The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law

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57 Vand. L. Rev. 1571 (2004)

In the courts and in the academy, the ostensible commitment of American tort law to individualized justice has experienced a sustained revival in recent years. Neither the modern mass tort case-law nor the scholarly literature, however, has adequately grappled with long-standing practices of de facto aggregation that have sprung up in the shadow of American tort law since the very beginnings of tort as a field. Reviewing more than a century of private aggregation from employers' liability to automobile accident litigation to the modern asbestos cases, this Article contends that American tort practice has been characterized almost from the start by decentralized and private institutions for the aggregate resolution of what may be described as "mature torts": personal injury cases that resolve themselves into regular and reiterated fact patterns. Private settlement institutions constitute a powerful countertradition to much better-known traditions of individualized justice in American tort law.

The Article begins with a historic account of the role of claims agents, sometimes lawyers but sometimes not, in providing claimants' side aggregation to offset the economies of scale and information that the coordinated defenders of local manufacturers or public transport companies held. The Article then traces the same pattern of routinization and efficient claims settlement from the industrial setting to seemingly idiosyncratic, one-time events such as auto accidents. By focusing on the institutional actors who administratively expedite settlement of similar claims, the Article adds a missing ingredient to the theoretical literature on settlement. It is not only shared assessments of the legal authorities governing claims that inform settlement, but the actual experience of repeat-play legal representatives in resolving factually similar cases in the past.

The Article concludes with an examination of the mass asbestos settlements rejected by the Supreme Court in Amchem *and* Ortiz. *In contrast to the Court's characterization on these mass settlement cases as departures from a "day in court ideal," the Article argues that the persistent aggregation of mature tort claims in private settlement markets situates the mass tort class action on a continuum of aggregating practices in American tort law. Moreover, the long- standing existence of private markets in aggregated settlement indicates that the truly distinctive challenges raised by class actions arise out of the monopolistic representation awarded to class counsel and the difficult agency relations that may ensue, not out of the mere fact of aggregation.*

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*Samuel Issacharoff** & *John Fabian Witt***

For the past decade or so, important aspects of American tort law have sought to reaffirm tort's ostensible commitment to individualized justice. In the courts, "the elephantine mass of asbestos cases"[1] has produced a reaffirmation of what Justice Souter in *Ortiz v.*

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Fibreboard Corporation called the "day-in-court ideal": "our deep-rooted historic tradition that everyone should have his own day in court."[2] The academy, in turn, appears to be in the midst of a sustained revival of the closely related idea that tort law consists in the reciprocal relationship between plaintiff and defendant, in which the bipolarity of the dispute forms the heart of the tort system's aspiration for corrective justice.[3] "Tort law's structural core," writes Jules Coleman, for example, "is represented by case-by-case adjudication in which particular victims seek redress" from particular defendants, each of whom "must make good her 'own' victim's compensable losses."[4]

Underlying these resurgent aspirations to individuation in the law of torts is, among other things, a common set of assumptions about the character of our "historic tradition," as Justice Souter put itnoted in *Ortiz*.[5] At conference after conference, in article after article, that tradition is said to be grounded in a purportedly long-standing American commitment to individualized justice.[6]

To be sure, sophisticated observers of the legal system understand that the overwhelming majority of cases settle long before an adjudication ever takes place. Yet the literature on tort settlements —inspired by Mnookin and Kornhauser's seminal article in the field of domestic relations[7]—adopts an individualized approach to thinking about bargaining in the shadow of the law. Settlement theorists have shown the deep significance of repeat-play agents in non-zero-sum fields like commercial litigation and negotiations among commercial

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comments on earlier drafts. Chris Brummer, Camden Hutchison, and Megan Renfrew provided excellent research assistance.

1. Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999)

2. *Id.* at 846.

3. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 63-66 (1995).

4. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 16 (2001).

5. *Ortiz*, 527 U.S. at 846.

6. *See, e.g.*, John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003); John C. P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034 (1997); John C. P. Goldberg, *Reconstructing Liberalism Rights and Wrongs*, 97 MICH. L. REV. 1828 (1999) (reviewing ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW (1999)); Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381 (1992); Stephen R. Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283 (2003); Stephen R. Perry, *Method and Principle in Legal Theory*, 111 YALE L.J. 1757 (2002) (reviewing COLEMAN, *supra* note 4); Stephen R. Perry, *The Distribution Turn: Mischief, Misfortune, and Tort Law*, 16 QUINNIPIAC L. REV. 315 (1996); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); Benjamin C. Zipursky, *Civil Recourse, not Corrective Justice*, 91 GEO. L.J. 695 (2003).

7. Lewis Kornhauser & Robert Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

entities, or in the non-zero-sum aspects of matrimonial law.[8] But there has been relatively little consideration of the role of repeat-play specialists and of the phenomenon of aggregation in tort settlements.[9]

Our question here is whether the description of American tort law that underlies recent case law and scholarship adequately accounts for the resolution of tort disputes in American law, either as a matter of historical tradition or as a matter of present reality.[10] Have tort cases really taken the individuated form that tort jurists like Justice Souter and Coleman and settlement theorists inspired by Mnookin and Kornhauser suggest? Indeed, can tort law in its current institutional form look the way the literature and the cases seem to indicate?

In our view, the individualized justice accounts overlook a powerful counter-tradition in American tort law. Mature torts—by which we mean torts that over time develop repetitive fact patterns and repeat-play constituencies[11]—have persistently resolved themselves into what are essentially bureaucratized, aggregate settlement structures. "Informal aggregation," as Howard Erichson has called it, is not the deviation but the norm in these cases.[12]

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8. *See, e.g.*, Robert H. Mnookin & Ronald J. Gilson, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 534-547 (1994). We set to one side the interesting and relatively new literature on the collective social norm shaping effects of legal norms. *E.g.*, WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003); *see also* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985) (giving an intriguing study, along these lines, in the law of torts).

9. Important exceptions include Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859 (2002); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997); Herbert M. Kritzer, *Contingent Fee Lawyers and their Clients: Settlement ExpectatSions, Settlement Realities, and Issue of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795 (1998); and Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001).

10. *See* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Non-Party Preclusion*, 67 N.Y.U. L. REV. 193 (1992) (laying out a project that adopts a different approach to a similar end).

11. We adapt our "mature torts" category from Francis McGovern's well-known work on "mature mass torts," meaning torts that have generated "multiple jury verdicts" and have demonstrated "persistent vitality in the plaintiffs' contentions." Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989). Our category of "mature torts" is dramatically broader than McGovern's "mature mass torts" in that it extends McGovern's category to those torts that regularly give rise to stereotyped fact patterns for resolution by repeat players, even those involving different actors and occurring at different times. Further, we focus more directly on the role of tort litigation in establishing a pricing mechanism for stereotyped fact patterns, regardless of whether the triggering events are typically thought of as mass harms.

12. Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386-409 (2000). Our project

Moreover, it almost always has been. Indeed, since the very beginnings of U.S. tort law, a variety of aggregate settlement institutions have powerfully shaped the resolution of particular cases in some of the most important fields of tort practice.

To a large extent, we seek merely to remake an insight that informed the initial development of the law of torts but seems to have been significantly forgotten. Oliver Wendell Holmes, Jr., developed his early view of the law of torts around cases of isolated individual injuries with the classic bipolar structure. The case of *Brown v. Kendall*, in which one man struck another with a stick while separating two fighting dogs,[13] was thus the paradigm case for the still-emerging theory of tort law he articulated in *The Common Law* in 1881.[14] Fewer than twenty years later in his "Path of the Law" address of 1897,[15] however, Justice Holmes had come to view American tort law as organized not around chance interpersonal encounters, but rather around the apparently inevitable onslaught of injuries thrown off by the progress of industry.[16]

Accordingly, in this Article we adopt a descriptive approach very similar to those adopted in prominent work in both the economics and the corrective justice literatures. In the former, Richard Posner's classic study of the law of negligence began with descriptions of reported negligence cases.[17] In the latter, moral philosophers have drawn their accounts of tort law from the practices of tort jurists. Indeed, the philosophers of tort law may even be said to have

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in this paper is to expand Erichson's claim that the conventional understanding of "a neat line between class and non-class litigation . . . misses important aspects of what happens in modern, large scale, non-class litigation." Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 524 (2003). In Erichson's account, mass litigation in recent decades is often "handled through collective representation even if no class is certified." *Id.* at 524-25. Our point is that even from long before recent mass-tort cases, mature tort claims processing was carried on through collectivized aggregate institutions.

13. 60 Mass. 292 (1850).

14. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 84-85 (1881).

15. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

16. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 7-8 (2004) (describing the transition in Justice Holmes's thought); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 109-43 (1992) (contending that Justice Holmes in his "Path of the Law" address abandoned his earlier search for an immanent morality in the common law in favor of the positivist separation of law and morals for which Justice Holmes is now famous); LOUIS MENAND, THE METAPHYSICAL CLUB 346-47 (2002) (showing the role of probabilistic thought in shaping Justice Holmes's intellectual environment in the post-Civil War period).

17. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 34 (1972); *See* Kornhauser & Mnookin, *supra* note 7 and accompanying text (similarly grounding their article in a description of the changing face of divorce settlement negotiations).

successfully wrested the use of description in tort law away from the economists. Coleman's most recent book on the subject, to take only one prominent example among many, is expressly organized around an account of tort law that he claims best embodies the "concepts that organize our torts practice,"[18] concepts that are sometimes (as the corrective justice scholars take great glee in noting) difficult to square with economic principles.[19]

Where Judge Posner looked to appellate court opinions and where Coleman looks to "case-by-case adjudication," however, we focus on institutions for the resolution of tort disputes that have sprung up outside the courthouse and outside the reported decisions. Standard histories of civil litigation purport to trace a long-term decline in the aggregation of civil claimants in which late-medieval and early-modern group litigation gave way to individualized claims.[20] In our view, by contrast, the decline of earlier group litigation has given rise to a tort system characterized in mature torts by a new set of distinctly modernist aggregating institutions and practices. The replacement for pre-modern group litigation has not been individualized claims adjudication but rather privatized mechanisms of settlement that take classes of claimants as aggregates and develop mechanisms for the settlement of claims at the wholesale level rather than at the retail level.

Important aspects of American tort practice, in other words, are characterized by the same kinds of institutionalized and bureaucratic modes of authority Max Weber identified in other modern social and economic institutions. As Weber observed a century ago, such institutionalized bureaucratic modes of authority have often emerged in the private sphere as well as in the public sphere.[21] The difference—and this is perhaps why academics and courts alike have failed adequately to recognize it—is that the private systems of aggregation in our tort system exist in a far-flung, decentralized, and under-the-radar world that rarely comes to the attention of tort jurists. Indeed, the Weberian irony is that tort law's ostensible commitment to individual litigant autonomy seems inevitably to

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18. COLEMAN, *supra* note 4, at xv.

19. *See* Stephen R. Perry, *Cost-Benefit Analysis and the Negligence Standard*, 54 VAND. L. REV. 893, 897-98 (2001); Perry, *Comment on Coleman*, *supra* note 6, at 382-83; Zipursky, *supra* note 6, at 755-56; Benjamin Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 70-73 (1998).

20. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); *see also* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)).

21. MAX WEBER, ECONOMY AND SOCIETY 982-83 (1968).

produce settlement markets in tort claims characterized by aggregating bureaucracies.[22]

At least two normative claims follow from the institutional countertradition of American tort practice, one in the domain of substantive tort law, the other in procedure.[23] First, the bureaucratic aggregation of our tort practice calls into question the individualized accounts of tort practice that are increasingly influential in the corrective justice literature. Multiple traditions, as political scientist Rogers Smith has put it in a parallel context,[24] have long characterized the practices of American tort law. In particular, systems of private aggregate administration (existing alongside our claimed tradition of individuation) have resolved the overwhelming majority of mature torts claims and continue to do so today. Our goal here is not necessarily to revise substantive tort law in those outlier cases that actually go to trial. Instead, we seek to describe the place of these litigated outcomes and their doctrinal offspring within the institutions of American tort law.

Second, our focus on aggregation reorients the U.S. Supreme Court's concern over mass tort class action settlements. Tort settlement classes in recent years have come under especially acute fire as inconsistent with the purportedly traditional approach of individualized inquiries and corrective justice. In our view, however, the class action cases that have drawn such extensive judicial and

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22. Weber's parallel point was to note the ways in which the forces unleashed by private enterprise were contributing to the bureaucratic rationalization of modern social life. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 67-69 (4th ed. 1952). To put it in the slightly different terms inspired by Robert Kagan's work on adversarial legalism, our claim is that with respect to mature torts, the American preference for adversarial legalism over public, hierarchical bureaucracy often results in private systems of informally aggregated settlements that bear a closer resemblance to public compensation systems than Kagan allows. The contrast that Kagan and others observe between public hierarchical bureaucracies and privatized settlement (though important) may thus be less stark than it has been understood to be. ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 125 (2001) (explaining that the U.S. has a "political tradition that is mistrustful of bureaucratic authority—preferring to fragment authority and hold it legally accountable through individually activated rights and adversarial litigation"); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 7 (2002) (describing the American constitutional tradition as distinctively organized around adversarial litigation).

