices
and in the Availability of Coverage, in TORT LAW AND THE PUBLIC INTEREST: INNOVATION,

63 See, e.g., Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C.

64 See Schuck, supra note 10, at 549 n.37.

65 Medicare benefit payments increased between 1980 and 1991 from $36 to $119
billion. Medicaid benefit payments increased between 1980 and 1991 from $23 to $77
billion. Statistical Abstract of the United States, 1994, Tables No. 156, 162. Disability pay-
ments are more difficult to quantify as they include federal, state, workers' compensation,
and private programs, but they too have grown rapidly. Between 1980 and 1992, for example,
Social Security disability benefit payments more than doubled to $81.1 billion. Id. at
Table No. 581.

66 The risk-bearing capacity of a plaintiffs' attorney depends on numerous factors,
including: the diversification of her litigation portfolio; access to reliable information
about the expected value of claims; access to financing; economies of scale in client develop-
ment, claims processing and litigation; and opportunities to innovate and operate flexi-
ibly in these areas. See Hensler & Peterson, supra note 1, at 1042-43.
torts bar has grown far more sophisticated, specialized, and efficient. For example, some lawyers now concentrate on particular kinds of torts, others on particular sites of bodily injury, and still others on particular types of plaintiffs and defendants. The plaintiffs' lawyers have established clearinghouses that help coordinate the exchange of legal briefs, depositions, information on expert witnesses, and other types of costly litigation resources—cooperation that partly reflects the interdependence of mass tort claims values noted earlier. The Trial Lawyers Association of America now distributes a flood of professional development materials and services. Imaginative plaintiffs' lawyers have devised new techniques for running their practices, obtaining and communicating with clients, influencing the media, administering cases, conducting discovery, managing documents, selecting juries, and financing their often protracted litigation. As a result, they have achieved a level of parity with their corporate opponents that was unimaginable as recently as twenty years ago.

3. Adopting New Modes of Judicial Management

The movement of courts toward managerial judging, spurred by mass tort litigation, has entailed some of the most far-reaching innovations in judicial history. These innovations include novel claims aggregation techniques, statistically-derived outcomes, administration of discovery, damages assessments, advanced courtroom technologies, more systematic alternative dispute resolution efforts, and co-

67 See Galanter, supra note 33, at 387 (describing information-sharing and coordination by lawyers).

68 This has produced what two commentators have recently called an "extreme risk aversion" on the part of mass tort defendants as they seek to avoid trials. Hensler & Peterson, supra note 1, at 1044. The authors go on to state that "defendants in mass tort litigation may not hold the same advantages over the plaintiff that they have in ordinary tort litigation." Id. at 1045.


70 See generally Stephen C. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 Wis. L. REV. 631 (providing a rich historical perspective on this development).


72 See, e.g., SOBOL, supra note 17, at 227-28 (describing use of this technique in the Dalkon Shield litigation).


ordinated federal-state court proceedings.\textsuperscript{75} Like the plaintiffs’ and
defendants’ lawyers, a relatively small number of judges (and their
special masters) have become repeat players, adept at routinizing the
extraordinary.\textsuperscript{76} These judges have even established professional orga-
nizations and informal consultations that actively facilitate learning
and coordination in mass tort cases.

These innovations have already generated an immense body of
commentary, both descriptive and prescriptive.\textsuperscript{77} Judicial inventive-
ness in adapting and reshaping the procedural and substantive law of
mass torts has led many scholars and some judges to question the legal
and ethical propriety of these changes, as well as their practical conse-
quences.\textsuperscript{78} Much of this commentary centers on the use of class ac-
tions in mass tort litigation, an approach that has increasingly met
with judicial approval despite the contrary views of the original Rule
23 draftsmen and the skepticism of many contemporary observers.\textsuperscript{79}

Signs of judicial, scholarly, and professional acceptance of the use of

\textsuperscript{75} See Hensler & Peterson, supra note 1, at 1054-55 (citing William W Schwarzer et al.,
\textit{Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts}, 78 VA. L.
Rev. 1689 (1992)).

\textsuperscript{76} Hensler & Peterson, supra note 1, at 964, 967.

\textsuperscript{77} In addition to the pieces included in this symposium, see Weinstein, supra note 1; Sym-
655 (1993); Symposium, \textit{Modern American Tort Law}, 26 GA. L. REV. 601 (1992); Symposium,

\textsuperscript{78} For some examples of scholarly skepticism about these innovations, see Schuck,
supra note 5; Coffee, supra note 6; Richard A. Epstein, \textit{The Consolidation of Complex Litiga-
tion: A Critical Evaluation of the ALL Proposal}, 10 J.L. & COM. 1 (1990); Richard L. Marcus,
\textit{They Can’t Do That, Can They? Tort Reform Via Rule 23}, 80 CORNELL L. REV. 858 (1995);
Resnik, supra note 69; Roger H. Transgrud, \textit{Mass Trials in Mass Tort Cases: A Dissent}, 1989
U. ILL. L. REV. 69. For some skepticism on the part of judges, see In re “Agent Orange” Prod.
Orange I); and In re “Agent Orange” Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993),
cert. denied, 114 S. Ct. 1125 (1994). Even Judge Weinstein, who initiated many of these innova-
tions, has expressed some reservations. See Weinstein, supra note 1.

\textsuperscript{79} In addition to settlement class actions, the federal courts have certified opt-out
classes in both mass disaster cases and mass toxic exposure cases. Regarding settlement
class actions, see, for example, Watson v. Shell Oil Co., 979 F.2d 1014, 1020-21 (5th Cir.
1992), reh’g granted, 990 F.2d 805 (5th Cir. 1993) (oil refinery explosion); In re Federal
Skywalk Cases, 95 F.R.D. 483 (W.D. Mo. 1982) (after vacating mandatory class); Coburn v.
4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977), \textit{mandamus denied sub nom.}. Union Light, Heat &
Power Co. v. District Court, 588 F.2d 543 (6th Cir. 1978) (Beverly Hills Supper Club fire).
But see In re EMC, supra note 31 (de-certifying settlement class action). Regarding opt-out
classes, see, for example, Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988)
(water contamination); In re Copley Pharm., Inc., “Albuterol” Prods. Liab. Litig., MLD
Docket No. 1013 (D. Wyo. Oct. 28, 1994) (albuterol); In re School Asbestos Litig., 789 F.2d
996, 1009 (3d Cir. 1986), cert. denied, 479 U.S. 852 (1986) (asbestos in schools); Jenkins v.
Raymark Indus. 782 F.2d 468, 473 (5th Cir. 1986) (asbestos); In re “Agent Orange” Prod.
Liab. Litig., 100 F.R.D. 718 (E.D.NY. 1983), \textit{mandamus denied sub nom.} In re Diamond
Shamrock Chem. Co., 725 F.2d 858 (2d Cir. 1984) (opt-out class for compensatory dam-
ages, mandatory class for punitive damages); Spitzfaden v. Dow Corning Corp., 619 So.2d
795 (La. 1993) (breast implants).
class actions in mass tort litigation can also be seen in the current proposals to revise Rule 23 which, by setting forth explicit authority to certify mass tort class actions, are likely to make it easier for judges to do so.\textsuperscript{80}

However one evaluates these changes, the important point for present purposes is that they constitute a firm, self-conscious judicial commitment to the project of systematizing and refining mass tort litigation into a distinctive genre with its own rules and practices, a project that legislatures have not disturbed.\textsuperscript{81}

4. Making Claim Values More Predictable

The importance of accurate valuation of mass tort claims cannot be overestimated; without it, the system would quickly break down under the pressure of unresolved claims. The number of individual claims currently pending and reasonably anticipated in the future is in some mass tort litigations so large that it is simply not practicable to provide individual trials in the traditional fashion.\textsuperscript{82} Even if it were practicable to try all disputes, it would be neither desirable nor necessary.\textsuperscript{83} As is well known, the cost and risks of going to trial induces settlement or other dispositions short of trial in over ninety-five percent of all civil claims, mass tort or otherwise.\textsuperscript{84} The certification of mass tort class actions, moreover, practically ensures that the litigation will be settled short of trial.\textsuperscript{85} Yet negotiated settlements are possible

\textsuperscript{80} Proposed Amendment to \textit{Fed. R. Civ. P.} 23, under consideration by the Advisory Committee on the Federal Rules of Civil Procedure (1993 draft on file with author); Telephone Interview with Professor Edward Cooper, University of Michigan Law School (Mar. 10, 1995).


\textsuperscript{82} RAND Institute for Civil Justice, Research Brief, supra note 74.


\textsuperscript{84} Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System-and Why Not?, 140 U. PA. L. REV. 1147, 1213 (1992).

\textsuperscript{85} Indeed, the strong pressure to settle that class certification exerts on defendants is sometimes considered a vice of mass tort class actions. See, e.g., In re Rhone-Poulenc Rorer Inc., No. 94-3912, 1995 U.S. App. LEXIS 5504, at *6 (7th Cir. Mar. 16, 1995). At a recent conference on class actions, none of the large group of knowledgeable participants could think of a single nationwide products liability or property damage class action that had

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only if the parties' separate estimates of a claim's expected value (net of transaction costs) converge. This convergence, in turn, will occur only if the parties can accurately predict case values.86

The mass tort system increasingly generates predictable claim values for particular torts. As noted earlier, this more mature tort system is facilitated by the development of new valuation techniques.87 Of course, even without any special mechanisms for facilitating the convergence of claims valuations, the maturing of particular mass torts would advance the maturation of other mass torts, and of the system as a whole. Individual cases proceeding through trial, verdict, and appeal in a variety of jurisdictions gradually reveal the behavior of juries and judges, clarify the applicable rules of law, and render the expected value of individual claims more predictable. More accurate information about claim values in turn encourages pre-trial settlements, which further refines and improves the quality of that information, which facilitates still more settlements, and so on. In this way, the litigator acquires an increasingly solid empirical foundation for his estimates of claim values.