23. Some of what we say in this article will come as no surprise to specialist readers. The tort literature has long noted the ways in which settlement practices coexist with the formal law of tort such that, as an empirical matter, relatively few cases actually go to trial. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 232-34 (1980). Nonetheless, as one insurance company lawyer noted decades ago, personal injury settlements remain "the stepchild of law schools and of the legal profession." Lawrence E. Carr, Jr., *Settlement of Personal Injury Cases*, 9 FOR THE DEF. 43, 43 (1968).

24. Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 549 (1993).

scholarly scrutiny – cases like *Amchem Products, Inc. v. Windsor*[25] and *Ortiz v. Fibreboard Corporation*[26]—are not so much departures from the normal workings of tort law as they are points along a continuum of aggregating devices that have long characterized tort practice in the area of mature torts.[27] Indeed, in those areas in which repeat players on the claimant and defense side have institutionalized aggregating practices for claims resolution, the American law of torts looks much like an opt-out class action tort suit. Tort claimants may opt out of the aggregate settlement structures and into individualized justice, but only at great cost and with long delays.

Class actions, to be sure, are considerably more transparent in their aggregation, more formal in their claims resolution processes, and more coercive in their compelled association. But class actions lay bare a process that exists below the surface of judicial scrutiny in tort settlement markets characterized by repeat-performance specialists.[28] Indeed, as Judge Posner has recently observed, in some cases alleging mass wrongs, the absence of aggregation should be more troubling than its presence.[29] The difficulty raised by cases such as *Amchem* and *Ortiz*, we will conclude, thus has less to do with the day-in-court ideal than with the problem of ensuring fairness in aggregate settlements that (a) replace markets in claims representation with monopolistic class representation; and (b) pose firm-killing liability risks, often with long-tail time horizons.

I. THE EMERGENCE OF REPEAT PLAYERS AND AGGREGATED SETTLEMENTS

The attention to tort law's apparent attachment to resolution of harms asserted between individual victims and individual tortfeasors,

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25. 521 U.S. 591 (1997).

26. 527 U.S. 815 (1999).

27. A stark "inherent tension" does not necessarily exist, as the Court put it in *Ortiz*, 527 U.S. at 846, between representative class suits and the day-in-court ideal. Moreover, although distinguished observers have rightly noted the powerful novelty of the modern era of mass torts, see, for example, Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 945-47 (1995), there are also powerful continuities that connect the modern mass tort to the historical traditions of American tort practice.

28. Class actions have taken the place of private settlement administration where: the small value of the claims in question inhibits private economies of scale, there are limits on the funds from which claims may be collected, and the future claims are of unknown and possibly large dimensions.

29. Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 288 (7th Cir. 2002) (describing risks of collusion when lawyers purport to settle cases without representing significant numbers of affected clients); *see also* Chris Brummer, Note, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1060-61 (2004).

though increasingly significant in the past few years, is hardly a new phenomenon. For almost as long as there have been tort jurists, they have described "individualism" as a primary value of Anglo-American tort law.[30] In the view of many tort lawyers, "The principles embedded in tort law . . . constitute a fundamental aspect of liberal individualism."[31]

Even a cursory examination of the formal doctrine of the law of torts calls such claims into question. Common law tort doctrine has long adopted what we may call doctrines of substantive aggregation in tort. Consider the familiar choice—pervasive in the law of torts—between rules and standards. Tort law has traditionally been shot through with liability-limiting rules that cut off the inquiry into tort law's basic reasonableness standard.[32] In these areas of tort doctrine, as Frederick Schauer has recently noted, the choice of rules over standards is effectively a choice to adopt a one-size-fits-all rule—effectively aggregating the individualized details of whole classes of cases—over a standard of "reasonableness" or "negligence" that may be tailored to the particular circumstances of an individual case.[33] Indeed, if we simply take the rules/standards choice, the practical commitment of American tort law to individualized inquiries—as opposed to the stylized rendition of tort law by tort theorists—is at best only a relatively recent and partial trend as some of the liability-limiting rules of late-nineteenth-century tort law have given way to a relatively pure negligence standard. [34]

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30. *See, e.g.*, Francis Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14-15 (1906); Daniel Polisar & Aaron Wildavsky, *From Individual to System Blame: A Cultural Analysis of Historical Change in the Law of Torts*, 1 J. POL'Y HIST. 133, 146-47 (1989). *See generally* J.M. Balkin, *Too Good to be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1454 (1987) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987)) ("[T]here is a clear analogy between individualist attitudes toward economic regulation and tort duties.").

31. Zipursky, *supra* note 6, at 754.

32. Special limited- and no-duty rules, for example, cut off tort suits against landowners and occupiers, product manufacturers, charitable enterprises, family members, employers, and many other categories of defendants. Other rules have long limited tort plaintiffs' ability to bring actions for pure economic loss or negligent infliction of emotional distress. *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 948-54 (1981) (discussing pure economic loss and negligent infliction of emotional distress as examples of cases outside the ambit of fault liability).

33. FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 104-05 (2003).

34. Even then, this trend toward deciding landowner and occupier cases, for example, or negligent infliction of emotional distress cases under the reasonableness standard is one that many think has come to a halt over the past decade or so. We may, in other words, be witnessing the reemergence of tort doctrine's long-standing tradition of aggregating particular cases for collective, one-size-fits-all resolution. *See* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 620-23, 684-90 (1992). Indeed, notwithstanding the long tradition of claims by tort jurists to the contrary, negligence rules and

We could go on in this vein for some time. Many of the ostensibly individualized doctrines in the private law of tort adopt what are effectively aggregating strategies.[35] In this paper, however, we want to make a different point. Our goal here is not to describe the *substantive* aggregation provisions in tort doctrine, but to focus on the long-standing tradition, and indeed the inevitability, of *procedural* aggregation in the law of torts.

A. The Beginnings of Tort in Mass Industrial Harm

For all the attention American tort lawyers show for their field's individualist traditions, it is a standard observation among historians that the doctrinal field of Anglo-American tort law arose out of the mass harms thrown off by mid-nineteenth-century industrialization. As Lawrence Friedman has put it, "The modern law of torts must be laid at the door of the industrial revolution, whose machines had a marvelous capacity for smashing the human body."[36] To be sure, a smattering of personal injury cases arose out of trespass and (later) trespass on the case going back to the early days of the English common law writ system.[37] But bringing together the procedural forms of action of the writ system under the umbrella of a field called torts was a distinctly modern move, arising out of the shift from the writ system to code pleading and out of the new pressures of

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other liability-limiting provisions in the law of tort are not necessarily any more individualized than strict liability rules or liability-expanding provisions. To be sure, from the *ex post* perspective, long favored by common lawyers, a choice not to reallocate accident costs from plaintiff to defendant is a choice plausibly described as consistent with individualism: *ex post* it is a choice to favor individual self-reliance over collective responsibility. But *ex ante*, the choice between letting accident costs lie where they fall or reallocating them through the law of torts is better described not as a question of whether to adopt an individualist approach but as a question of how to strike one of several equally individualistic accommodations among competing interests: one that protects victims' individualism against harms caused by doers, or one that protects doers' individualism against the inhibiting force of others' claims in their individualism. *See* Roy Kreitner, Insurance at the Crossroads: Nineteenth Century Law and the Appropriation of Risk, Presentation at the Annual Conference of the American Society for Legal History, Washington, D.C. 12 (November 2003) (on file with authors) (noting that "the conception of absolute individual rights ... arose at the same time with the increased popularity of insurance attitudes ...[and] the attitude of embracing risk was already an important element of late nineteenth century expansion of insurance institutions"); *see also* Robert Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1193-94 (1996) (noting that negligence and strict liability have each been supported by both corrective justice and collective justice principles).

35. *Cf.* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 855 (1984) (advocating the expansion of aggregating approaches to the ostensibly private law of torts).

36. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 467 (2d ed. 1985).

37. *See* 1 MORRIS ARNOLD, SELECT CASES OF TRESPASS FROM THE KING'S COURTS, 1307-1399 (1985).

industrialization.[38] The first significant English-language treatise on torts, for example, appeared only in 1859.[39] More than a decade later, Holmes famously complained that "Torts is not a proper subject for a law book."[40] Nonetheless, a flurry of successive editions and competing volumes followed, all seeking to keep up with what leading torts jurist Thomas Cooley called the ever "more frequent controversies" accompanying the "new inventions and improvements" of the machine age.[41]

For many observers, the most extraordinary feature of the new law of torts was the speed with which the dockets became crowded with personal injury cases.[42] Contemporaries estimated that personal injury suits in urban areas increased by as much as 800 percent over the last two decades of the nineteenth century, a claim which historians have essentially confirmed.[43] As one awe-struck member of the New York State Bar Association explained in 1897, "Negligence claims are blocking our calendars with a mass of litigation so great as to impede administration in all other branches of law."[44] George Fisher has recently even suggested that the growth in personal injury cases at the turn of the twentieth-century was so great that it had ripple effects across American law, placing pressures on court time that fundamentally altered the processing of cases even on the criminal side of the docket.[45]

Importantly for our purposes, substantial—and probably growing—parts of the new personal injury docket consisted of cases brought against large industrial concerns whose operations were the source of what is plausibly described as the first American mass tort dilemma: the inevitable cascade of injuries sure to arise out of

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38. *See* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1227 (2001).

39. FRANCIS HILLIARD, THE LAW OF TORTS, OR PRIVATE WRONGS (1859). One earlier work has escaped the attention of many tort historians (including one of us): "a little book which has for its title on its spine 'Torts and Wrongs,' " which Professor Milsom describes as having been published in 1720. S. F. C. Milsom, *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUDS. 1, 6 (1981). The volume's obscurity (it is not catalogued by the Library of Congress or any other U.S. research library) supports the general point. Moreover, Milsom notes that the volume was not at all a treatise in the nineteenth-century sense but rather a "detached bit of abridgment" cataloguing medieval and early modern decisions concerning such actions as trover. *Id.*

40. Oliver Wendell Holmes, Jr., Book Note, 5 AM. L. REV. 340, 341 (1871) (reviewing C. G. ADDISON, THE LAW OF TORTS (Boston, Little, Brown, & Co. 1870)).

41. THOMAS M. COOLEY, TREATISE ON THE LAW OF TORTS (OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT) 1 (Chicago, Callaghan 1879).

42. WITT, *supra* note 16, at 59.

43. *Id.*

44. *Id.*

45. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 867-68 (2000).

industrial enterprises. In New York City, for example, work injuries accounted for 21 percent of all personal injury lawsuits in 1890 and 27 percent in 1910.[46] Across the country, in and around Oakland, California, "Common carrier accidents dominated the personal injury docket," with a few major players attracting substantial shares of the personal injury lawsuits.[47] As Lawrence Friedman and Thomas Russell have observed, by 1904 the court clerk in Alameda County Superior Court was regularly using a rubber-stamp with the words "Southern Pacific" on it rather than writing the words by hand![48]

Institutional repeat-play tort defendants constituted the beginnings of defense-side organization in the personal injury bar. By the turn of the twentieth century, defendants' lawyers in personal injury litigation routinely handled significant numbers of personal injury claims.[49] Railroad attorneys in particular began to organize and coordinate their strategies, holding conferences at which they shared information and developed tactics for fighting off employee injury litigation. The first "railroad attorneys' conference" was held in 1906 in Louisville, Kentucky to discuss the possible effects of the Federal Employers' Liability Act on railroad employers' liability litigation.[50] Further conferences followed in Atlantic City in 1908 and elsewhere, and the organized defense bar was born.[51]

A specialist plaintiffs' bar and its associated ranks of runners and claimants' agents of a variety of different kinds also began to develop, though it was severely underdeveloped as compared to the lawyers on the defense side.[52] Commentators sympathetic with defendants were the first to identify the plaintiffs' bar. "Barratrous speculat[ors]," growled jurists like the New York Court of Appeals's

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46. RANDY BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK, 1870-1910 21 (1992). Work injuries' share of the personal injury docket was considerably smaller than their proportion of the total number of accidental injuries in the United States at the time, which has been estimated at between one-third of all accidental deaths and one-half of all disabling injuries. *See* WITT, *supra* note 16, at 27, 240 n.141.

47. Lawrence M. Friedman, *Civil Wrongs*, 1987 AM. B. FOUND RES. J. 351, 361.

48. Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-10*, 34 AM. J. LEGAL HIST. 295, 299 (1990).

49. 42 percent of defense lawyers in one sample handled ten or more personal injury cases. BERGSTROM, *supra* note 46, at 97.

50. WILLIAM G. THOMAS, LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH 226-46 (1999).

51. *Id.* On the litigation and settlement tactics of the organized defense bar, see Edward A. Purcell, Jr., *Private Law and Social Inequality in the Industrial Age*, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE 505-35 (Willibald Steinmetz ed., 2000).

52. BERGSTROM, *supra* note 46, at 97 (finding that only 7.5 percent of plaintiffs' attorneys in personal injury cases filed ten or more lawsuits in his sample, as opposed to 42 percent of defendants' attorneys).

Irving Vann at the turn of the twentieth century.[53] But the phenomenon of specialist practitioners appears to have been more than just the hyperbole of hide-bound reactionaries like Vann. By the turn of the century, a few law schools had even begun to school students in soliciting personal injury clients.[54]

What exactly was the consequence of this early development of repeat-play interests around the personal injury problem? For one thing, it encouraged the settlement of claims. Tort lawyers in the early twenty-first century regularly observe that only a tiny share of tort claims go to trial.[55] They less often note that this pattern of settlement rather than trial finds its roots in the early decades of the law of torts. Lawrence Friedman's study of Alameda County, California found that only 31.5 percent of 340 personal injury cases filed between 1880 and 1900 went to trial. Already by the beginning of the twentieth century, the percentage of cases going to trial had begun to drop: only 20 percent of the personal injury cases filed in Alameda County courts between 1901 and 1910 went to trial.[56] By the late 1920s, the fraction of cases going to trial was miniscule: of a sample of

53. WITT, *supra* note 16, at 62-63. The result of the introduction of repeat-play agents on our account generates increased value for the claims of the otherwise "have-nots." In turn, this often leads to claims of extortionate behavior by the claims agents, whose portfolios give them real bargaining power. *See generally* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (discussing the modern rendition of the blackmail argument in the context of the class action).

54. WITT, *supra* note 16, at 61; LOUIS ANTHES, LAWYERS AND IMMIGRANTS, 1870-1940: A CULTURAL HISTORY 131-70 (2003).

55. See, e.g., Symposium, *The Vanishing Trial*, 30 A.B.A. SEC. LIT. 1 (Winter 2004), *available at* http://www.abanet.org/litigation/journal/winter2004/home.html.

56. Friedman & Russell, *supra* note 48, at 307 (1990); *see also* Thomas D. Russell, Blood on the Tracks: Turn-of-the-Century Streetcar Injuries, Claims, and Litigation in Alameda County, California, Rohrschach Lecture at Rice University 4 (Oct. 29, 1998) (transcript available from authors) [hereinafter Russell, Blood on the Tracks] (finding that 19.7 percent of claims handled between 1897 and 1910 by an attorney for the Oakland Traction Company went to trial); Thomas D. Russell, Death on the Tracks: Solace and Recompense in Turn-of-the Century Streetcar Deaths, Presentation to the Law and Society Association Annual Meeting 10 (May 28, 1999) (transcript available from authors) (finding that two of sixteen wrongful death actions filed against the Oakland Traction Co. between 1907 and 1910 went to trial); Stephen Daniels, *Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties*, 19 LAW & SOC'Y REV. 381, 400-01 (1985) (stating that "contested trials would become less important and migrate towards the top of the bar while uncontested judgments migrated to the bottom and displaced trials as the modal category."); Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 287 (1976) ("In 1890, more than one out of every three cases filed in Alameda County was brought to trial. Today less than one in six has such a life cycle (a difference significant at the .1% level)."). Russell's study of the Oakland Traction Co. indicates just how misleading even percentages of cases going to trial are when the denominator is cases filed in court rather than claims lodged with the defendant. Between 1903 and 1905, the Oakland Traction Co. made payments on 581 personal injury claims even though only twenty-two personal injury cases were filed against the company in the courts. Russell, Blood on the Tracks, *supra*, at 13.

almost 25,000 third-party liability insurance claims paid by the Travelers Insurance Company in the late 1920s, 82 percent were paid without a suit ever having been filed, whereas only 2 percent of the claims were paid after judgments.[57] A decade later, a federal study of railroad employee injuries under the Federal Employers' Liability Act found that of almost 14,000 claims settled with some cash payment by the railroad employer, only about 100 cases went to trial, though that figure included between 8 and 16 percent of the death and permanent total disability cases.[58] And by the middle of the twentieth century, industry studies estimated that only 1.7 percent of incurred automobile liability insurance losses was paid to claimants as a result of court judgments; over 98 percent of automobile cases settled prior to judgment.[59] In the early decades of the tort system, rising settlement rates already suggested that specialized claims agents were filling the market opportunities created by the explosion in tort suits.

Indeed, as early as the turn of the twentieth century, the most insightful American jurists had begun to see that the development of repeat-play interests around personal injury settlements promised to shift the nature of personal injury practice. Nicholas St. John Green and Oliver Wendell Holmes, Jr., in particular, glimpsed in the developing practices of the law of torts the halting and partial beginnings of a mature economy of mass harms. In the early 1870s, Green noted that American tort law had begun to develop along the lines of the aggregate actuarial phenomena with which insurance underwriters dealt.[60] And before the nineteenth century was out, Justice Holmes noted famously that "the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses" such as "railroads, factories, and the like."[61] As Justice Holmes pointed out, the significance of these repeat-play defendants was that they seemed to make tort cases a matter of aggregate rather than individualized treatment.[62] Liability for repetitive harms, Justice

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57. *See* Report from the Committee to Study Compensation for Automobile Accidents, to the Columbia University Council for Research in the Social Sciences 24 n.9 (1932) [hereinafter Columbia Report] (on file with the authors).

58. UNITED STATES RAILROAD RETIREMENT BOARD, REPORT TO SENATE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON INCIDENCE OF WORK INJURIES IN THE RAILROAD INDUSTRY: THEIR COST, AND SOCIAL & ECONOMIC CONSEQUENCES 9 (1947) [hereinafter RAILROAD RETIREMENT BOARD].

59. *Effective Auto Claims Handling Refutes Critics*, 9 FOR THE DEF. 59, 59 (1968); *see also* Comment, *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. U. L. REV. 895, 895 n.5 (1953).

60. HORWITZ, *supra* note 16, at 59.

61. *See* Holmes, *supra* note 15, at 467.

62. *Id.*

Holmes explained, was readily estimated by defendants.[63] Jury determinations in particular cases, by contrast, were mere "chance, once in a while rather arbitrarily interrupting the regular course of recovery," and perhaps "therefore better done away with."[64]

In one sense, the descriptions of tort law offered by Green and Justice Holmes were wildly futuristic. Even at the beginning of the twenty-first century, a full century after Green's and Justice Holmes's speculative musings, American tort jurists continue to resist the overt introduction of the actuarial tools of the statistician into the formal law of torts.[65] Yet in important respects, Justice Holmes and Green had a much better sense than many reluctant jurists in the century since of trends in the world of tort litigation, as opposed to the slower-moving world of formal doctrine. For if tort lawyers have often resisted the introduction of statistical aggregation techniques at the retail level of decided cases and tort doctrine, they have been pioneers in the aggregation of tort cases at the wholesale level of settlement. In the deep shadows of the law of torts, out of the field of vision of the treatise writers and the jurists and the doctrinal synthesizers, American tort lawyers have for more than a century now been quietly developing a privatized, virtually unregulated, sometimes exploitative, but sometimes quite sensible, system of aggregated settlement techniques for the resolution of mature torts.

B. Employers' Liability, Repeat Players, and the Beginnings of Aggregated Settlement

Work accidents presented the first forum for the widespread development of the kinds of privatized settlement systems that have come to characterize tort practice in areas involving mature torts. Though Green and Justice Holmes may have been the first to bring the mass-tort features of the emerging law of personal injury to the attention of elite jurists, state civil servants had begun to make similar observations in the 1870s and 1880s.[66] "The Moloch of

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63. *Id.*

64. *Id.*

65. For resistance to statistical techniques, see Charles Nesson, *The Evidence or the Event? on Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985); Laurence H. Tribe, *A Further Critique of Mathematical Proof*, 84 HARV. L. REV. 1810, 1810-11 (1971); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in The Legal Process*, 84 HARV. L. REV. 1329, 1329-30 (1971). For more favorable reviews of the use of statistical tools, see Judge Weinstein's campaign for a different approach in cases like *In re* Simon II, 211 F.R.D. 86 (E.D.N.Y. 2002), as well as SCHAUER, *supra* note 33, and Daniel Shaviro, *Statistical Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 543-48 (1989).

66. WITT, *supra* note 16, at 141.

industrial activity," announced the reports of state departments of labor statistics, "demands a sacrifice of life and limb, constant, as the actuarial tables show, and inevitable so long as human contrivances and human understanding are fallible."[67]

State reports on work accident statistics were published against the background of the enactment in Western Europe of formal, publicly-managed compensation systems for workplace accident victims.[68] In the United States, by contrast, the work injury crisis of the late nineteenth and early twentieth centuries generated (at least at first) a series of privatized compensation systems in the shadow of the common law of torts.[69] Indeed, many employers (and even some plaintiffs' representatives) developed private settlement structures that resembled the workmen's compensation schemes of Western Europe as much as they did the doctrinal architecture of the American law of torts.[70]

For one thing, some American employers—especially the largest and most managerially sophisticated—began in the 1880s and 1890s to adopt employer-specific, contractual workmen's compensation systems in which employees waived their right to sue in return for scheduled accidental disability benefits.[71] When the *ex ante* waivers of the right to sue in these early examples of welfare capitalism were held unenforceable, employers often converted them into simple *ex post* settlement systems in which employees could choose between advancing a case to trial or selecting from the compensation scheme's scheduled settlement offer.[72]

Even where employers did not adopt formal compensation schemes, however, studies of the ways in which work injuries were compensated in the pre-workmen's compensation era suggest that many employers developed standardized settlement practices closely resembling the kinds of administrative claims processing emerging at virtually the same time in Western European workmen's compensation systems. In a highly schematic model of work accident settlements in the early American tort system, one would expect many employers to trade the uncertainties of their negligence defense for

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67. *Id.*

68. DANIEL RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 223-25 (1998); WITT, *supra* note 16, at 9-10, 95-96.

69. *Id.* at 43-125.

70. *Id.* at 103-25.

71. PRICE FISHBACK & SHAWN KANTOR, PRELUDE TO THE WELFARE STATE 91-92 (2000); WITT, *supra* note 16, at 113-116; Richard Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800 (1982); John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 26 (2003).

72. *See* WITT, *supra* note 16, at 123.

limitations on the unpredictability of a jury award. Similarly, one would expect injured employees, many of whom would have been deprived of their earning capacity, to opt for certain and immediate payment rather than the vagaries and delays of litigation.

Further, one would expect the private administrative settlement system to discount settlement awards for the risk of plaintiff non-recovery across the entire at-risk population, rather than in one case at a time. For example, assume a set of comparable industrial accidents were 70 percent likely to be the product of employer negligence, as opposed to contributory negligence, assumption of risk, or any other defense to liability. Under an idealized system of individualized trials, the plaintiff would win 70 percent of the time, and the employer 30 percent of the time. In those cases where the plaintiff wins, the recovery would be 100 percent of the value of the injury; where the plaintiff loses, the recovery would be zero. A highly-idealized mature administrative settlement system, by contrast, would internalize the proportionate win rates by reducing all awards to a corresponding percentage of what might be obtained at trial. In other words, a mature system spreads the risk of non-recovery across potential claimants, rather than concentrating the losses (and the gains of complete recovery) in subsets of claimants, some of whom come out ahead, and some of whom suffer devastating losses.

As a result, in a mature system one would expect to find that a higher proportion of claimants are compensated than would be the case were all cases litigated to judgment, and one would expect the recoveries to be less than those received by claimants who had actually litigated a case to judgment. This, of course, is the basic structure of the workers' compensation system. And this is also roughly what we find in the American common law of employers' liability before its replacement by workers' compensation.