But lawyers, courts, and scholars have also developed techniques for predicting claim values that are more sophisticated and systematic than the trial-and-error model outlined above. Some of these techniques are retrospective; they predict future claim values on the basis of a careful review of outcomes in past cases. One such approach employs regression analysis of claim profiles and other statistical methods to model the precise relationship that various claim characteristics bear to claim values in recent litigation and settlements. This approach enables lawyers to estimate more accurately the expected value of pending and future claims.88 The claims-processing facilities established by mass tort defendants and insurers (as in the asbestos and silicone gel breast implants litigation) and by courts administering settlement funds (as in the Agent Orange and Dalkon Shield litigation) employ some variants of this approach.89

86 See Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257 (1974); Priest & Klein, supra note 40. Inaccurate estimates could fortuitously converge, but this is hardly to be expected. On the other hand, there may be a certain class of cases in which uncertainty is so great that it facilitates, rather than impedes, settlements. See Marc Galanter & Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339 (1994); Peter H. Schuck, The Role of the Judge in Settling Complex Cases: The Agent Orange Example, 53 U. CHI. L. REV. 337, 346 (1986).
87 See supra notes 33-38 and accompanying text.
88 See, e.g., Bone, supra note 71; Robinson & Abraham, supra note 2.
Prospective methods have also been developed. Courts sometimes stage non-binding "mini-trials," relying on the hypothetical verdict to induce settlements short of a full trial. Other courts identify "representative" plaintiffs, who are thought to typify larger claimant populations. The claims of these representatives then proceed to full trials, and the outcomes establish patterns that can encourage settlements or (if settlement fails) damages assessments with respect to the claims of the remaining claimants. Another prospective method is statistical or sampling adjudication. Here, the court aggregates a large population of cases, selects a random sample, adjudicates each sample case, and then statistically combines the sample outcomes to yield results for all cases in the population. In contrast to the "representative plaintiff" approach, in which each claimant retains the right to go to trial on his individual claim, the sampling approach requires each claimant in the larger population to accept an average award rather than one that is tailored to the circumstances of his individual claim.

Furthermore, experience gained and techniques developed in the context of a particular mass tort can be used by practitioners specializing in other mass torts, or applied to new species of mass tort as they arise. Information about the value of a Dalkon Shield claim may not be fully transferrable to, say, a breast implant claim, but the information may nevertheless have some utility to breast implant litigators in their efforts to narrow their zones of uncertainty.

5. Negotiating Global Settlements

"Global" settlements of mass tort claims represent the culmination of the system's maturation. Only at the high levels of aggrega-
tion, coordination, risk distribution, and legal and factual determinacy, which typify a highly mature system, can global settlements of the kind that have recently been fashioned in mass tort cases become practicable. Even then, global settlements are intricate and extremely difficult to negotiate, and those settlements that are reached are not truly global.\textsuperscript{95}

The elusiveness and incompleteness of these settlements, however, should not obscure an extremely important fact: A much higher percentage of tort victims file claims and receive some payment under these mass tort settlements than would sue and recover in tort.\textsuperscript{96} The vice of this virtue, however—and it is a great vice indeed—is that mass tort actions attract, and mass tort settlements encourage and pay, a large number of claims that are insubstantial—or, in the words of one experienced plaintiffs' lawyer, "junk."\textsuperscript{97} Moreover, these junk claimants may obtain substantial recoveries under the global settlements.\textsuperscript{98} Still, the relatively high percentage of genuine victims who will recover something under global settlements must be counted as a weighty advantage.

\textsuperscript{94} For a discussion of some of the impediments, see Hensler & Peterson, \textit{supra} note 1, at 1050-52; text accompanying infra note 116.

\textsuperscript{95} For a variety of reasons, a global settlement will probably not resolve literally all claims. In the Agent Orange litigation, for example, several hundred claimants opted out of the class action and therefore could not participate in the class action settlement. It is noteworthy, however, that Judge Weinstein did his best to extend the benefits of the settlement to those claimants who opted out of the class. See Schuck, \textit{supra} note 5, at 226. In the asbestos litigation, the now-pending class action settlement covers only future claims, not present ones, and the number of claimants who will opt out remains to be seen. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 298 (E.D. Pa. 1994). In the silicone gel breast implant litigation, the pending settlement covers both present and future claims against the participating defendants, but does not cover claims against defendants who declined to join the settlement. \textit{In re Silicone Gel Breast Implant Prods. Liab. Litig.}, No. CV 92-P-10000-S, Civil Action No. CV 94-P-11558-S, 1994 U.S. Dist. LEXIS 12521, at *78-86 (N.D. Ala. 1994). Again, many claimants will opt out, if only because the funds will probably be insufficient to cover all claims. See Feder, \textit{supra} note 6; \$5 Million for Implant Leak, N.Y. Times, Feb. 16, 1995, at A20; \$6 Million Award in Implant Suit, N.Y. Times (National), Feb. 5, 1995, § 1, at 18. In the Dalkon Shield litigation, the plan of reorganization confirmed by the bankruptcy court did not cover claims brought against the company's insurers. Sobol, \textit{supra} note 17, at 209-24.

\textsuperscript{96} See, e.g., Hensler & Peterson, \textit{supra} note 1, at 1019 (summarizing earlier RAND study of filing behavior in tort system); Paul C. Weiler et al., \textit{A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation} 73 (1993) (according to a study of New York hospitals, one in 50 negligent injuries yields a malpractice claim).

\textsuperscript{97} According to Rheingold, 90% of the claims are "junk." Rheingold Interview, \textit{supra} note 7; see also McGovern, \textit{supra} note 45 at 1023-24.

\textsuperscript{98} Note that the lowest scheduled award under the breast implant settlement is \$140,000. This amount may be reduced, however, if the number and amount of the claims is large enough to deplete the fund, which appears to be the case, \textit{supra} note 6. \textit{See Schedule of Benefits, Breast Implant Litigation Settlement Notice} 6 (Sept. 16, 1994) (on file with author).
Global settlements can also resolve a variety of complex administrative and policy issues. These agreements establish detailed ground rules to govern the necessary long-term relationship between bitter adversaries, under changing and unpredictable conditions. These rules cover such diverse issues as exposure criteria, medical criteria, claims administration, atypical or extraordinary claims, all aspects of compensation, funding guarantees, opt-outs, case flows, notice, counsel fees, administrative cost, informal dispute resolution, limits on judicial review, and termination of the agreement. In the absence of global settlements, these thorny issues would have to be resolved by further litigation and by courts lacking good information and relevant expertise.

Global settlements provide strong evidence that contemporary mass tort litigation has evolved into a far more coherent and efficient system than its predecessors. All global settlements tend to follow the same general pattern. Imitation being the sincerest form of flattery, this suggests that mass tort litigation has engendered a relatively successful mechanism of dispute resolution. Experiences of litigators, courts, and claims facilities in negotiating and administering global settlements are being accumulated and integrated into patterned, recurrent, and increasingly predictable forms. As a result, new settlements are likely to employ variations on now-familiar themes.

Precisely for this reason, the question of whether these global settlements are fair and reasonable within the meaning of Rule 23(e) assumes crucial importance. In its present form, the Rule supplies judges with no explicit evaluative criteria for making this determination. Courts that have considered this issue focus on the specific terms of the settlement, comparing the treatment of claimants under the settlement against the likely disposition of their claims at trial. In almost all cases, the courts have found the settlements unambiguously fair. These judicial affirmations, however, have not satisfied all doubters; the skeptics tend to focus on the specific terms of particular settlements, the potential for collusion between class counsel and defendants, and the risk of unwarranted preclusion of future claims.
In this Article, I do not assess the fairness of any particular settlement; that task falls to those who have reviewed in detail all of the relevant evidence bearing on this issue. Instead, I suggest two structural criteria that can help frame and inform any fairness analysis: (1) the maturity of the tort, and (2) the conditions of claimant choice among the competing compensation systems—the tort system and settlement—particularly the quality of information about claim values.

C. Assessing the Fairness of Global Settlements in Mass Tort Actions

1. Maturity of Claims

The fairness of a mass tort settlement is much easier to assess when a large volume and wide variety of claims have been litigated, adjudicated, and settled by numerous lawyers, judges, and juries. In contrast to an embryonic tort, a mature tort has generated a supply of data which, applying the methods described above, can be used to produce unbiased estimates of claim values. The judge in a mass tort action can use these estimates to compare the value that a claim would have if litigated through the tort system to its prospective value under the settlement (applying appropriate discounts to reflect differences in speed and certainty of recovery, the amount of legal fees, the level of other transaction costs, and so forth). Furthermore, this data assists the judge to make the irreducibly subjective judgments about how to balance the values that each of the competing systems embodies and that a fairness determination requires. Other things being equal, the more mature the tort, the more confident the judge can be that all of the prerequisites for class certification under Rule 23 have been met, that the negotiations were conducted at arm's length and free of actual or potential conflicts of interest, and that the actual settlement terms negotiated by the lawyers are fair.