The best evidence on pre-workers' compensation employers' liability settlements comes from the recent work of Price Fishback and Shawn Kantor.[73] In their account, employee recoveries under the tort system resembled in many ways those that would soon be produced by the workmen's compensation system. A considerably higher percentage of work accident victims under the pre-workers' compensation tort system received payments from their employers than would have been able to obtain judgments in a tort suit.[74] At the same time, the dollar amounts of those payments were considerably smaller than the amounts that would have been recovered had those

73. FISHBACK & KANTOR, *supra* note 71, at 28-53.

74. *Id.* at 34.

same employees prevailed in tort suits, typically amounting to only a fraction of the losses incurred by the injured worker recipients.[75]

Indeed, we see virtually the same pattern in other studies of employers' liability litigation.[76] When the Railroad Retirement Board studied work accidents on the railroads, for example, it found that average payments to injured employees under the Federal Employers' Liability Act were almost identical to average payments made in railroad injury cases falling under state workmen's compensation laws. Wage loss replacement for claims under the two systems—tort and workmen's compensation—tended to cluster between 30 and 60 percent of lost wages.[77] Only among higher-paid train and engine service employees, for whom state workmen's compensation award statutory ceilings kicked in, did the tort system offer significantly different (because higher) average damage awards.[78] By the end of the 1950s, the most extensive empirical examinations of the operation of the personal injury settlement market were finding that tort law was neither "the all-or-nothing proposition that its rules envision and its critics decry,"[79] nor the lottery system that some of today's commentators decry,[80] but instead a matter of "part-recovery-most-of-the-time."[81]

High settlement rates, widespread (if usually small) recoveries, and discounted claims values were not the only ways in which employers' liability practice mimicked workers' compensation. Anticipating workers' compensation damages grids, early employers' liability practitioners developed rudimentary standardized procedures for the valuation of claims on a categorical rather than individualized basis.

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75. *Id.* at 43-42.

76. *See, e.g.*, Columbia Report, *supra* note 57, at 273 tbl.16 (focusing on automobile accident injury claimants in the late 1920s); Russell, Blood on the Tracks, *supra* note 56, at 1 (listing streetcar injury claimants in the first decade of the twentieth century).

77. RAILROAD RETIREMENT BOARD, *supra* note 58, at 119 tbl.27.

78. *Id.* tbl.22.

79. Marc A. Franklin et. al., *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 35 (1961).

80. *E.g.*, Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 778 (1967).

81. Franklin et. al., *supra* note 79, at 35; *see also* PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 49-50 (1985) (describing stability in the settlement marketplace in medical malpractice claims and arguing that "the tort system in practice is far from random"); 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) ("The allegation that the tort system is an erratic lottery is exaggerated. . . . More than 90 percent of claims are settled out of court. Two-thirds are closed within two years of filing. On average, claims settle for 74 percent of their potential verdict.").

Lawrence Friedman has observed that repeat-play defendants began to establish claims departments and to develop "standard procedures" for settling the repetitive claims that came before them.[82] Perhaps as a result of such standardized claims practices, employee accident compensation in practice tended to depart from what the formal law of torts might have provided in any individual case. Fishback and Kantor have found that although common law tort doctrines "influenced the probability and level of accident payments . . . they were clearly not the only influences and sometimes not even the dominant influence."[83] There is even some evidence to suggest that employer negligence did not raise the amount paid to accident victims in nonfatal accident cases, though the link between employer negligence and compensation paid is clearer in fatal accident cases.[84] Indeed, the relative unimportance of the fault question in some work accident settings appears on the face of the accident notice forms used by liability insurers and their insureds. In the years before workmen's compensation statutes, some employers' liability insurers even dropped questions about whether the injury was "due to any negligence or fault" from their notice forms altogether.[85]

Employers' liability practice, in short, seems often to have moved away from individualized determinations of claims measured against the baseline of tort doctrine. Particular employers' group personnel-management decisions often appear to have been more significant than the individual merits of any particular case in shaping the settlement values of pre-workmen's compensation claims. The management of labor turnover and workforce morale, for example, seems to have prompted many employers to provide small amounts of compensation to their injured employees even where the employer had not set up a formal work accident compensation scheme.[86] Similarly, employers' decisions to outsource work injury compensation by acquiring liability insurance appear to have

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82. Friedman, *supra* note 47, at 372; *see also* Held, 13 STREET RAILWAY J. 770 (1897).

83. FISHBACK & KANTOR, *supra* note 71, at 45.

84. *Id.* at 44.

85. *See, e.g.*, notices of accidents made out at Lyman Mills for the American Mutual Liability Insurance Company in Boston. Lyman Mills Claims Forms, (on file with Baker Library, Harvard Business School, in Lyman Mills Collection, Box LAD-1). Notice forms prior to October 1910 ask for the employer's evaluation of fault and negligence; subsequent notice forms drop the negligence and fault question. *Id.* Workmen's compensation legislation did not go into effect in Massachusetts until July 1912. Letter from Sydney A. Williams, secretary, American Mutual Liability Insurance Company, to The Lyman Mills, (Dec. 13, 1911) (on file with Baker Library, Harvard Business School, in Lyman Mills Collection, Box ED-1, Folder ED-3).

86. *See, e.g.*, Letter to Insurer (June 3, 1897) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-30).

significantly increased their injured employees' likelihood of receiving post-accident compensation.[87]

The emergence of employers' liability insurance added an additional repeat-play institution to the settlement mix. The presence of employers' liability insurance appears to have increased the probability that an injured employee would receive some compensation.[88] Insurers, in other words, appear to have moved settlement practices closer to the model of settlements set out above.[89]

Indeed, from early on, employers' liability insurers adopted streamlined bureaucratic mechanisms for settling work accident disputes. At one remove from the shop floor, early liability insurers developed rough rules-of-thumb for the evaluation of work accident cases, adopting categorical approaches to claims resolution rather than making individualized inquiries. Was the employee new to the machine at which he was working when injured, or was he experienced with it?[90] Was the employee engaged in her usual occupation when injured?[91] Did the injured employee speak the language in which warnings or safety instructions were posted?[92] Standardized form responses to employers' claims – typically reporting "no legal liability"[93] or that "no liability should attach"[94] – predominated. Individualized inquiries into the particulars of a given injury were extraordinarily rare.

87. FISHBACK & KANTOR, *supra* note 71, at 48.

88. *Id.*

89. *See supra* notes 72-73 and accompanying text.

90. *See, e.g.*, Letter from Charles E. Hodges, Assistant Manager, American Mutual Liability Insurance Company, to Dwight Manufacturing Company (Nov. 8, 1897) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-30); Letter from Charles E. Hodges, American Mutual Liability Insurance Company, to Dwight Manufacturing Company (May 6, 1907) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-41).

91. *See, e.g.*, Lyman Mills Claims Forms (Jan. 1890) (on file with Baker Library, Harvard Business School, in Lyman Mills Collection, Box LAC-1); Accident Report Form (Mar. 1888 – Aug. 1892) (on file with Baker Library, Harvard Business School, in Lawrence Manufacturing Company Records, Folder GO-1,).

92. *See, e.g.*, American Mutual Liability Insurance Company forms (printed for Dwight Manufacturing Company) (Oct. 22, 1901) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-1); Lyman Mills Claims Forms, (Sept. 1909) (on file with Baker Library, Harvard Business School, in Lyman Mills Collection, Box LAC-9);

93. Letters (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-35).

94. Letters from Employer's Liability Insurance Corporation, Ltd., to Lawrence Manufacturing Company (on file with Baker Library, Harvard Business School, in Lawrence Manufacturing Collection, Letter File GP-1)..

C. Plaintiffs'-Side Claims Brokers and the Case of the Dwight Manufacturing Company

So far, our discussion of the consequences of repeat players in American tort practice has focused on the defense side. Indeed, repeat players developed much more slowly on the plaintiffs' side.[95] Yet even in the late nineteenth and early twentieth centuries, in the years before workmen's compensation statutes, we find evidence that the market in work injury claims led again and again to the emergence of groups of claimant representatives—lawyers and otherwise—who developed portfolios of claims against precisely the kinds of institutions that were becoming repeat-players on the defense side.

Consider the picture of accident claims practice that emerges from one extraordinary resource for studying pre-workers' compensation employers' liability practice: the liability insurance files of the Dwight Manufacturing Company, a textile firm in Chicopee, Massachusetts that employed a largely Polish-immigrant workforce to manufacture sheetings, shirtings, and fancy cottons.[96] Dwight was insured by the American Mutual Liability Insurance Company, based in Boston.[97] The overwhelming majority of the accidents Dwight reported to American Mutual were relatively slight injuries to employees' hands, fingers, and feet, for which American Mutual typically paid minor medical expenses.[98]

Many of the patterns we have described above appear in Dwight's injury settlement practices as well, including the vastly disproportionate relationship of adjudicated cases to claims settled,[99] the adoption of settlement strategies designed for personnel management purposes rather than simply in exchange for waivers of

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95. *See supra* text accompanying notes 47-49.

96. *See* CARL GERSUNY, WORK HAZARDS AND INDUSTRIAL CONFLICT (1976) (describing the Dwight Manufacturing Company's accident compensation practices). Gersuny's early archival work led us to the Baker Library's rich collection of employers' liability insurer records.

97. Letters (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-30).

98. *See, e.g.*, Letter from Charles E. Hodges, Assistant Manager, American Mutual Liability Insurance Company, to Dwight Manufacturing Company (June 3, 1897) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-30).

99. Out of thousands of total claims in the Dwight Manufacturing Company files, there is a mere one reported case arising out of injuries at the Dwight Manufacturing Company before 1913. *See* Glover v. Dwight Mfg. Co., 18 N.E. 597, 599 (Mass. 1888) (affirming jury verdict for thirteen-year-old female plaintiff whose fingers were injured while cleaning a machine on the ground that there was sufficient evidence from which the jury could reasonably have found defendant negligent and plaintiff free of contributory negligence).

prospective tort liability,[100] and the use of standard form denials of liability as a matter of course in the bureaucratic handling of claims.[101] There is also evidence of still another aggregating practice: trading off settlement funds from one claimant or group of claimants to another, as when Dwight encouraged American Mutual to provide extra funds to certain injured employees out of the savings of money that had been "kept back" from other injury claimants.[102]

Dwight and American Mutual also used their repeat-player position to improve their bargaining position as much as possible. In cases of severe injury, they put to use what they called the "Chicopee method of settlement" (named after the location of the Dwight mill): waiting until the family members of a disabled Dwight employee "get hungry for money before going to see them."[103] Additionally, American Mutual often advised Dwight to take steps to ensure that it would maintain favorable asymmetries of information about the law and the facts.[104] The insurer sometimes discouraged Dwight from asking pointed questions that might lead a possible claimant to infer the existence of a new legal rule around which she might tailor her testimony.[105] In other cases, American Mutual instructed Dwight to bar injured employees and their representatives from access to the mill (and thus access to the scene of the injury) prior to receiving a waiver of liability.[106] In the work accident area, it seems, Marc Galanter's "haves" were coming out ahead already in the late nineteenth and early twentieth centuries.[107]

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100. *See, e.g.*, Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (Mar. 14, 1902) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-2).

101. *See, e.g.*, Printed Form (Oct. 24, 1899) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-32).

102. Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (Apr. 24, 1902) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-2).

103. Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (Mar. 17, 1902) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-2).

104. *See, e.g.*, Letter from Charles E. Hodges, Assistant Manager, American Mutual Liability Insurance Company, to Dwight Manufacturing Company (July 13, 1897) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-36) (instructing Dwight to "keep the case out of the hands of the enemy").

105. Letter from Charles E. Hodges, Assistant Manager, American Mutual Liability Insurance Company, to Dwight Manufacturing Company (July 28, 1897) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-30).

106. Letter from Charles E. Hodges, Assistant Manager, American Mutual Liability Insurance Company, to Dwight Manufacturing Company (Mar. 15, 1904) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-36).

107. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103-105 (1974) (referring to repeat players in litigation as

Whenever the haves came out ahead because of superior information or economies of scale, however, a new entrepreneurial opportunity was created for agents able to develop information and amass claims of their own. In effect, the emergence of a claims market generated an opportunity for arbitrage by agents able to replicate on the claimants' side the efficiencies of centralizing information and coordinating claims. Thus, we find, at almost the same time, an interesting phenomenon developing in Dwight's employees' accident settlement practices: the introduction of informal claimant-side agents or claims brokers who appear quickly to have built up portfolios of claims.[108]

At Dwight, early claims brokers were not lawyers but interpreters, who served as intermediaries between the firm and its Polish employees. This emergence of interpreters as intermediaries is hardly surprising given that immigration provided the human muscle for the great period of American industrialization. The first interpreter appeared in Dwight's correspondence to American Mutual in 1902,[109] and in a short time references to interpreters became commonplace.[110] By 1909 and 1910, a small cadre of shady and often unnamed interpreter claims brokers, led by a man named Starzyk, came to play an increasingly important role in the management of employee injury claims at Dwight.[111] Importantly, the introduction of claimant-side repeat-play agents had significant consequences for the claims settlement market. In particular, negotiations between Dwight and American Mutual, on one hand, and claims brokers, on the other, expressly took into account not just the circumstances of the particular case presented to them, but also the run of cases in the

"haves" and noting that most repeat players "are larger, richer, and more powerful than are most ... [one-shotters].").