2. Claimants' Choice Between the Tort System and the Settlement

In some cases, mass tort claims may be maintained as a class action only if the court certifies a mandatory class. Ordinarily, however, fairness will require that claimants be permitted to protect their individual interests by making a meaningful choice either to remain in the class or to opt out and proceed individually in the tort system. Indeed, all recent global settlements have provided claimants with at least two opt-out opportunities. For example, the Georgine settlement that resolves future asbestos-related claims first permits a claimant to an adequate price." John Frank, Remarks at Research Conference on Class Actions, supra note 85.

See Fed. R. Civ. P. 23(b)(1), (c)(3).
opt out after the class notice is published, and then (under certain conditions) renews the opportunity after the claims facility has made a specific settlement offer. The silicone gel breast implant settlement, which provides a more determinate schedule of awards at the outset, also provides multiple opt-out opportunities. Current claimants may opt out either at the front end, or subsequently in the event that the settlement fund becomes inadequate to cover all claims (a "ratchet-down" opt-out). Ongoing and future claimants may likewise opt out if and when their benefits are ratcheted down. Defendants in these settlements also insist on multiple opt-out rights, which usually depend on the number of claimants who decide to opt out.

The addition of intermediate and back-end opt-out opportunities constitutes a highly desirable and important innovation for the emergent mass tort system despite the increased uncertainty that these opportunities create in the short term. Indeed, the fairness of a settlement under Rule 23(e) may require that such opportunities be extended to claimants. First, they institutionalize and enlarge the central value of claimant autonomy. Second, they permit a dynamic and superior balance to be struck between the competing interests in aggregating and individualizing claims. Each claimant can then choose, from among the alternatives the settlement makes available, the particular mix of collective and individual claiming that best serves her wishes. Third, opt-out provisions furnish a kind of market test of a settlement's fairness and adequacy, particularly of the specific compensation offers that will be made under settlement.

Suppose that a large number of claimants, counseled by their lawyers, conclude that the settlement offers they have received are too low relative to the tort system baseline and therefore decide to opt out. Assuming that these claimants were well-informed, their decisions would constitute the best available (but not necessarily the only) evidence of the settlement's overall inadequacy relative to that baseline. By the same token, of course, if relatively few claimants decided

104 Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 336 (E.D. Pa. 1994). Access to the back-end opt out is subject to some important restrictions. See id. at 281. This is discussed just below.


106 Id. In addition, the settlement provides an opt-out right for the children of class members and two opt-out rights (including a "ratchet down" provision) for foreign claimants. See Breast Implant Litigation Settlement Notice, supra note 85, §§ 18, 20, 22-24 (on file with author).

107 See discussion supra note 6.

108 The market-test justification for back-end opt-outs was suggested to me by Professor David Rosenberg in a personal conversation sometime in 1993.

109 If the number of opt-outs turns out to be large enough, the defendants may have a right under the settlement agreement to terminate it.
to opt out, their decisions would constitute equally strong evidence of the settlement's overall fairness and adequacy relative to the baseline. The number of opt-outs needed to discredit the fairness of a settlement presents a genuinely difficult question. Moreover, adverse selection within the opt-out process may also occur; claimants with the strongest claims may elect to opt out while those with weaker claims may decide to remain in the class and get paid under the settlement. This may cause the settlement to unravel as defendants find themselves increasingly disadvantaged by it and thus decide to opt out themselves, as they may have reserved a right to do under the settlement agreement. Fortunately, however, the system need not concern itself overmuch with these uncertainties. Assuming that the notice and information were adequate, the parties, counseled by their lawyers, can resolve these issues for themselves.

Because opt-out provisions contribute to fairness and meaningful choice only if claimants are sufficiently well-informed at the time they must decide whether or not to join the class, front-end opt-out provisions, standing alone, may not be enough to warrant a judicial determination that a settlement is fair. Rather, the sufficiency of a front-end opt-out should depend in large part on the maturity or immaturity of the mass tort in question. In all opt-out class actions, Rule 23 requires that claimants receive at the front end adequate notice of the implications of joining the class or not. In cases in which the tort is immature, however, little discovery, adjudication, and settlement of similar claims will have occurred; consequently, little useful information about claim values and other factors, such as the quality of class counsel and potential conflicts within the class, may be available to claimants at the front end. Indeed, the claimant in this situation is trapped in a kind of Catch-22: In order to inform his decision about whether or not to remain in the class, he must remain in the class and see how the information that will subsequently be produced in discovery appears to affect the value of his claim. Should discovery reveal that the claimant's best strategy would have been to proceed alone, however, it will be too late for him to do so if the only opportunity to opt out came at the front end.

Indeed, just counting the number of genuine opt-outs can be a controversial matter, as evidenced by the pending dispute over this question in the Georgine litigation. See Georgine v. Amchem Prods., Inc., No. CIV.A. 93-0215, 1994 WL 590611 (E.D. Pa. Oct. 21, 1994) (presenting findings of fact and conclusions of law in support of issuance of preliminary injunction).

For an explanation of adverse selection in the insurance context, see Kenneth Abraham, Insurance Law and Regulation: Cases and Materials 3-4 (1990).

Under Rule 23(e), of course, the court must make a threshold determination of fairness, but this precedes the opt-out decisions by parties to the settlement.

This Catch-22 merely reflects the more general fact that information is both costly to acquire and difficult to value until it is in fact acquired. The dilemma is therefore not
The informational void can be even more prejudicial to uninformed claimants in three increasingly common situations. First, an immature tort may produce a “settlement class action,” in which the action is simultaneously filed and settled. (This is to be distinguished from a settlement in a conventional class action.) Here, the claimants’ information about claim values may be inadequate even at the back end (which Rule 23 does not expressly address), for there will be little or no tort system experience against which claimants can compare their specific settlement offers.

Second, the class may contain future claimants who have been exposed but are not yet injured (as with many asbestos claimants) or have not yet been exposed but may be exposed in the future (as with recipients of heart valves and breast implants that have not yet malfunctioned). Here, claimants may not even know that they have a claim, let alone its value, until after a settlement is concluded. As many commentators have noted, future claims class actions raise many vexing problems of effective notice, adequate representation, litigation management, actual or potential conflicts of interest, legal ethics, and claims administration.\(^{114}\) I discuss future claims further in Part III.

Third, the information about the number of present and future claims, the value of those claims, and the rate at which they will be filed may be so limited that even those settlements that are reached and approved by the court may ultimately unravel, as may turn out to be the case with the breast implant litigation.\(^{115}\) This situation may well leave claimants worse off, as a great deal of time will have elapsed without progress toward the resolution of their claims.

A very different situation arises, however, when a mature tort leads to a settlement. The asbestos litigation that culminated in Geor-gine is perhaps the best example. Here, a properly advised asbestos claimant can draw on a twenty-five-year history of jury awards and settlements in a wide variety of litigation contexts before deciding at the front end whether or not to remain in the class and, if so, whether to accept a particular settlement offer at the back end. Moreover, as noted above, the judge will be able to draw on this experience in determining whether to certify a class and whether to approve a settlement under Rule 23.\(^{116}\)

\(^{114}\) See Hensler & Peterson, supra note 1, at 1045-48; Coffee, supra note 6.

\(^{115}\) See discussion supra note 6.

\(^{116}\) See supra part I.C.1 and 2.
Accordingly, judges confronted with a Rule 23 fairness determination should require that the settlement contain a back-end opt-out right whenever claimants cannot reasonably predict at the front end the specific settlement offers that they will eventually receive at the back end. This condition will usually exist in a settlement or a settlement class action involving an immature tort and will arise in any future claims class action, whether brought before or at the time of settlement.

Assessing the fairness of the particular conditions that a settlement may place on the claimant’s exercise of a back-end opt-out right presents further difficulties. From the claimants’ perspective, some conditions may clearly be objectionable. Certain conditions may prevent some claimants from exercising the back-end opt-out right immediately or perhaps at all; other claimants may find their rights truncated under the settlement if they choose to return to the tort system. The Georgine settlement, for example, places an annual cap on the number of claimants with qualifying asbestos-related medical claims who can return to the tort system or elect binding arbitration, and it bars those who decide to proceed in the tort system from seeking either punitive damages or damages for mere exposure without impairment. In addition, claimants may not know whether these conditions will actually affect them until well after the settlement is in effect, when it will be too late to object. Yet, a settlement may be unattainable unless defendants can impose such conditions on back-end opt outs and can also reserve their own opt-out right under certain circumstances. Defendants’ need for certainty about their future obligations and cash flows may impel them to reject any settlement that fails to protect these interests.

It is doubtful that courts can deduce general principles to guide them in reviewing the fairness of the conditions placed on back-end opt-out rights. The probable consequences, and hence the fairness of each condition, are likely to be tailored to each settlement—and as always, both God and the Devil are in the details. The settlement terms may subject defendants, and not just claimants, to disadvantages if a claimant decides to return to the tort system. Under the Georgine settlement, for example, defendants may not raise noncausal defenses

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117 In a settlement class action, for example, “front end” will usually refer to the time that the settlement is approved.

118 Note that not all settlements condition back-end opt outs. Pfizer did not insist on limiting them in the Shiley heart valve settlement, which involved a much smaller number of claims. See Hensler & Peterson, supra note 1, at 988-92.

in such a case. These back-end opt-out provisions will embody a variety of tradeoffs, the consequences and fairness of which must be weighed and balanced.