108. *Cf.* HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990).

109. Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (July 9, 1902) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-2).

110. Letter from Dwight Manufacturing Co. to American Mutual Liability Insurance Co. (Feb. 28, 1903) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-2); Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (May 4, 1904) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-2); Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (May 26, 1908) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-3).

111. *See, e.g.*, Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (Feb. 17, 1910) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-3); Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (Aug. 8, 1910) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-3).

claims brokers' portfolios. The settlement of injury cases thus became an increasingly aggregate endeavor, as the firm, the insurer, and the repeat-play claimants' agents sought to manage the run of claims arising out of the mill's operations.

Concentrating claims in the hands of these agents was not without peril for injured employees. Without clear competition among contending potential brokers and without easy recourse to the more transparent tort system, there was a strong risk of what might tactfully be termed high agency costs—or, less tactfully, betrayal. In some cases, it seems that claims brokers colluded with firms to take advantage of the injured claimants.[112] We can tell from Dwight's files that the brokers were taking payment not just from the claimants, in the form of contingency fees, but also (and perhaps unbeknownst to the claimants) from Dwight itself.[113] Indeed, Dwight regularly noted the assistance that "friendly" interpreters had provided in reducing the amounts claimed by injured employees.[114] Brokers like Starzyk found themselves in the position of talking employees into accepting settlement offers the employees had previously viewed as too small.[115] And claims brokers often warned Dwight about the arrival of "shyster lawyers" at an employee's doorstep.[116] In short, the claims brokers sometimes took advantage of their ability to offer something that mass tort defendants would later describe in precisely the same terms as Dwight managers and American Mutual officials: settlement "for the sake of peace."[117]

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112. *See generally*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class-Action*, 95 COLUM. L. REV. 1343 (1995) (describing parallel risks in the modern class-action context) [hereinafter *Class Wars*]; John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 851-52 (1995) (same); Samuel Issacharoff, *Class-Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 812-813 (1997) (same) [hereinafter *Class Action Conflicts*]; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class-Actions*, 1999 SUP. CT. REV. 337, 372 (same).

113. Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (July 15, 1911) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-4).

114. *See, e.g.*, Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (Feb. 17, 1910) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-3).

115. *Id.*

116. Letter from Dwight Manufacturing Company to American Mutual Liability Insurance Company (Mar. 21, 1902) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-3).

117. Letter from Charles E. Hodges, Assistant Manager, American Mutual Liability Insurance Company, to Dwight Manufacturing Company (July 12, 1911) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-44); *see also* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class-Action*, 115 HARV. L. REV. 747, 749-59 (2002) (analyzing mass tort defendants a century later).

Yet claims brokers also provided a valuable service to injured employees who, as Galanter's "one-shotters,"[118] faced steep informational deficits and often powerful risk aversion obstacles to maximizing the value of their settlements.[119] For one thing, it is entirely plausible to think that the claims brokers were as duplicitous (or more so) in their dealings with Dwight as Dwight's files suggest they sometimes were in their dealings with clients. But duplicity aside, the claims-broker go-betweens performed a valuable service in the informal accident compensation system at Dwight. With ongoing reputational stakes on both sides, the claims brokers served an important gatekeeper role, providing Dwight and American Mutual with a shorthand way of identifying credible claims worth compensating.[120] At the same time, the claims brokers provided their employee-clients a modicum of expertise and repeat-play know-how in dispute resolution, while minimizing the risk that Dwight would single out their claims for hardball settlement tactics.[121] Indeed, Dwight and American Mutual seem to have understood very well the complex and potentially dangerous dual functions played by interpreters who could very quickly stir up expensive claims against them.[122] Even the apparently compromised agents at the Dwight

118. Galanter, *supra* note 107, at 97 (describing "one-shotters" as those litigants who do not participate in litigation very often).

119. The consequences of claimant risk aversion in tort settlement appear to turn on the framing effects of whether the claimant sets his or her possible future tort judgment damages as the baseline, departure from which in the form of a settlement would be a downward departure, or instead sets the pre-judgment status quo as the baseline, departure from which in the form of a settlement would be an upward departure. *See generally* literature on law and behavioral economics.

120. Presentation of claims that turned out after the fact not to have been worth paying would have done in a claimsbroker's reputation. *See* Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997) (analyzing plaintiff's representatives as gatekeepers); *see also* John C. Coffee Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003) (developing a model of attorneys as gatekeepers).

121. *See* Mnookin & Gilson, *supra* note 8, at 513 (describing the value of lawyers as ongoing repeat-players in bargaining games). As Herbert M. Kritzer has pointed out, contingency fee agents, such as lawyers, are inhibited from seeking their own interests at their clients' expense by the need to maintain reputational capital among the pool of future clients. Herbert M. Kritzer, *Contingent-Fee Lawyers and their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 801-02 (1998).

122. Letter from Charles E. Hodges, Assistant Manager, American Mutual Liability Insurance Company, to Dwight Manufacturing Company (Dec. 4, 1911) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, Letter File ML-44); Letter from Dwight Manufacturing Co. to American Mutual Liability Insurance Co. (July 11, 1911) (on file with Baker Library, Harvard Business School, in Dwight Manufacturing Collection, HL-4).

Manufacturing Company seem to have facilitated recoveries for the injured workers at Dwight.

In the Dwight case, the development of repeat-players, first on the defense side and then later on both the defense and the plaintiffs' sides, had powerful consequences for the ways in which tort law played out. At Dwight and elsewhere, when one actually looks beyond the layers of reported cases, beyond the jury verdicts and even beyond the case filings, and instead focuses on the ground-level practices of claims resolution in the first American experience of mass harm, one finds a tort system that informally functioned much like the formal workmen's compensation system that replaced it.[123] Formal compensation systems, of course, had the potential to operate with considerably greater systemic rationality than the informal aggregate settlement systems that they replaced; all too many needy and deserving claimants surely went uncompensated or under-compensated in the informal settlement regime that grew up in the pre-workmen's compensation era. And where the private administration of the tort system made it difficult for public institutions to collect information about the extent and severity of the work injury problem, formal compensation systems in the work accident area served to create a mechanism for information collection.[124]

But the absence of a formalized, systematic rationality should not distract us from significant similarities between the two regimes. Both compensated relatively large percentages of work injury victims —considerably more than the formal doctrine would have suggested— by providing them with awards that were more certain, albeit smaller, than those that might have emerged in fully litigated cases. Both adopted rule-of-thumb categories and stereotyped claims practices, rather than conducting individualized inquiries, to determine questions of compensation. To be sure, the tort system allowed Justice Holmes's "chance, once in a while"[125] case to go to a jury, but the

123. Our observation here is consistent with the observations of many of those who have researched the law of torts in action. *See, e.g.*, ROSS, *supra* note 23, at 246; *see also* FISHBACK & KANTOR, *supra* note 71, at 59 (coming to the same conclusion as to damages amounts).

124. For further consideration of the relative merits of private aggregation and public compensation systems, see *infra* text accompanying notes 208-212. Privately administered settlement systems rely on information about claims valuations and claims volume that is privately-held by the repeat-players in the system and often not publicly available. In other words, in addition to raising questions about doctrinal barriers to trial (such as summary judgment) or the development of alternative dispute resolution mechanisms in lieu of trial, the diminished role of trial as claims mature often removes information about the underlying phenomena from the public sphere.

125. Holmes, *supra* note 15.

available evidence suggests that such cases were especially few and far between when repeat-play defendants were involved. Indeed, neither settlement in the shadow of the tort system nor compensation through a publicly-run system provided the typical claimant with a day in court. Instead, the private tort system, like its public counterpart, created institutional mechanisms to respond to "accidents" that were probabilistically certain *ex ante*, even as the identity of individual victims was unknown.

D. Informal Aggregation in Early Mass Harms

The Dwight Manufacturing Company experience, of course, is just one case study. More work would need to be done across a wider spectrum of firms before concluding that the Dwight experience accurately represents the claims practices in other repeat-player, mature tort contexts. But the very nature of the phenomenon that we seek to describe—privatized, informal, and unpublished—makes the occasional glimpse into the real world of mature tort settlement practices extremely valuable.[126]

Moreover, there is good reason to think that the Dwight experience is not anomalous. In a variety of contexts, in work accidents and elsewhere, repeat-play actors seem to have been filling the markets for settlement created by the late-nineteenth-century injury crisis. Consider the 1890s law practice of one Samuel Evans Maires of Philadelphia. Maires specialized in claims against the Philadelphia Traction Company, which operated trolleys. His practice consisted essentially of purchasing causes of action from a stable of claimants, providing them with much-needed cash and with the certainty of some kind of recovery, while assuming for himself the risk and the reward of an outsized judgment or settlement.[127] Or think of the practice of Arthur E. Clark of upstate New York, who developed a portfolio of more than 2,000 claims by property owners against New York telephone and telegraph companies in the late 1890s. Clark created economies of scale, spread claimants' risk of being subject to a down-side outlier judgment, and offered defendants the opportunity for a global (or near-global) settlement.[128]

Similar early plaintiff-side aggregation practices arose out of mass torts such as dam breaks, mine explosions, and train wrecks. In one 1911 dam break at Black River Falls, Wisconsin, for example, a

126. *See* Saks, *supra* note 81, at 212 (describing the difficulty of getting good information about the workings of the private settlement system).

127. Maires's Case, 2 Pa. D. 297, 297 (Pa. Common Pleas 1898).

128. *In re* Clark, 77 N.E. 1, 5-6 (N.Y. 1906).

single Wisconsin law firm signed up a large number of property damage claimants and arranged to have all its clients' claims assigned to one claimant for trial.[129] Aggregation allowed the firm to create economies of scale by avoiding the multiplication of costs necessary to bring individual claims.[130] Similarly, a 1902 mine explosion in Fraterville, Tennessee, led one law partnership to take on 40 of the approximately 190 claims brought against the company.[131] Risk-averse claimants may thereby have sought to reduce the risk that their cases would produce a downside outlier judgment on either the question of liability or the question of damages. The law partners, by contrast, very likely sought to achieve some (if not all) of the economies of scale that the Black River Falls law firm would achieve a few years later.

A few decades later, the Railroad Retirement Board study of railroad employee injuries under the Federal Employers' Liability Act found that fraternal orders and railroad brotherhoods were taking on a role in employee injury claims similar to the role played by repeat-play claims agents in the early mass torts.[132] As the Board discovered, "In the great majority of the serious injuries and in practically all the less severe injuries, claims under the liability act are settled by a quasi-bargaining process."[133] The railroads were represented by "claim agent[s] specializing in injury cases" who were "master[s] of the technique of 'adjusting' claims."[134] And though employee claimants generally went without representation, many such claimants were represented by a railroad brotherhood lodge chairman or some other union official.[135] Lodge and union officials were in an especially good position to minimize informational asymmetries between the parties and to establish ongoing reputational stakes for railroad claims agents. Not surprisingly, claimants with representation from the unions did much better in settlement negotiations than those without.[136] Indeed, as early as the beginning of the 1930s, at least one railroad brotherhood had expanded its program of legal aid through a

129. Ellis v. Frawley, 161 N.W. 364, 365 (Wis. 1917).

130. *Id.* at 365-66.

131. Ingersoll v. Coal Creek Coal Co., 98 S.W. 178 (Tenn. 1906).

132. *See* RAILROAD RETIREMENT BOARD, *supra* note 58, at 10 (noting that at settlement discussions, "[t]he employer is represented by the claim agent and the employee generally speaks for himself or is assisted by the local lodge chairman or other union official").

133. *Id.* at 10.

134. *Id.* at 47-48.

135. *Id.* at 10, 48.