My emphasis here in opt-out rights as indicia of a settlement's fairness should not obscure the larger context in which fairness must be assessed. An opt-out right, of course, is only one element of a complex settlement in which numerous other elements also implicate fairness concerns. It is the settlement as a whole that must be fair, not any particular provision. Finally, the judge must also consider the risk that an entire settlement otherwise conforming to the Rule 23 fairness standard might collapse if she rejects a carefully negotiated opt-out provision—perhaps throwing the parties back into the tort system from which they hoped, perhaps with good reason, to escape.

II
Common-Law Process

The changes to the mass tort system described in the preceding Part were fashioned largely through a process of common-law decisionmaking. Common-law adjudication is a distinctive lawmaking process, with powerful normative claims grounded in the common law's faithful reification of certain ideals, forms, and symbols cherished by American legal-political culture. In this Part, I argue that understanding the common-law character of the mass tort system's development is at least as important to evaluating its performance as is understanding the system's procedural and substantive content.

Before exploring the consequences of the common-law development of mass tort litigation, three categories of statutory intervention into the mass torts area should be mentioned. First, Congress and some state legislatures have enacted occupational and environmental regulation measures, right-to-know statutes, special statutes of limitations, and other laws designed to prevent mass toxic harms and facilitate victims' recoveries. Second, Congress has established administrative compensation programs directed at certain mass toxic

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120 Id. at part X.C.S.
121 The common law of mass torts has borrowed extensively from equity jurisprudence, which empowers courts to exercise broad discretion in tailoring old doctrines, procedures, and remedies for application to the new, perplexing problems posed by mass torts. See Weinstein, supra note 1, at 123-62; Jack B. Weinstein & Eileen B. Hershenov, The Effect of Equity on Mass Tort Law, 1991 U. Ill. L. Rev. 269. When I refer to the "common law" of mass torts, then, I simply refer to that body of applicable legal doctrines and procedures initiated and then elaborated by the courts largely through incremental (some would say ad hoc), case-by-case adjudication without the guidance of any comprehensive framework or vision.
122 Again, the distinctiveness of this American approach should be noted. Fleming, supra note 81.
injuries, most notably the black lung benefits program. The cost and performance of the black lung program, however, have received harsh and sustained criticism from many quarters. Indeed, for critics of the mass tort system who advocate federal compensation statutes as a solution, the black lung program’s record has become the ultimate conversation-stopper. Third, as we have already seen, many states adopted “tort reform” statutes in the 1980s and although most were targeted primarily at medical malpractice litigation, some of the statutes inevitably affected mass tort cases as well. Still, no jurisdiction has even come close to establishing a comprehensive statutory regime to govern the litigation or compensation of mass tort claims.

Like the discovery by the Molière character that he had been speaking prose all his life, the fact that virtually all mass tort law is judge-made seems embarrassingly obvious—once attention is called to it. Even so, it is a striking fact, one that cries out for explanation. The public and private interests involved in mass tort litigation are enormous. Moreover, almost all commentators view the current litigation approach as a costly, tragic, social policy failure. Why, then, have politicians allowed judges to fashion this high visibility, high stakes legal regime without any meaningful political direction, let alone a comprehensive statutory or regulatory framework?


I do not discuss state workers compensation statutes in this context because they were designed primarily to address traumatic workplace accidents, not chronic occupational diseases.

124 The black lung program’s arbitrary, unscientific use of presumptions vastly increased the compensation paid. This approach was “the epitome of political manipulation of the pork barrel process under the guise of operating a workers’ compensation scheme,” according to the most exhaustive study of the program to date. Peter Barth, The Tragedy of Black Lung 128 (1987). Kenneth Feinberg, perhaps the leading expert on the politics and administration of mass tort compensation programs, notes that Congress has taken one lesson away from its experience with the black lung program: “Don’t do it again.” Telephone interview with Kenneth Feinberg, Esq., cited in Edward B. Zukoski, The Evolution of the Black Lung Compensation Program and Its Consequences for Mass Torts, at 86 (1992) (unpublished manuscript on file with author).

125 See supra note 52 and accompanying text.

126 Examples include changes in rules governing punitive damages, collateral sources, and joint-and-several liability. Congress is almost certain to enact national caps on punitive damage awards in product liability cases, which includes most mass torts. See Neil A. Lewis, Senate Agrees On Bill to Cut Civil-Court Damage Awards, N.Y. TIMES, May 10, 1995, at Al.

127 If enacted, certain provisions in the tort reform sections of the civil liability legislation now pending in Congress would affect the mass tort litigation. In addition to the punitive damages cap referred to in note 126, these provisions include the FDA safe harbor

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lung program) we had foreseen the development of a mass torts crisis that defied resolution by even the most imaginative and resourceful courts, would we have also predicted that no comprehensive remedial legislation would have even been considered during the next twenty-five years?

A. Possible Causes of Legislative Inaction

In seeking to account for this legislative inaction, we can quickly dispose of two relatively straightforward explanations. The first possible explanation is that cautious politicians simply refuse to confront so controversial an issue as mass torts policy, involving as it does powerful political interests, enormous sums of money, serious human suffering, conflicting values, and so forth, especially after the black lung program fiasco. But this ignores the fact that, like it or not, politicians simply cannot avoid addressing controversial issues indefinitely: Given sufficient public outcry, they must respond one way or another. Mass tort law, moreover, evokes far less controversy and political division than such explosive issues as abortion, taxation, affirmative action, gun control, and health care reform—issues on which legislators routinely must take public positions, even at their political peril. Finally, this argument fails to recognize the eagerness with which many politicians position themselves on some of the most controversial issues, including those just mentioned and indeed on tort reform itself. A second explanation—that legislative inaction bespeaks satisfaction with the mass tort system—seems clearly false. Virtually all politicians (and judges) who comment on the mass torts system perceive a crisis and assert that there are better ways to handle mass tort claims; these critics typically suggest that an administrative compensation scheme would be better.

Public choice theory suggests a somewhat more plausible explanation. Perhaps legislators cannot, or do not wish to, assemble a successful coalition in favor of any statutory change. Several factors might support legislative inaction. First, expanding mass tort liability may be highly advantageous to a forum state’s citizens (and politicians and judges) in that the plaintiffs tend to be state residents while the defendants tend to be foreign corporations; hence, the benefits of broad liability will inure to the forum state while the costs will largely

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provision discussed supra note 49, and a provision concerning the standard for admitting scientific evidence.

128 In an earlier article, I subscribed to this theory—too readily, I now think. See Schuck, supra note 10, at 552.

129 For a summary and critique of these views, see Siliciano, supra note 2.

be borne by out-of-staters. Second, powerful interest groups may prefer the status quo. This would be true, for example, if the beneficiaries of the current system were highly organized, with few conflicting interests and large per capita stakes in the outcome. These conditions might, in fact, seem to hold, because plaintiffs' natural allies—the plaintiffs' bar, some "public interest" groups, and many labor unions—which ardently oppose any systemic change in mass tort law, are highly effective lobbyists and shapers of public opinion. Potential mass tort claimants, on the other hand, are difficult to organize politically because they may be unaware that they have been exposed or that they may have valuable tort claims now or in the future. Even claimants with existing claims will experience such difficulties because they constitute a large and diverse group. Their conflicting interests (they differ, for example, in the nature of their exposures, in the strength of their claims, and the quality of their lawyers), and their incentives to free ride on others' organizational efforts would also impede their ability to form a broad reform coalition.

It is true, of course, that mass tort defendants and their insurers strongly advocate some changes. Indeed, they have succeeded in securing state-level tort reform legislation reducing their liability risks, and although they have failed for almost two decades to win broad protection at the federal level, they might finally succeed. Not all mass tort defendants, however, support the same changes.

131 For a refreshingly candid defense of this strategy by a state judge, see RICHARD NEELLY, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 1-4 (1988). In such a situation, defendants may seek and obtain a federal statutory solution, a dynamic that contributed to the enactment of the Clean Air Act of 1970. See Bruce Ackerman et al., Toward a Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J. L. ECON. & ORGANIZATION 813 (1985). It also helps to explain industry's current efforts to federalize products liability law. See, e.g., Schuck, supra note 55.


133 As Judge Reed noted in his fairness opinion, however, the AFL-CIO supported the settlement plan in Georgine. See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 325 (E.D. Pa. 1994).

134 The word "systemic" is meant to recognize that the plaintiffs' bar has supported some statutory modifications of the common law, such as extensions of the limitations period to revive barred mass tort claims. It also strongly supports modifying the common law to make it easier for smokers (and states paying for smoking-related costs) to prevail in court. See Richard Daynard, Smoking Out the Enemy: New Developments in Tobacco Litigation, TRIAL MAG., Nov. 1993, at 16. In general, however, the plaintiffs' bar has viewed most statutory reform proposals as a threat to its interests (and those of its clients).

135 See OLSON, supra note 132.

136 See supra note 52 and accompanying text.

137 The 104th Congress seems likely to enact at least some changes. See supra notes 49, 126-27.
Some, like the powerful tobacco industry, have found the common-law status quo quite congenial.\(^\text{138}\)

A convincing public choice analysis would, of course, require a more refined distinction among and consideration of particular group interests.\(^\text{139}\) Moreover, such an analysis would also have to consider the role of groups such as judges\(^\text{140}\) and investors and the political force of ideology as well as that of economic interests.\(^\text{141}\) But enough has already been said to suggest that public choice analysis is complex and points in a number of different directions; it yields no unambiguous explanation of why politicians have allowed the judiciary to initiate, develop, and refine its own mass torts jurisprudence despite widespread public and professional condemnation of the results.

Finally, a legal process or “public interest” explanation is also worth considering.\(^\text{142}\) Perhaps legislators have left mass tort lawmaking to the courts because they believe that, all things considered, the courts can do it better. Although many politicians perceive a mass tort “crisis,” they might nevertheless conclude that the scientific, legal, economic, political, and social conditions relevant to mass injuries are too complex and fluid to permit an adequate legislative response—a conclusion that the experience with the federal black lung program might well support.\(^\text{143}\) In this view, legislators might leave resolution

\(^{138}\) See Schwartz, supra note 22. This could change, however, if plaintiffs can substantiate claims left open by Cipollone v. Liggett Group Inc., 112 S. Ct. 2608 (1992) (e.g., fraud), or if new groups of plaintiffs less subject to defenses, such as infants, bring suit against the tobacco companies. See also Charles C. Correll, Jr., The Tobacco Industry's Liability for Prenatal and Infant Injuries (October 1994) (unpublished manuscript on file with author). Indeed, several states have already done so. See, e.g., Milo Geyelin, Tobacco Companies Are Set Back By Actions in Florida, Mississippi, WALL ST. J., Feb. 22, 1995, at B4. The recent certification of a class action against the companies may also weaken the defendants' commitment to the status quo. See Glenn Collins, Judge Opens Way for Class Action Against Tobacco, N.Y. TIMES, Feb. 18, 1995, at 1 (Castano litigation in federal district court in Louisiana).

\(^{139}\) Most product manufacturers, for example, presumably favor retaining some common-law products liability as a means of fostering consumer confidence in their products which might be reduced if consumers could rely only on contract law and reputation to enforce desired safety levels. The same is probably true of products liability insurers that sell such coverage.

\(^{140}\) Some commentators suggest that the judicial commitment to settlement class actions and other controversial changes in the mass tort system reflects their obsession with reducing their burgeoning caseloads rather than more disinterested motives. See, e.g., Coffee, supra note 6; Marcus, supra note 78.

\(^{141}\) Public choice theory has difficulty taking account of non-economic values. See Donald P. Green & Ian Shapiro, Pathologies of Rational Choice Theory: A Critique of Applications in Political Science (1994). The role of ideology in the mass tort system is briefly discussed infra part III.


\(^{143}\) See supra notes 128-28 and accompanying text.
of systemic problems to the courts, the plaintiffs’ bar, and corporate defendants, with the expectation that these powerful, well-informed, roughly balanced interests will develop workable solutions on their own as needed—always subject, of course, to the possibility of legislative fine-tuning. As we shall see in the next subpart there are often good reasons for legislators to pursue this strategy—at least to a point—in the area of mass torts.

B. The Pros and Cons of Common Law Policy-Making

Whatever the reasons for legislative inaction during the first twenty-five years of mass tort litigation, the system remains almost entirely a regime governed by common law, developing and implementing policy in the common law’s distinctive modalities.\textsuperscript{144} Common-law policymaking, however, can be problematic for several reasons.\textsuperscript{145}

1. \textit{Technocratic and Instrumental Considerations}

First, if political accountability for policymaking is desirable, adjudication may represent a poor vehicle for accomplishing it. The judiciary, which dominates the process, is relatively insulated from the kind of refined public opinion to which legislators and agency policymakers are subject. Moreover, the narrow focus of adjudication tends to diminish the likelihood of political mobilization in response to imprudent or unjust policy decisions. The character and outcome of adjudication is also influenced to a considerable extent by lawyers, who are institutionally and ethically responsible to their clients, not to the general public.

Second, adjudication constitutes a radically decentralized, poorly informed decisionmaking process, which reduces the policy coherence and general applicability of judge-made law. Because tort adjudication tends to be very fact-specific, stare decisis and appellate review are particularly weak coordinating mechanisms in the tort context.\textsuperscript{146}

\textsuperscript{144} Indeed, in the traditional view, tort law should not be seen as a policy instrument at all, but rather as an instrument of private law understood as corrective justice. See Richard A. Epstein, \textit{A Theory of Strict Liability}, 2 J. LEGAL STUD. 151 (1973); Ernest J. Weinrib, \textit{Corrective Justice}, 77 IOWA L. REV. 403 (1992). Yet, even if one generally views tort law in general as private law, it does not necessarily follow may not follow that one should also view mass tort law in the same way. See Rosenberg, \textit{supra} note 2. Certainly, the courts have treated mass tort law as a public law problem, even while speaking the language of corrective justice. See, e.g., Lester Brickman, \textit{The Asbestos Litigation Crisis: Is There A Need for an Administrative Alternative?}, 13 CARDOZO L. REV. 1819 (1992).


\textsuperscript{146} See Yeazell, \textit{supra} note 70, for a discussion of the limits of appellate review. This point applies a fortiori to mass tort litigation, where the trial judge’s managerial impera-
Furthermore, rules of evidence limit the kind of policy-relevant information to which judges have access. Adjudication also has a selection bias against the most typical, generalizable behavioral patterns with which policymakers should be primarily concerned.

Third, the institutional competence of the judiciary limits the range of issues that it can address effectively. Common-law judges are generalists, seeing relatively few cases dealing with any given subject and having little control over their issue agendas. In seeking to influence behavior and implement their decisions, common-law judges in mass tort cases can use only the most limited tools: formal rules and money damages. Other deeply embedded common-law tort structures militate against sound, systematic policymaking. These include a vestigial moralism that over a century of functional critiques have failed to displace entirely a glacial accumulation of precedents, a weak and attenuated feedback loop, and a retrospective view transfixed (and perhaps distorted) by the plaintiff's palpable human suffering.147 This is especially true in the mass torts context, in which the court must confront many complex public policy issues.

But if common-law policymaking is problematic in several important respects, it also exhibits some characteristic strengths, which are often the flip-side of its defects. The same geographical, institutional, and analytical decentralization that hobbles systematic policymaking in tort adjudication also stimulates innovation, especially in mass tort cases:148 Unbound by bad precedent in one jurisdiction, mass tort judges and lawyers in other jurisdictions are free to eschew past errors and undertake novel approaches to knotty problems. The small and elite cadre of mass tort lawyers, animated by a contingency fee system unavailable in the legal system of any other nation,149 has particularly strong incentives to respond quickly, resourcefully, and effectively to any inefficiencies or inequalities resulting from misguided innovations, and to propose remedial changes. These incentives of the bench and bar have driven the evolution of mass tort law, producing many striking instances of both procedural and substantive innovations: market share and proportional liability, various forms of statistical adjudication, medical monitoring damages, personal injury and settlement class actions, compensation schedules, joint federal-state court proceedings, novel uses of adjunct court personnel, and a variety of organizational techniques. Centralized, statutory systems proba-

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147 See Schuck, supra note 145, at 15-16.
148 I speculate that some judges in mass tort cases, such as Jack Weinstein, Robert Parker, and Thomas Lambros, sometimes compete to be the most innovative.
149 See Fleming, supra note 81, at 520, 527.
bly would not—and in civil law countries have not—adopted such innovations as quickly, or in some cases at all. The common-law system, however, facilitated not only their creation but also the refinements and new applications that followed. Of course, incremental changes—both good and bad—cumulate almost imperceptibly over time into what amounts to a qualitatively different system. When this occurs, legislative deliberation and negotiation—generally more comprehensive and responsive policymaking processes than common-law adjudication—may reveal systemic problems that adjudication has failed to resolve wisely and that therefore need to be addressed in non-adjudicatory ways.

My point, then, is certainly not to deny a role for legislative regulation or refinement of legal regimes in general or of mass torts law in particular. It is simply to note that the common law of mass torts is likely to be, as a practical matter, more flexible and responsive to contextualized litigation experience than is a statutory solution, which legislatures will revisit only occasionally, often reluctantly, and usually

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150 See Fleming, supra note 81.
151 While many judicially devised mass tort innovations have succeeded, many others have not. Market share liability is an interesting example of the double-edged quality of judicial innovations in mass tort actions. In principle, it is an ingenious, elegant, logically consistent solution to an intractable problem of proof. In practice, however, litigants and courts have found it extremely difficult to implement. In the New York DES litigation, for example, several years and much expense were required to design an acceptable national market share matrix, even though the parties had the advantage of being able to draw on earlier negotiations and settlement patterns in the California DES litigation. In the end, over 99% of the New York claims were settled before the New York matrix was even sufficiently developed to influence the settlement negotiations. Rheingold Interview, supra note 7.
152 One example involves the importance of enabling class members to acquire better information about claims values in immature and future claims mass tort settlements. See discussion supra notes 82-119 and accompanying text. Courts have toiled fruitlessly over this information cost problem for some time in different settlement contexts; it may now be ripe for legislative review. See also Linda Silberman, Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure, 137 U. Pa. L. Rev. 2151, 2173-76 (1989) (explaining the need to refine special master procedures). More substantive examples of legislative responses include the narrowly focused administrative compensation schemes established by federal and state statutes. See supra notes 123-24 and accompanying text.
153 Professor Richard Marcus correctly notes the possibility that global settlements, which supplant judicial supervision with a detailed structure of long-term governance, will limit this flexibility. Letter from Richard L. Marcus, Professor of Law, Hastings College of Law (Oct. 25, 1994) (on file with author). Although it is too early to tell how the parties will interact under these agreements over time, some flexibility may be retained if, as seems likely, the parties may occasionally negotiate some changes (presumably with judicial approval) and invoke the arbitral or judicial forums which the agreements sometimes provide. For this reason, practice under these agreements may actually permit somewhat more flexibility than under judicially entered consent decrees. See, e.g., David K. Fram, Recent Development: The False Alarm of Firefighters Local Union No. 1784 v. Stotts, 70 Cornell L. Rev. 991 (1985) (examining the scope of a district court's power to modify consent decrees).
This common-law advantage may be especially great during the maturation period of mass tort litigation which, as we have seen with the asbestos litigation, may be quite protracted. At least in this area, judicial policy errors are likely to be more confined than legislative ones; more fact-specific and less systemic, judicial errors are usually less firmly entrenched and hence easier for appellate courts and legislatures to correct than legislative policy errors. Furthermore, the political inertia that usually follows a legislative resolution of controversial issues tends not to afflict courts so acutely. Thus even if courts were to err more frequently than legislatures on mass torts issues, the courts’ errors might nevertheless be less persistent and less costly to society.