136. *Id.*

formal Legal Aid Department that provided injured members with referrals to qualified plaintiff-side FELA lawyers.[137]

Of course, as in the Dwight case, such arrangements sometimes involved abuses of the power of claimant-side agents. With at least one defendant, for example, Arthur Clark of upstate New York simply turned around and sold the claims in return for $3,000 for his own account, promising to "help . . . in the settlement of the cases," and to keep his clients from going to other lawyers, and authorizing the company to settle his clients' claims "at your own terms and figures."[138] And whether or not Samuel Maires was offering a valuable service to some of his Philadelphia trolley car clients – and there is some reason to think he was—he also appeared to have systematically lied to other clients about the amounts received in settlement payments from Philadelphia Traction.[139]

Yet we have no reason to believe that abuses such as those that may have taken place in the Clark and Maires cases were the rule rather than the exception. Where the claimants' agent was not, like Clark, apparently planning to exit the industry, claimants were often acting quite rationally to seek such a repeat-player in the claimants' agent business. As Herbert Kritzer has observed, and as the Dwight Manufacturing Company's injured employees seem to have understood, the ongoing reputational interests of such contingency fee agents in the pool of possible future clients effectively aligned the interests of the agents with their clients.[140] Far from being an indicator of exploitation, then, the aggregation of claimants by plaintiffs' agents often served as a bonding mechanism ensuring an agent's fidelity to the claimant's interests.[141]

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137. Bhd. of Ry. Trainmen v. Virginia, 377 U.S. 1, 4 (1964); George E. Bodle, *Group Legal Services: The Case for* BRT, 12 UCLA L. REV. 306, 309 (1964).

138. Clark would "write conciliatory letters to all who write asking about settlements, and to aid in every way possible in making the settlements." *In re* Clark, 77 N.E. 1, 5-6 (N.Y. 1906).

139. Maire's Case, 2 Pa. D. 297, 297 (Pa. Common Pleas 1898).

140. Kritzer, *supra* note 120, at 795-802.

141. Critics of market mechanisms, to ensure lawyer accountability, often point to the apparent absence of price competition in the market for contingent-fee legal services as evidence of the inadequacy of such mechanisms. *See, e.g.*, Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is it Price Competitive?*, 25 CARDOZO L. REV. 65, 115-25 (2003) (contending that the lack of price competition due to the rigidity of standard contingent fee pricing has not been counteracted by market solutions because of lawyers' control over the market for tort claims). As economists have long observed, however, price convergence is often evidence of the competitiveness of a market, not of collusion or monopoly: this is the so-called "law of one price." *See* George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 214 (1961); Charles Engel & John H. Rogers, *How Wide is the Border*, 86 AM. ECON. REV. 1112, 1112 (1996). Moreover, if we look closely, there is evidence of at least some long-standing informal price competition among the plaintiffs' bar. Of 186 cases in which the 1932 Columbia study of auto accident injuries was able to determine the amount of an arms-length lawyers' fee.

The over-representation of cheats and swindlers in our story is no doubt in part an artifact of the evidentiary sources. The best sources for otherwise invisible plaintiff-side aggregation are the disciplinary cases of state bar associations. Early attempts at aggregation by claimants' agents ran headlong into professional disciplinary prohibitions on champerty[142] and on the improper solicitation of claims.[143] And yet as one claimants'-side agent cogently put it in defense of his firm's solicitation practices, to obstruct claimants'-side agents from accumulating portfolios of claims was to leave the field to the repeat-players on the defense side: "their monopoly is established, competition is banished, rivals are crushed, [and] the trust rule is enthroned."[144] An occasional court agreed. As a Tennessee county chancery court noted shortly after the turn of the twentieth century, if a single lawyer or a single firm can represent "a large business in its operation causing or originating successive suits," ought not a plaintiffs'-side lawyer or firm be able to solicit the cases thus caused?[145]

E. An Excursion Into the Theory of Settlement: Market Makers and Settlement Values

Focusing on the colorful characters that emerge in the rough-and-tumble of early tort law should also not obscure the significance of such repeat-play actors in bringing an informal rationality to the tort system. Repeat-play agents permit private settlement systems to emerge based on the information the agents possess about the value of claims in the retail litigation market of adjudication. By allowing for the wholesale resolution of claims through settlement, instead of the expensive prospect of retail resolution through actual trial, the repeat agents perform an arbitrage function, in which the overall system

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92 cases involved fees of 25 percent or less of the total recovery; 76 cases involved fees of between 25 and 50 percent of the total recovery; and 18 cases involved fees of 50 percent or more of the total recovery. Columbia Report, *supra* note 57, at 42-43 n.23. For contemporary anecdotal evidence of such informal, below-the-radar-screen price competition, *see* Adam Liptak & Michael Moss, *In Trial Work, Edwards Left a Trademark*, N.Y. TIMES, Jan. 31, 2004, at A1 (describing tort clients who reported that "all the lawyers they interviewed except Mr. Edwards wanted one-third of any award. . . (but that) Mr. Edwards offered to take a smaller percentage, unless the award reached unexpected heights"). Thanks go to Ed Morrison and Peter Schuck for conversations on the meaning of price convergence.

142. Ellis v. Frawley, 161 N.W. 364, 366 (Wis. 1917).

143. Ingersoll v. Coal Creek Coal Co., 98 S.W. 178, 190 (Tenn. 1906).

144. *Id.* at 187 (quoting plaintiffs' counsel).

145. *Id.*at 182 (quoting and reversing the court below). The same theory has animated the American Supreme Court's relaxation of the prohibitions on lawyer advertising in the modern era. *See generally*, Florida Bar v. Went For It, Inc., 515 U.S. 618, 633-34 (1995).

moves toward greater efficiency while the agents themselves profit from their role in providing predictability and order.

Our focus on the institutional role of these market makers extends the contemporary legal understanding of the relation between the small number of actually litigated cases and the capacity of the legal system to settle cases. The standard models for explaining why most cases settle and why some cases actually go to trial hinge largely on the availability of information about likely litigated outcomes.[146] In the Mnookin-Kornhauser account of settlements bargained in the shadow of the law, knowledge of likely results in litigation allows parties to settle and thereby jointly benefit from the lower transaction costs of not having to litigate.[147] Similarly, in the Priest-Klein model of why cases go to trial, information plays a central role.[148] According to the Priest-Klein hypothesis, cases go to trial either because litigants erroneously overvalue their claims or, more likely, because there is sufficient uncertainty about the state of the law so that litigants are unable to form overlapping estimations of the value of the plaintiff's claim. In either case, according to Priest-Klein, there is no directional bias regarding which cases reach trial and, accordingly, the win-rates of plaintiffs and defendants should be about 50-50.[149]

Together these two models focus on the role of decisional law, coupled with a systemic commitment to respect for precedent, as a public good that informs future disputants. Each of the models then addresses the dilemmas that attach to all public goods: why would any private party invest in the creation of a public good, and how do parties realize the private benefit from the public good? To answer the first question, Priest-Klein posit an equilibrium model in which cases go to trial primarily because of an insufficiency of decisional law that, once realized, protects others from similar inquiries in like cases. The Mnookin-Kornhauser model then allows the availability of the decisional law to inform subsequent disputants by creating a broader ambit of resolution from the narrow outcome of adjudicated cases.

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146. Samuel Issacharoff, *The Content of Our Casebooks: Why do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1270 (2002).

147. *See generally* Kornhauser & Mnookin, *supra* note 7.

148. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) ("[A]ccording to our model, the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement.").

149. *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 361, 371-72 (1991) (testing the Priest-Klein hypothesis).

Both Mnookin-Kornhauser and Priest-Klein rely on reported decisional law and the knowledge of lawyer intermediaries to apprise disputants of likely litigation outcomes so that they might reach efficient settlements.[150] Although the institutional setting for settlement is not a separate consideration in either model, each assumes tacitly a world of individual actors making private decisions in the shadow of decisional law. Both models are consistent with a world of bipolar dispute resolution, and neither has occasion to reexamine that assumption at any depth.[151]

Even working within the established models of settlement, however, it is possible to question the assumption that decisional law is sufficient to guide settlement in tort suits. Under any theory of bargaining, settlement is ultimately a matter of price. The question then becomes how parties agree on an actual dollar value for a claimed harm. While helpful, reported decisions are unlikely to give a full rendering of the value of highly fact-dependent tort claims.[152] Decisional law will likely speak volumes about the doctrine of assumption of the risk and other legal considerations affecting liability. But settlement requires not just agreement on liability, but also on the appropriate remedy. At its most basic, decisional law is unlikely to be able to put a direct value on, for example, the idiosyncratic claim of a twenty-five-year-old Latino man with a high-school degree who catches his dominant hand in a stamping press.

Even if a factually similar case has previously gone to trial and has been recorded in the decisional law, it is not clear how much information would be available to the parties in a later dispute. The valuation of the remedy in tort disputes is so centrally a jury function that there is little occasion for reported decisions to discuss the value of the underlying claims absent a truly extraordinary appeal of the remedy itself. Moreover, the most common form of judicial intervention into the jury assessment of value, the use of remittitur or

150. *See generally* Priest & Klein, *supra* note 148; Kornhauser & Mnookin, *supra* note 7.

151. Most of the studies that have tested the Priest-Klein hypothesis, with the most comprehensive being Gross & Syverud, *supra* note 148, have tried to model the strategic behavior of litigants as a component of the Priest-Klein equilibrium model. For example, Gross & Syverud are highly attentive to the incentives created by contingency contracts as opposed to the plaintiff having to bear the costs of litigation. They also focus on the reputational effect of medical malpractice liability to explain the higher than expected trial rate and the low rate of plaintiff success in these cases. In turn, Gross & Syverud examine repeat-players in terms of how they affect the strategic elements of bargaining, as opposed to an independent examination of the institutional forms of portfolio litigation.

152. For skepticism about the capacity of the thin layer of adjudicated cases to inform the value of claims in the settlement market, see Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 61, 73-80 (Robert E. Litan ed., 1993) and Saks, *supra* note 81, at 1223.

additur to compel the parties to accept a verdict departing from the jury's award, occurs in a little-discussed judicial gray area in which the threat of mistrial cajoles parties to accept final judgment. Since parties generally bargain for finality even after a jury award, this too is likely to remain obscured from reported case law.

As a result, to bargain over highly fact-specific claims in the shadow of the law requires knowledge far beyond what the reported decisions can reveal. Parties seeking to settle need to know not only doctrine but also value. Effective claims agents need to know what similar claims settled for in the private market. They need to know how those claims compared to more and less serious injury claims, or even to death claims under similar working conditions. It is not too far a stretch to describe the early plaintiff-side intermediaries as market makers who, despite the presence of ruffians and cheats, allowed an informed bargain to be forged in the shadow of the thin body of actually litigated cases.

II. STAGE TWO: THE AUTOMOBILE ACCIDENT

By the 1920s, as work accident rates in most U.S. industries began to fall, attention among tort jurists turned to the problem of automobile accidents. Here, too, was a social phenomenon that produced an inevitable stream of injuries. Viewed from a sufficiently high level of generality, automobile accident injuries and deaths were the inevitable product of a mass driving society. As industrializing societies such as China are discovering even today, putting thousands upon thousands of automobiles on the roads results in certain injuries – even though, once again, who is actually injured and under what circumstances cannot be known ahead of time. Even as early as the late 1910s in this country, the inevitability of significant numbers of injuries led some observers to advocate the enactment of statutory automobile injury compensation systems in place of tort.[153] Supporters of such systems hoped to do for motor vehicle accidents what workmen's compensation had done for work accidents.[154]

In the decades since, the literature on automobile accidents has been largely preoccupied with the contrast between such public no-fault compensation systems and the law of tort. Indeed, in the tort system, automobile claims have become the paradigm case for the way

153. WITT, *supra* note 16, at 194

154. WITT, *supra* note 16, at 149; Jonathon Simon, *Driving Governmentality: Automobile Accidents, Insurance and the Challenge to Social Order in the Inter-War Years*, 4 CONN. INS. L.J. 521, 527-28 (1998).

in which tort deals in individualized dispute resolution. Individual drivers, after all, are virtually always one-shotters in the tort claims system. Even the very worst drivers can hardly expect to develop much repeat-play expertise, and those who do acquire repeat-play status are usually not with us for long. Accordingly, as Deborah Hensler has put it, "[N]o one would include 'fender-bender' cases under the mass tort rubric."[155] Auto claims, in Professor Hensler's words, are dealt with "individually" rather than "in a collective fashion."[156]

Or so one would think. Even here, in this classically individualized area in tort, we can see the development of privatized systems of aggregate settlement in the stereotyped claims practices of automobile accidents' first repeat-play agents: liability insurance claims adjusters.

Liability insurance claims practices began to shape the settlement markets in auto tort claims even as state legislatures were rejecting the first generation of no-fault public automobile injury compensation plans.[157] The liability insurance premiums written by stock insurance companies (by far the most important form of liability insurer) increased from $64 million in 1918 to $212 million in 1927, an 86 percent increase after adjusting for inflation.[158] In 1927, automobile liability insurance represented almost 70 percent of the entire tort liability insurance market.[159] The same year witnessed sharp growth in the number of states enacting "financial responsibility laws" that required motorists to have insurance or equivalent wherewithal to pay tort judgments.[160] Connecticut enacted the first such statute in 1926, with Massachusetts, New Hampshire, Rhode Island, and Vermont following in 1927.[161] By 1935, twenty-

155. Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 887-88 (2001). Many thanks to Howard Erichson for bringing this particular passage to our attention.