2. Normative and Symbolic Considerations

The relative advantages of developing a mass tort system through common law courts, subject to periodic legislative review, transcend these technocratic and instrumental considerations. These advantages also extend to the normative and symbolic realms where reifying deeply felt, widely shared norms is of paramount importance. In such realms, the common law’s ethos matters as much as its actual performance—even when, as is sometimes the case, its ineffectiveness overshadows that ethos. In the mass torts context, two related aspects of this common-law ethos are particularly salient: (1) commitment to the adversary system and in particular to trial by lay jury, and (2) reliance on a nonbureaucratic mode of legitimating political authority.

a. The Adversary System and the Jury

The canonical elements of the common law model of adversary trial—litigant-controlled proofs and proceedings, neutral and detached judging, and lay jury fact-finding—carry enormous normative force in the American legal-political culture. This observation would appear to apply a fortiori to mass torts litigation. Unlike victims of highway collisions or other determinate harms, mass torts claimants often can only guess at the source of their injury—an invisible chemical, a defective product, something insidious in their food, water or

154 Congress’s sporadic and piecemeal review of the Superfund program is an example. See, e.g., John H. Cushman, Jr., Congress Foregoes Its Bid to Hasten Cleanup of Dumps, N.Y. TIMES, Oct. 6, 1994, at A1 (failure to enact Superfund amendments). In the mass torts field, as we have seen, Congress’s interventions have been both infrequent and narrowly-focused. See Rabin, supra note 12, and text accompanying supra notes 123, 126-27.

neighborhood, the victim's genome, or mother nature herself. Victims, finding themselves in such a profoundly perplexing and dispiriting position, often desire a knight in shining armor who will come to their aid and ride boldly into battle on their behalf against the anonymous wrongdoers. In an increasingly bureaucratized, often incomprehensible system of justice, the plaintiffs' lawyer seems to play this idealized role, providing a "day in court" before a jury of one's peers.

The lay jury, too, captures the American public's imagination in a way that can scarcely be exaggerated. The groups with the greatest stakes in mass tort litigation—trial lawyers, judges, and litigants—tend to venerate the jury. Indeed, the jury's popularity continues despite a century of sustained criticism by academics and judges and despite (or perhaps because of) a broad secular trend, extending well beyond mass tort law, toward consolidating and collectivizing claims that were traditionally viewed as individual. The political tide propelling tort reform in virtually every state in the 1980s chipped away at the edges of jury discretion, but left the jury's essential structure and functions largely intact. Two quite recent events—the failed effort to amend the Federal Employer's Liability Act of 1908 to substitute a workers' compensation scheme for the long-standing jury-based tort system, and the extension of jury trials to claims alleging sex and disability discrimination in the Civil Rights Act of 1991—demonstrate that public attitudes, far from supporting reforms that would restrict juries, strongly favor preserving and expanding the scope of their authority. "Jury reformers are so many voices crying in the political wilderness." In short, any appraisal of a litigation system in the United States must respect the central role that the jury has been assigned and will continue to play in the dominant public conception of justice.

The realities of mass torts litigation, of course, sharply contradict these luminous lay conceptions of legal representation and the day in court. The plaintiffs' lawyer, for example, may represent thousands of other clients whom she regards as more or less fungible, and with whom she communicates only intermittently, impersonally, and

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156 This fascination with the civil lay jury does not extend either to Britain, which has largely abolished it in tort actions, or to civil law countries like Germany. See generally Richard A. Posner, Juries on Trial, Commentary, Mar. 1995, at 49, 50.


159 See Schuck, supra note 157.


162 See Schuck, supra note 157.

163 Id. at 329.
unidirectionally. Indeed her own interests may directly conflict with theirs, for reasons including: her powerful financial incentives to settle early, the zero-sum competition between the amount of her fee and the funds available for compensation of clients, and her possible control over the compensation fund in the event of a settlement.\textsuperscript{164}

In all probability, the client's day in court will amount to a written notice of settlement or dismissal; he may never see an Article III judge, much less a jury of his peers;\textsuperscript{165} and if there is a hearing he will probably not be permitted to speak. But whatever the distance between ideal and reality, the former retains overwhelming symbolic power. Indeed, the larger the gap, the more enchanting the ideal.

\textbf{b. Non-Bureaucratic Authority}

A commonplace of American legal-political culture is the fear of concentrations of governmental power, especially in its conventional administrative forms.\textsuperscript{166} For reasons that are hard to fathom, we regard it as almost unthinkable, perhaps even unconstitutional,\textsuperscript{167} that an administrative official might make decisions not reviewable by an Article III judge. Yet, we view as authoritative and legitimate the decisions of a single judge or panel of judges—even when those decisions are essentially unreviewable and hence final.\textsuperscript{168} These public attitudes persist, indeed flourish, in the face of two facts which should undermine them: First, the popular, idealized image of judicial process is seldom if ever realized, especially in mass tort litigation. Second, well-

\textsuperscript{164} This assumes that she works under a standard contingent fee arrangement. For a critique of these arrangements and a proposal to reduce the conflict of interest they generate, see \textit{Lester Brickman et al., Rethinking Contingency Fees} (1994).

\textsuperscript{165} Much pretrial adjudication in mass tort cases is handled by magistrates and special masters.


\textsuperscript{167} E.g., \textit{Northern Pipeline Constr. Co. v. Marathon Pipeline Co.}, 485 U.S. 50 (1982) (holding that Article III bars Congress from establishing bankruptcy courts with exclusive jurisdiction over bankruptcy matters); Crowell v. Benson, 285 U.S. 22 (1932) (holding that the Constitution restricts congressional power to replace Article III courts with administrative courts).

\textsuperscript{168} Yeazell, \textit{supra} note 70, at 647. Congress's decision in 1988 to impose political review and formal adversary process on the determination of veterans' benefits, one of the very few administrative areas that still lacked these features, is a telling illustration of the point. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988). This hostility to bureaucratic power is not shared by most democratic civil law countries such as France and Germany. On the other hand, these countries seem to be gravitating slowly toward the American model. \textit{See generally Mauro Cappelletti, The Judicial Process in Comparative Perspective} (1989).
managed administrative agencies can and sometimes do achieve impressive levels of accuracy, efficiency, procedural fairness, and political accountability.\(^{169}\) For present purposes, however, the important point is that Americans are profoundly, and perhaps incorrigibly, antibureaucratic.

The common law's distinctive appeal, then, rests in large part on its role as a nonbureaucratic process for legitimating the exercise of public authority.\(^{170}\) Moreover, the common law's antiquity, as well as the trappings of the civil courtroom, convey a solemnity, grandeur, and mystery that elicit lay deference and respect, even awe. Paradoxically, although the common law's gradual accretion of precedent imparts to it an opacity that helps to insulate it from lay criticism, lay persons seem to consider judicial rulings to be more transparent, accessible, and acceptable than the fiat of a faceless bureaucracy (to use the common cliche). These features give the common law normative and symbolic advantages over statutory and administrative law.\(^{171}\)

Sometimes, however, circumstances can overwhelm the common law's advantages in the mass torts area and create openings for administrative solutions.\(^{172}\) In any event, although the differences between courts and agencies are steadily narrowing,\(^{173}\) the differences continue to operate at the crucial cognitive, symbolic, and affective levels of lay perception. These perceptions make the emergence of a mass tort system grounded largely in common-law institutions and practices appear less irrational than many commentators (myself included) have previously believed. Indeed, these lay preferences appear even

\(^{169}\) For the classic exposition of this point, see Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims (1983) (demonstrating the success of bureaucracy in dealing with social security claims).


\(^{171}\) These advantages are in addition to the technocratic and instrumental advantages noted supra part II.B.1.

\(^{172}\) See supra text accompanying notes 148-52.

\(^{173}\) Increasingly—and especially in mass tort litigation—courthouses operate like administrative offices. See supra part I.A.3. Many court decisions and settlement decrees are as lengthy and detailed as agency regulations. Courts employ auxiliary staff for routine tasks that judges need not perform. Massive records are accumulated. Even the level of deference that courts and agencies accord to precedent may be converging: Judicial doctrines often entail sharp departures from precedent while administrative ones may be models of stare decid. Although common law is of course not simply a matter of logical inference pronounced by disembodied oracles, normative claims of precedent are recognized in almost all systems of law, and agencies as well as courts routinely accept their compelling force.
more defensible when one considers the leading alternative strategies for achieving mass justice in this context.