156. *Id.*

157. *See* WITT, *supra* note 16, at 194-95; Simon, *supra* note 154, at 524.

158. BEST'S INSURANCE REPORTS: CASUALTY & MISCELLANEOUS 409 tbl. A (Alfred M. Best Co., ed., 6th ed. 1919); BEST'S INSURANCE REPORTS CASUALTY & MISCELLANEOUS 824 tbl. D (Alfred M. Best Co., ed., 15th ed. 1928).

159. BEST'S INSURANCE REPORTS CASUALTY & MISCELLANEOUS 824 tbl. D (Alfred M. Best Co., ed., 15th ed. 1928). This tort liability insurance figure excluded workmen's compensation liability insurance. Total workmen's compensation liability insurance premiums written in 1927 (stock and mutual companies combined) amounted to $212 million, equaling the total liability insurance premiums written by stock companies in all other areas combined. *Id.*

160. *1935 Record Year for Financial Responsibility Laws*, 36 BEST'S INS. NEWS (Casualty Ed.) Feb. 1936, at 570, 570.

161. *Id.*

eight states and the District of Columbia had enacted the laws.[162] Ten years later, stock casualty insurance companies alone were adjusting some four million claims each year.[163]

The growing presence of liability insurance in the automobile accident area produced many of the same kinds of settlement patterns that we observed in the work accident context, though some of the processes by which those patterns came about were different. In the work accident context, repeat-play claims agents, employers' ongoing interest in workforce morale, and insurers' ongoing reputational interests in the market for claims within the community of their insured's employees powerfully shaped the dynamics of the settlement market. Each of these factors exerted concerted pressure toward the development of ongoing claims practices that took advantage of the bargaining agents' relationships over time. Given the one-shot nature of automobile accidents, by contrast, ongoing relationships rarely existed, at least in the early years of automobile liability practice. Instead, what we see in the automobile injury case is the unilateral development by liability insurers of rules-of-thumb, settlement formulae, and claims categories for the ready resolution of ordinary cases.

To understand the claims practices in the auto accident field, it is important to begin with the point that liability insurance claims adjusting developed in the twentieth-century United States as a markedly low-status occupation.[164] The job came with little prestige, relatively low pay, and high turnover rates.[165] Insurers frequently complained about the difficulties of recruiting skilled adjusters, and when they were able to do so, a good adjuster was likely to rise quickly into the hierarchy of the home office.[166] Yet the work of insurance adjusting seemed to require the exercise of considerable discretionary judgment.[167] Was settlement appropriate? How much money would purchase a release? How much was too much?

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162. *Id.*

163. J. Dewey Dorsett, *Human Relations*, BEST'S INS. NEWS (Fire & Casualty Ed.), May 1946, at 48.

164. Wilson C. Jainsen, *Confessions of a Claim Man*, BEST'S INS. NEWS (Fire & Casualty Ed.), Sept. 1941, at 19 (writing in 1941 that "some twenty years ago claim men too frequently smacked of the water front and a choice collection of billingsgate might then have been considered a desirable asset for a claim man"); C.R. Carpenter, *Claim Administration*, BEST'S INS. NEWS (Fire & Casualty Ed.), Mar. 1963, at 132-33 (stating that "historically, in our business, there has been a concept that a claim man is a cross between a con-man and a house dick").

165. H.L. Handley, Jr., *Claims Adjusting*, BEST'S INS. NEWS (Fire & Casualty Ed.), Nov. 1964, at 114.

166. *E.g.*, Carpenter, *supra* note 164, at 131-132; Handley, *supra* note 165, at 114.

167. *Insurance Is Good or Bad*, 27 BEST'S INS. NEWS (Casualty Ed.), June 1926, at 27-28; *Fast and Fair Settlements*, 2 FOR THE DEF. 49, 49 (1961).

Many insurers responded by developing rules rather than discretionary standards for the management of their adjusters. These were claims management techniques designed by insurers "to protect [themselves] against the inexperience or the incompetency of the adjuster"[168] while ensuring the speedy processing of a large number of claims.[169] The aim was not to minimize the costs of any one settlement but "to produce *collectively* a satisfactory return"[170] by adopting categorical rules for claims treatment that would minimize the sum of administrative costs and compensation costs. Automobile cases, as H. Laurence Ross noted some time ago, were therefore "seldom individualized" in their claims settlement treatment. Indeed, much as rules (rather than standards) in tort doctrine systematically aggregate through what we described at the outset of this paper as *substantive* aggregation,[171] the internal rules of liability insurers' claims departments created strategies of *procedural* aggregation that exerted powerful effects on the resolution of automobile accident claims. In the context of automobile collisions, the seemingly infinite array of possible accident scenarios quickly boiled down into the basic categories of "rear-enders, red-light cases, stop sign cases, and the like."[172] Rules-of-thumb created rough-and-ready categories of claims, often based in actuarial findings, such as the observation that drivers of new cars, for example, tended to get into accidents in the third month of ownership.[173] Braking distance and speed data gave rise to categorical liability estimates:[174] drivers emerging from streets governed by stop signs were assumed to have been negligent;[175] drivers making left turns in front of oncoming traffic were assumed to be liable.[176]

While determinations of liability lent themselves relatively readily to formulaic, on/off rules, the application of rough-and-ready approaches to damages (including bodily injury) was an even more

168. Charles N. Sergeant, *Personal Injury Claims*, BEST'S INS. NEWS (Fire & Casualty Ed.), Nov. 1950, at 42.

169. *See* ROSS, *supra* note 23, at 134 (estimating that claims adjusters handled 30-50 new claims each month); Robert L. Lusk, *The Adjuster's Dilemma*, BEST'S INS. NEWS (Fire & Casualty Ed.), May 1961, at 96 (explaining that adjusters "are constantly rawhided" to speed the process).

170. ROSS, *supra* note 23, at 134 (emphasis added).

171. *See supra* note 35 and accompanying text.

172. ROSS, *supra* note 23, at 135.

173. L. J. McCrory, *The Critical Period in Auto Collision*, BEST'S INS. NEWS (Fire & Casualty Ed.), Aug. 1947, at 35.

174. *Auto Accident Investigations: Simple But Valuable Calculations*, 8 FOR THE DEF. 10, 10-11 (1967).

175. ROSS, *supra* note 23, at 99.

176. *Id.* at 101.

significant development. Money damages are in some respects a supremely effective technology for individuation.[177] They are minutely divisible to reflect the particular circumstances of the case in question.

Yet on the damages side of the equation, a similar set of formulae shaped settlement values. The "most successful adjusters," as one leading adjuster noted, "have a uniform approach which has become a habit and does not yield to the necessities of changing circumstances."[178] By the middle of the twentieth century, claims adjusters had adopted a number of such formulae—"bargaining conventions"[179] or "negotiation conventions"[180] as they are called in the scholarly literature—to deal with even the seemingly most idiosyncratic of personal injuries. The " 'yard stick' approach . . . classifie[d] injuries by their nature, each having a fixed value, regardless of the extent thereof in an individual case."[181] The "three times three" rule multiplied the special damages of the claimant by a factor of three.[182] The "Sindell formula" generated a complex points system in which settlement value was calculated on the basis of likelihood of liability, "type" of plaintiff, "type" of defendant, actual losses, and the value of similar cases in the same jurisdiction.[183] Actuarial life insurance tables were used from early on to calculate lost future earnings.[184] As Ross put it, even the most individualized aspects of the claim—"the measurement of pain, suffering, and inconvenience"—were often "thoroughly routinized" by "multiplying the medical bills by a tacitly but generally accepted arbitrary constant."[185]

Indeed, actuarial estimates of the possible exposure of the insurer became powerfully important in shaping settlement values. Liability insurance actuaries produced estimates of possible liability

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177. Of course, a consequence of using money damages as a measure of individuation in personal injury cases is the suggestion that money and personal injury are commensurable, which at a deeper level undercuts the ability of money damages to individuate. *See generally* MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993).

178. Sergeant, *supra* note 168, at 41.

179. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 787 (1995).

180. Saks, *supra* note 81, at 1223-24.

181. *Id.*

182. CORYDON T. JOHNS, AN INTRODUCTION TO LIABILITY CLAIMS ADJUSTING 367-68 (1965).

183. ROSS, *supra* note 23, at 116.

184. ROSS, *supra* note 23, at 239; FRANCIS TIFFANY, DEATH BY WRONGFUL ACT: A TREATISE ON THE LAW PECULIAR TO ACTIONS FOR INJURIES RESULTING IN DEATH § 174 (1893).

185. ROSS, *supra* note 23, at 239. Plaintiffs' lawyers began in the middle of the twentieth century to push for the use not of arbitrary multipliers of special damages but of *per diem* multipliers. *Id.*

for virtually every claim as a matter of course.[186] Claims adjustment departments, in turn, used these actuarially-derived reserve fund estimates as a benchmark by which to evaluate their claims adjusters' performance.[187]

To be sure, many claims adjusters contended that no formula or yardstick could capture the value of personal injury claims.[188] Perhaps as a form of craft pride or simply job trusting, they would argue that each claim needed to be evaluated on its own merits.[189] There was thus "no substitute for experience in claims handling," industry experts noted.[190] And as previous students of the claims business have noted, more individualized treatment was often the norm in high-value, outlier claims.[191] Yet despite the presence of outlier claims, and despite the self-interested craft arguments of the adjusters to the contrary, the fact remains that the insurance industry moved toward actuarial administrative models that seem to have encompassed many of the most fact-dependent claims of individualized harm.

As a result, for the typical claims—the mature torts—that were the stuff of everyday claims adjusting practice, formulae and rules-of-thumb virtually covered the field.[192] As leading claims adjuster Corydon T. Johns noted, "the idea of an arithmetical relationship as a

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186. J.H. Pittenger, *Claim Reserves*, BEST'S INS.NEWS (Fire & Casualty Ed.), Apr. 1958, at 131.

187. Dudley M. Pruitt, *In Reserving for Loss Claims*, BEST'S INS. NEWS (Fire & Casualty Ed.), Jan. 1951, at 29.

188. Carr, *supra* note 23, at 44; Kenneth C. Berry, *Individual Claim Problems*, BEST'S INS. NEWS (Fire & Casualty Ed.), Mar. 1957, at 144.

189. Charles B. Marshall, *The Most Common Mistakes*, BEST'S INS. NEWS (Fire & Casualty Ed.), Mar. 1967, at 70 (describing the " 'rule of thumb' formulas used in various jurisdictions for the settlement of claims" as "a true bane of the insurance profession"); Forrest S. Smith, *What's a Claim Worth?*, BEST'S INS. NEWS (Fire & Casualty Ed.), Mar. 1956, at 37 (stating that "there is no yardstick by which to measure disability evaluation; each case is a problem unto itself, to be weighed and judged according to its own facts and circumstances").

190. Hugh D. Combs, *Handling Negligence Claims*, BEST'S INS. NEWS (Fire & Casualty Ed.), Apr. 1956, at 127.

191. ROSS, *supra* note 23, at 115; *see also* Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1943 (1997) ("The civil jury trial just is not an affordable alternative in all but a tiny number of cases, given the cost and delay that precedes and accompanies it.").

192. Another important source of the standardization of claims settlement practices was the use of claims reserves built by reference to actuarial tables. As claims managers noted, "statistical analysis of actual claims" could produce accurate predictions of aggregate claims values, even if the value of any one claim was itself difficult to predict. Thomas E. Murrin, *Comments on Loss Reserves*, BEST'S INS. NEWS (Fire & Casualty Ed.), May 1966, at 32. In turn, actuarially-derived claims reserves were often said to drive settlement values because of insurers' use of those reserves to evaluate the performance of claims adjusters. *See supra* note 187 and accompanying text.

determiner of verdicts" was perhaps "pure myth," but it nevertheless was "widely accepted" and thus heavily influenced the behavior of claimants, insurers, and their agents.[193] "The myth which probably has no reality as a verdict-predicter," Johns concluded, "is both real and influential in the attainment of settlements, especially in settlements made with plaintiffs' attorneys."[194] Moreover, in Johns's view, tort law's chief claim to rationality lay in the myths and folklore of the claims adjusters.[195] In any one case taken on its own terms, there was simply no "scale of values"; "each jury is literally a law unto itself."[196] In the aggregate, however, "The system as a whole does present a vague consensus of value."[197] As one casualty insurance actuary had noted some decades earlier, "statistical mass phenomena exhibit a tendency to cluster around certain norms,"[198] and tort claims were no different. Though the consensus was "dim" and "subject to some doubt," it was that dim consensus about aggregate claim values that drove the market in settlements.[199]

By the late 1920s, the consequences of such claims agent practices (though still in their infant stages) were already becoming apparent. The well-known Columbia University study of automobile accident injury compensation found that where defendant drivers were insured, extremely high percentages of claims resulted in some payment through the claims settlement process: 90 to 96 percent of claims in Philadelphia; 71 percent of temporary disability claims and 100 percent of fatality claims in Muncie, Indiana; and so on.