III
Selection

Although the mass tort system often seems chaotic and continues to exhibit some decidedly worrisome features, it has actually evolved into a more or less patterned system.\textsuperscript{174} This is not a random or adventitious result; rather, the emergent system reflects a selection from among three competing models of legal process and legitimation—common-law, contractual, and bureaucratic. A combination of economic, ideological, institutional, and political pressures and inertias have driven this competitive selection dynamic, resulting in an eclectic, hybrid system dominated by common-law policymaking with some relatively narrow statutory refinements.\textsuperscript{175}

Up to this point, my discussion of the new mass tort system has been largely descriptive. In this final Part, I briefly compare this system to three leading reform alternatives.\textsuperscript{176} As noted in the Introduction, this comparison is merely suggestive. A rigorous, systematic comparison would require a far more detailed specification of goals, empirical data, and additional analysis. Such an analysis would go well beyond the scope of this Article, which seeks to provoke institutional comparison rather than to proselytize on behalf of any particular solution.\textsuperscript{177}

My tentative claim, drawing on the institutional evolutionist perspective, is that despite the mass tort system's many problems,\textsuperscript{178} it compares rather favorably to competing models. Specifically, the system already incorporates the most valuable elements of common-law reform proposals ("collective processing"); is perfectly consistent with the contractual approach (a market in tort claims); and is likely to be superior in many respects to the bureaucratic approach (administrative compensation).

A. Collective Processing

Professor David Rosenberg has proposed what he calls a "public law" model of mass tort litigation that would involve a number of in-

\textsuperscript{174} See supra part I.B.
\textsuperscript{175} See supra part II.
\textsuperscript{176} I do not wish to discuss the whole host of possible incremental reforms to the current system, some of which have already been adopted in one or more jurisdictions.
\textsuperscript{177} For a more ambitious project of institutional comparison, see Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy (1994), especially chap. 6 on tort reform.
\textsuperscript{178} See, e.g., Schuck, supra note 10, at 553-68.
novative procedural techniques and doctrinal changes.\textsuperscript{179} Rosenberg's proposals are animated by the same policy goals that have driven the evolution of the mass torts litigation system—to improve horizontal equity and the timeliness of compensation, to reduce transaction costs, to shift some of the burden of causal uncertainty from claimants to defendants, and to increase deterrence of risky behavior.

I will not indulge in a belabored treatment of Rosenberg's model, parts of which I have criticized elsewhere.\textsuperscript{180} For present purposes the most striking feature of his model is the extent to which common-law courts have already incorporated its main elements—class actions, proportional liability, damage scheduling, averaged judgments, insurance-fund judgments, fee- and cost-shifting arrangements—into the current mass tort system.\textsuperscript{181} Mass tort class actions (especially for settlement purposes) have become more common as courts attempt to protect claimants by assuring adequate notice, by minimizing potential conflicts of interest both within classes and between claimant and lawyers,\textsuperscript{182} and by controlling counsel fees.\textsuperscript{183} Market share liability, which many courts have adopted, is a form of proportional liability.\textsuperscript{184} Forms of damage scheduling and averaged judgments have been widely used, most notably in the Agent Orange, asbestos, and breast implant settlements.\textsuperscript{185} The global settlements in Georgine\textsuperscript{186} and the silicone gel breast implant litigation\textsuperscript{187} include damage schedules


\textsuperscript{180} SCHUCK, supra note 5, at 268-72.

\textsuperscript{181} Indeed, Rosenberg's writings may have partly prompted these changes. In the seminal Agent Orange fairness decision, for example, Judge Weinstein cited Rosenberg and endorsed much of his model. Id. at 270.

\textsuperscript{182} See, e.g., Nancy Morawetz, \textit{Bargaining, Class Representation, and Fairness}, 54 OHIO ST. L.J. 1 (1993) (discussing distributional conflicts class action lawyers must resolve). Id. at 4 n.10 (citing broadly to the legal literature and to judicial authority).


\textsuperscript{184} E.g., Hymowitz v. Eli Lilly & Co., 593 N.E.2d (N.Y.) (holding that manufacturers of DES are severally liable to claimants in proportion to their national market share), cert. denied, 493 U.S. 944 (1989). Medical monitoring of damage awards based on exposure can also be viewed as a crude form of proportional liability. See In re Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990), cert. denied, 493 U.S. 961 (1991). See also discussion supra note 151.


which are, in effect, insurance-fund judgments for future claims. In these settlements, fee- and cost-shifting have been achieved indirectly and incompletely through court control and reduction of class action costs and contingency fee awards, as well as through agreements by defendants to bear the costs of claims processing and plaintiffs' counsel fees.

B. A Market in Tort Claims

Some scholars have urged the relaxation of traditional legal restrictions on the purchase and sale of tort claims in order to encourage the emergence of a reasonably thick market for tort claims. These proposals seek to exploit the perceived efficiency and transaction cost advantages markets offer as compared to tort law. They also envision some regulation of the proposed market to reduce possible informational asymmetries between the buyers and sellers of mass tort claims.

As to individual claims, one would expect primary markets to develop in which claimants would make initial offerings of their claims in exchange for cash, and secondary markets in which these purchased claims would then be aggregated and sold to others. In such markets, one would expect private sellers of claim valuation services to emerge and compete for claimants' business. One would also expect to see claimants being paid an amount closer to the true, time-discounted litigation value of their claims and receiving that payment more quickly than under the existing system. Plaintiffs' lawyers, defendants, and insurers would be the most likely traders in secondary markets, since they would be in the best position to estimate claim values accurately, to efficiently trade in and settle claims, and to litigate them if necessary.

In the case of a class action, where Rule 23 requires the court to find that the class representatives (which in practice means their lawyers) will fairly and adequately represent the class, and where the court in practice determines which plaintiffs' lawyers will control the man-


189 This system would minimize, if not eliminate, two problems in the current system that were noted above—the fact that many insubstantial claims nevertheless receive significant payments, supra notes 97-98, and the risk of adverse selection in the opt-out process, supra note 110.
agement of the litigation, the court could convene and administer a second kind of market, auctioning the right to represent the class. The court would not necessarily confer class counsel status on the highest bidder (i.e., the attorney willing to accept the lowest fee), but would take the amounts and terms of the bids into account in making her decision. This approach would have many advantages. In one stroke, it would improve the information available to the court when making its Rule 23 determination of adequate representation for the class, maximize class members' net recoveries, and eliminate what is perhaps the greatest barrier to settlement of class actions—attorneys fee disputes.

New markets in tort claims and in class counsel status, then, would make compensation of claimants fairer and more efficient. By doing so, moreover, they would also tend to optimize deterrence. This general approach would be especially desirable in the mass torts context where there generally are higher agency and transaction costs, higher stakes, more numerous and individualized claims, and more uncertain claim values than in consumer and securities class actions.

Granted, the prospect of markets in tort claims and class representation rights raise some genuine concerns. These include the danger that well-informed traders would take advantage of poorly informed claimants, and that judges would be unable to evaluate class representation claims on the basis of bids in an auction. But then again, the current mass tort system suffers at least as much from these problems as would a market system. I noted earlier that the relationships between mass torts lawyers and their clients, relationships that are attenuated, bureaucratized, commercialized, and conflict-ridden, already present formidable agency problems. Significant informational asymmetries about claim values thus exist now between claimants and their lawyers, and between plaintiffs and defendants. Fair net compensation to claimants under the current system is doubt-

190 Macey & Miller, supra note 188, at 105-10, propose a judicially run auction of the power to control large-scale, small claims class actions and derivative suits. Professor Coffee has criticized this proposal on the ground that it would deter attorneys from conducting pre-filing research, since a late-comer to the auction could free ride on the information that has been produced by others. Weinstein, supra note 1, at 268. This problem, however, could be ameliorated by requiring the auction winner to compensate those who have conducted valuable pre-filing investigation and research, perhaps at an hourly rate augmented by a novelty premium. A similar hourly rate arrangement is part of the proposal by Brickman et al., supra note 164, to control abuses of the contingency fee system.

191 Judge John Nangle recently observed that fee disputes were the main obstacle to settling class actions. John Nangle, Remarks at Research Conference on Class Actions, supra note 85. The implication, however, that this strengthens the policy argument for auctioning the right to represent the class is mine, not his.

192 See supra notes 164-65 and accompanying text.
ful; even when paid, it is both skewed and slow in coming. Deterrence is suboptimal. Judges are now even more uninformed in predicting adequacy of representation, as they must in order to certify a class. Thus, in all of these respects, the defects of a mass tort claims market are equalled or surpassed by flaws in the traditional tort system.  

Finally, each claim (or, more precisely, one-third or more of each claim) is already "sold" in the current mass tort system. The purchaser, of course, is the claimant's contingent-fee lawyer. Depending on how this lawyer finances her litigation costs, she may use part of her share to secure further financing (which may be tantamount to selling that part). Despite legitimate ethical concerns about such arrangements, invalidating them would probably deny legal representation to all but the most affluent claimants—a proposition that raises equally profound ethical problems at least to American ways of thinking.

Although the current contingent fee and class action financing arrangements already effectively employ a market in tort claims, adopting the proposed market approach would not be superfluous. As we have just seen, existing rules now permit the sale (without calling it that) of only a fraction of the claim. More important, a variety of procedural and ethical barriers inhibit evolutionary reform toward a thick, fully functional market. Finally, of course, courts do not currently auction the right to represent the class, despite the enormous economic value of that right both to the lawyers and to the class members. If enabled by legislative fiat, mass tort claims and class representation markets could, if well-regulated, readily accommodate more complete, well-informed, and efficient trading of claims.

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193 As we have seen, these problems may be ameliorated somewhat in global settlements of mature mass torts with effective back-end opt out rights that can function as a market test on settlement claim values. See supra notes 104-13 and accompanying text.
195 See, e.g., Schuck, supra note 5, at 192-206 (discussing the fee-sharing agreement in the Agent Orange case and the ethical issues raised by such arrangements); see also Weinstein, supra note 1, at 76-82; Vincent R. Johnson, Ethical Limitations on Creative Financing of Mass Tort Class Actions, 54 BROOK. L. REV. 539 (1988) (suggesting that novel features of mass tort litigation may require that traditional fee-splitting rules be relaxed in that context).
196 See Fleming, supra note 81.
198 The current auctioning of licenses by the Federal Communications Commission, which is required to meet a "public interest" standard roughly comparable to the court's obligation under Rule 23, is an obvious analogy.
C. Administrative Compensation

The bureaucratic approach to personal injury compensation has received extensive treatment in the literature, in part because schemes such as workers' compensation, disability insurance, and "focused" no-fault plans have been in place for a long time. Professor Robert Rabin has recently reviewed several existing administrative compensation programs. One is the Price-Anderson scheme for nuclear accidents, a "hybrid" plan combining tort and no-fault elements. Another is the National Childhood Vaccine Injury Act of 1986, a narrowly focused no-fault program that also retains a tort option. Rabin also considers several more expansive no-fault plans that have been proposed for toxic-related injuries, plans that would retain tort options. Each of these approaches, Rabin observes, must struggle with the same knotty issues: defining the compensable event, setting compensation levels, deciding the degree to which compensation should be individualized, structuring the tort system's role under the scheme, and specifying how the system should be financed when multiple sources of harm exist.

Rabin finds that the mass tort litigation system remains inadequate even after claims-aggregation, cost controls, and uncertainty-reducing innovations are instituted, but adds that "the superiority of a no-fault approach is far from clear," at least where toxic-related diseases are concerned. In such instances, no-fault schemes seem unable to grapple with causation any more effectively than does a reformed tort system, at least so long as the scientific base remains weak. Moreover, these issues become more problematic as the scheme's ambit broadens. His conclusion about the advantages of administrative compensation schemes in the context of many mass torts is decidedly guarded:

Administrative compensation schemes offer greatest promise when the compensation-triggering "event" features a relatively clear relationship between source, substance, and pathological condition. When one ventures, however, into the unconfined area of mass toxic harms, administrative compensation schemes share many of

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200 Rabin, supra note 12, at 955-62. It should also be noted, as Professor Abraham has pointed out, that torts (including mass torts) comprise only a tiny portion of the serious accidents that occur, and that creating an administrative compensation apparatus to deal with them "would be massive overkill." Kenneth S. Abraham, Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform, 73 Va. L. Rev. 845, 901 (1987).
201 Rabin, supra note 12, at 978-79. Rabin notes that workers' compensation has been far more effective in dealing with traumatic accidents than with long-latency diseases. Id. at 980 n.107.
the burdens that beset a reconstructed aggregative tort liability approach.\textsuperscript{202}

Several points can be drawn from Rabin’s analysis. First, neither I nor Rabin means to assert that an administrative compensation approach—whether implemented along side the mass tort system or supplanting it altogether—could never be preferable to the status quo. Any meaningful comparison would require significant empirical study and theoretical refinement concerning the appropriate trade-offs among competing social values. But given the current state of our knowledge, the superiority of an administrative scheme to the contemporary mass tort system is highly debatable.

Second, Rabin’s valuable comparison between the litigative and administrative modes of compensation is incomplete in at least one significant respect. Rabin rightly notes that these two modes often interact with and complement one another; thus, he proposes to create a "switching mechanism" that would move tort claims into an administrative compensation system after litigation has reached a certain level of maturity.\textsuperscript{203} This proposal is appealing insofar as it seeks to exploit the advantages of both systems—litigation’s ability to mobilize information about risk, causation, and other common generic issues, and administration’s ability to minimize transaction costs and reduce extreme horizontal inequities once that information has come to light.

Rabin’s analysis, however, largely ignores the role of settlement in mass tort litigation—which is rather like analyzing an orchestra without considering the strings. He therefore overlooks the extent to which today’s mass tort system already employs administrative modes of compensation—a fact that should inform one’s comparison of the two systems. In practice, mass tort litigators “batch” claims into broad disease groups for settlement purposes, groups that bear a striking resemblance to the kinds of compensation categories that an administrative scheme might employ. Of course, these batches of claims will be subject to individualizing variables, the number of which will vary depending on the complexity of the settlement structure. The batching may also be distorted by the litigators’ strategic considerations.\textsuperscript{204} But in general, claimants in a given batch will receive roughly similar settlement amounts—just as they would under the compensation categories that are central features of most administrative schemes.

\textsuperscript{202} Id. at 982.
\textsuperscript{203} Id. at 968-69.
The hybrid character of the mass tort system\textsuperscript{205} is especially striking in the context of the global settlements in which mass tort litigation now often culminates. Indeed, these carefully negotiated settlement plans can be viewed as more tightly drafted, more carefully designed, more scrupulously casted, and more adequately funded versions of administrative compensation statutes. They contain detailed definitions, decision criteria, and distribution protocols. They provide a mix of categorical and individualized treatment of claims.\textsuperscript{206} The facilities that the plans establish to process thousands of claims\textsuperscript{207} are closely modeled on administrative agencies such as workers' compensation boards. The plans assure long-term funding of the obligations to which the claims will give rise. They seek to anticipate numerous contingencies, while prescribing alternative dispute resolution procedures for those contingencies that cannot be foreseen or immediately resolved.\textsuperscript{208} Indeed, in the plans' level of precision and concern to anticipate future developments, they bear more resemblance to bond indentures than to compensation statutes.

This, of course, is no accident; it reflects systemic differences between legislation and contract regimes. When legislators address controversial subjects like compensation, they employ a variety of strategic behaviors: ambiguous drafting, deferring difficult issues, hiding or underestimating costs, and delegating norm elaboration and implementation tasks to agencies and courts.\textsuperscript{209} These behaviors magnify the notoriously high monitoring costs that any legislature faces in delegating authority to an agency.\textsuperscript{210}

In contrast, litigants who negotiate a global settlement are designing a structure to guide their relationship, manage their actual and

\textsuperscript{205} As Francis McGovern observes in his Comment on this Article, McGovern supra note 45, at 1025, mass tort law can be viewed as a procedural application of Guido Calabresi's characterization of torts as "the law of the mixed society." Guido Calabresi, \textit{The Law of the Mixed Society}, 56 Tex. L. Rev. 519 (1978).

\textsuperscript{206} Civil law systems of mass torts also appear to be acquiring hybrid forms. Fleming, supra note 81, at 519-27.

\textsuperscript{207} For a detailed examination of such facilities, see Symposium, supra note 89.


potential conflicts, administer their agreements, and distribute their resources over a long period of time during which the incentives to defect may be great and resort to agencies or courts may be costly and otherwise undesirable. Most important, the parties are putting their own money on the line. Accordingly, they take far greater pains than do legislators in drafting the governing document to minimize future uncertainty rather than delegating to others the responsibility for doing so.\footnote{Nevertheless, significant agency costs continue to plague and distort the relationship between mass tort plaintiffs' lawyers and their clients, especially in class actions. See Macey & Miller, supra note 188, at 19-27.}

CONCLUSION

Mass tort litigation began to appear in the courts in the late 1960s. Since then, mass tort law has developed gradually through trial-and-error as courts and litigants struggle to adapt traditional legal theories and practices to what only slowly came to be seen as a novel set of problems. The policymakers and judges of the earlier period failed to anticipate many of the dilemmas of legal doctrine, resource allocation, incentives, and institutional design that we now associate with mass tort litigation. Even less predictable was the nature of the system that would emerge in response. Indeed, only in the last decade or so have the general contours of these difficulties become clear enough to elicit serious scholarly attention to the relative merits of possible solutions.

The character of the mass torts system, our understanding of it, and the plausibility of different approaches to its reform are all affected by the path of common-law adjudication along which the system has evolved. By identifying this system with the most precious, evocative symbols and commitments of American legal-political culture, the common law has infused mass tort litigation—for better or for worse—with a powerful normative content and institutional support that it would have otherwise lacked.

In this sense, the common law has favored certain traditional aspects of mass tort law and practice, even as it has quietly and gradually transformed them into a new system. The balance struck by the common law is selective and highly eclectic; it has borrowed from some critiques and remedial approaches, while decisively eschewing others. It has made some functional adaptations while retaining certain features that I and many others view as dysfunctional. From the institutional evolutionist perspective that I have advanced here, the emergent system carries with it some valuable social information that we would be foolish to ignore. The selection of this system in competition with others justifies a presumption that, all things considered, it
satisfies important social needs (not just those of the lawyers) better than do the other approaches that have been either tried or seriously considered. As my discussion of a market in mass tort claims suggests, these approaches do not exhaust the universe of plausible alternatives. This presumption of functional superiority, of course, can and should be overcome if the relevant facts (including political ones), values, and needs change. Meanwhile, mass torts scholars should use this selection as an invitation to disenthrall ourselves and thus to think anew about the nature of the competing systems and about their possible reform.