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193. JOHNS, *supra* note 182, at 378.

194. JOHNS, *supra* note 182, at 378; *see also* Geistfeld, *supra* note 179, at 787 (noting that "there is no reason why actual pain and suffering injuries should be related to some multiple of the plaintiff's economic loss" and describing the use of multipliers as a "bargaining convention"); Saks, *supra* note 81, at 1223-24.

195. JOHNS, *supra* note 182, at 2.

196. *Id.*

197. *Id.* Johns's point here is consistent with studies suggesting the extreme difficulty of predicting liability determinations and judgment values in American tort law. KAGAN, *supra* note 22, at 116, 137-39; Kritzer, *supra* note 121, at 817-18.

198. Arne Fisher, Written Discussion, *Abstract of the Discussion of the Papers Read at the Previous Meeting*, 5 PROCEEDINGS OF THE CASUALTY ACTUARIAL AND STATISTICAL SOC'Y OF AM. 118, 121 (1918-1919).

199. JOHNS, *supra* note 182, at 2.

Closed Cases in the 1932 Columbia Study of Automobile Accident Injury Compensation: Paid According to Severity of Injury and Insurance Status

	Closed Insured Cases			Closed Uninsured Cases		
	Percentage of Cases with Payments			Percentage of Cases with Payments		
	Temporary	Permanent	Fatal	Temporary	Permanent	Fatal
Philadelphia	90	96	93	31	33	23
New York	84	100	88	16	0	6
Terre Haute	81	90	75	22	11	0
Muncie	71	90	100	12	13	18
California	80	97	84	25	24	24
New Haven	89	90	88	42	43	9
Rural Conn.	83	100	80	36	29	0
Boston	88	94	96	5	0	0
Worcester	88	100	80	22	0	0
Totals	86	96	88	27	21	17

Source: Report by the Columbia University Council for Research in the Social Sciences, to the Columbia University Council for Research in the Social Sciences 273 tbl.16 (1932).

As the table from the Columbia study indicates, the number of claims paid as a percentage of the total number of claims was far lower in precisely those cases in which the repeat-play claims agents were not involved: the uninsured cases. To be sure, this no doubt reflects some percentage of uninsured claims in which defendant motorists' lack of insurance rendered them effectively judgment proof and thus unable to pay out on large claims.[200] Nonetheless, the sharp disparity in the number of claims for which any payment was made at all suggests the dramatic consequences of repeat-play claims agents for the tort system.

These consequences grew still more pronounced over time. Increased coordination on both the defendants' side and the plaintiffs' side came slowly at first. The Liability Insurance Association began meeting in 1907 and was folded into the International Association of Casualty and Surety Underwriters in 1911.[201] The International Claim Association was founded in 1909.[202] The Casualty Actuarial

200. On the other hand, motorist cases will usually involve defendant drivers with at least one asset: an automobile.

201. *Agreement of "Merger" between the International Association of Casualty & Surety Underwriters and the Liability Insurance Association*, 1 INT'L ASSOC. OF CASUALTY AND SURETY UNDERWRITERS CONVENTION 17-20, 158 (1911).

202. *See The International Claim Association*, 35 BEST'S INS. NEWS (Casualty, Surety and Misc. Ed.), Sept. 1934, at 257 (noting that 1934 "is the 25th ... Anniversary of the Association").

and Statistical Society of America followed in 1914.[203] In 1920, *Best's Insurance News* founded its "Casualty, Surety and Miscellaneous Edition," which published regular reports on the field of liability insurance claims adjusting.[204] By the late 1920s, local claims adjusters clubs were springing up in cities like Washington, D.C.[205] On the eve of the Second World War, the Federation of Insurance Counsel brought together many of the nation's insurance lawyers.[206] And after the war, organizations like the Defense Research Institute[207] and the Defense Information Office,[208] publications like *For the Defense*, the *Insurance Counsel Journal*, and the *Defense Law Journal*,[209] and local associations such as the Defense Counsel of Northern California and the Texas Defense Counsel[210] all coordinated tactics among the defense bar and disseminated standard practices in the field such as the use of rough-and-ready rules-of-thumb.

Coordinating organizations developed on the plaintiffs' side as well, in a kind of dialectical arms race with defense organizations to arm their constituencies with the latest strategies and information. The National Association of Claimants' Compensation Attorneys, established by workmen's compensation lawyers in 1946, became the American Trial Lawyers' Association in 1971.[211] Even before its formal renaming, the NACCA had become a clearinghouse for information among the plaintiffs' personal injury bar, forging referral networks and sharing information about settlement techniques, claims valuation formulae, and the like.[212] In particular, the "King of

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203. *A Letter of Historical Interest*, 1 PROCEEDINGS OF THE CASUALTY ACTUARIAL AND STATISTICAL SOC'Y OF AM. 8, 8 (1914-1915) (noting the "recent inaugural dinner of the Casualty Actuarial and Statistical Society of America").

204. *Introducing the Casualty News*, 21 BEST'S INS. NEWS (Casualty, Surety & Misc. Ed.), May 1920, at 1, 1; *see also Best's Recommended Insurance Attorneys*, 30 BEST'S INS. NEWS (Casualty Ed.), July 1929, at 148 (describing the ways in which Best's Insurance News functioned as a clearinghouse for insurance adjusting, investigation, and litigation).

205. *See Claim Adjusters Club of D.C. Hold Annual Meeting*, 31 BEST'S INS. NEWS (Casualty Ed.), Oct. 1930, at 424, 424 (noting that "[t]he Claims Adjusters Club ... was formed in 1928").

206. *Report of the Secretary-Treasurer*, 9TH ANNUAL CONVENTION OF THE FED'N OF INS. COUNSEL 48, 49-50 (1949).

207. *The Defense Research Institute*, 1 FOR THE DEFENSE 33, 33-34 (1960).

208. *Defense Information Office*, 2 FOR THE DEFENSE 55, 55 (1961)..

209. 1 FOR THE DEF. 1 (1960); 1 INS. COUNSEL J. 1 (1934); 1 DEFENSE L.J. 1 (1957).

210. *Local Defense Organization – San Francisco*, 1 FOR THE DEFENSE 41 (1960); *Texas Defense Counsel Hold First Annual Meeting*, 2 FOR THE DEF. 65 (1961); *see also The Work of Local Defense Groups*, 4 FOR THE DEF. 9, 9-10 (1963); *Defense Association of New York*, 6 FOR THE DEFENSE 49, 49-50 (1965).

211. WITT, *supra* note 16, at 196.

212. *See, e.g.*, TRIAL AND TORT TRENDS: 1958 BELLI SEMINAR (Melvin Belli, ed. 1959) (containing "the extended proceedings, with additional papers, of the eighth annual Belli Seminar, August 9, 1958").

Torts" Melvin Belli, though more famous in later years for his flamboyant courtroom theatrics, founded a system of information sharing, network connections, and training through the so-called Belli Seminars that preceded the annual NACCA conferences beginning in 1951.[213] As Stephen Yeazell has pointed out with respect to plaintiffs' lawyers in more recent years, "The plaintiffs' bar, with its system of referrals" had begun to "achiev[e] transactionally the kinds of specialization and breadth that the corporate bar is achieving by growth in firm size."[214]

Organization came hand in hand with increased specialization among the plaintiffs' bar. By the late 1950s, students of personal injury litigation in New York City were discovering that plaintiffs as well as defendants were able to take advantage of a pool of specialized repeat-play claims agents. Thirty-three specialist plaintiffs' lawyers—1.8 percent of the total New York plaintiffs' bar—handled almost 13 percent of the personal injury claims in one sample.[215] Similarly, in 1960, the one hundred leading firms in the Federal Employers' Liability Act field brought some 4,974 interstate employee injury claims against railroads, resolving 1,556 of them in that same year for a total of $23.5 million.[216] The ten leading firms resolved claims worth $9.5 million.[217]

The increased role of repeat-players on the plaintiffs' side allowed individual claimants to spread the risk of outlier results within a class of mature torts. Insurance claims adjusters and claimants' agents developed some of the same kinds of relationships that had begun at the Dwight Manufacturing Company in the 1890s, forging settlements that took into account the ongoing relationships between the bargaining agents. "[Y]ou might even swap cases," as one

213. *Id.* at iii.

214. Yeazell, *supra* note 9, at 202. Yeazell suggests that it is at least possible that "plaintiffs' firms are merely lagging the rest of the bar" and that plaintiffs' lawyers will soon begin to reorganize their practices as hierarchies rather than as markets. *Id.* It is also possible that the plaintiffs' firms are ahead of the curve, not behind it, and that referral markets and horizontal networks of practitioners may be an emerging model for law practice that elite corporate practice (now organized in hierarchically managed firms) will one day follow. *See also* Erichson, *supra* note 12, at 535-36. For analogies in the literature on the history and theory of the firm, see Naomi R. Lamoreaux et. al, *Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History*, 108 AM. HIST. REV. 404 (2003); Charles Sabel & Jonathan Zeitlin, *Historical Alternatives to Mass Production: Politics, Markets and Technology in 19th Century Industrialization*, 108 PAST AND PRESENT 133 (1985).

215. Maurice Rosenberg & Michael Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115, 1167 (1959). Interestingly, the specialist bar in New York City was significantly less likely than the non-specialist bar to take their cases to trial. *Id.*

216. *F.E.L.A. Specialists*, 2 FOR THE DEF. 70, 70 (1961).

217. *Id.*

insurance claims adjuster put it in the 1960s, "you might agree that in this case you'll go 50 percent if such-and-such other case is settled accordingly."[218]

The settlement of mature torts by repeat-play bargaining agents itself began to mature with the publication of verdict reporters in the 1950s. Even as late as the 1940s, claims adjusters could look to only a few sources for collections of verdict values.[219] But beginning in 1951 with Melvin Belli's collection of jury verdicts ("The Adequate Award") in the *California Law Review*,[220] the collection and publication of jury awards became an increasingly important part of the functioning of the tort claims settlement market. Verdict reporters brought into view what Corydon Johns had called the "dim consensus" of juries and courts as to claim value.[221] Adjusting, in turn, was "done in the light of this . . . scale of values."[222] Settlements between repeat-play bargaining agents thus became increasingly routine and increasingly relied on publications such as the California Jury Reports for valuations of both settlements and trial outcomes. Indeed, the occasional litigation of uncertain claims played the role anticipated in the Priest-Klein model of litigation as a mechanism for testing a judgment in the retail (trial) market in order to set wholesale (settlement) prices. As plaintiffs' lawyer Joseph Sindell of Cleveland, Ohio (after whom the Sindell Formula for settling cases had been named[223]) suggested:

> every once and a while we will run across a case where a claim man and myself will agree that this is the kind of case that has to go to trial, and the expression is used "to send up a trial balloon" to see what the tenor of the time is, and how juries are reacting to the particular values and the injuries that they are told about and shown.[224]

Trials, in Sindell's view, were no longer the one-sided contest between repeat-play, deep-pocket defendants and the one-shot injured, as Marc Galanter's well-known model would have it.[225] For Sindell, occasional resort to adjudication had become the guidepost for private settlement markets characterized by repeat-play agents on both sides.

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218. ROSS, *supra* note 23, at 143.

219. HOWARD L. OLECK, NEGLIGENCE INVESTIGATION MANUAL 99-100 (1953) (citing GEORGE HIRAM PARMELE, DAMAGE VERDICTS (1927) as the best source of verdict information).

220. Melvin Belli, *The Adequate Award*, 39 CAL. L. REV. 1 (1951); *see also* MELVIN BELLI, THE MORE ADEQUATE AWARD: A COLLECTION OF THE MORE ADEQUATE AWARDS TO FEB. 1952 (1952).

221. JOHNS, *supra* note 182, at 348.

222. *Id.*

223. ROSS, *supra* note 23, at 116.

224. TRIAL AND TORT TRENDS THROUGH 1955, at 307 (Melvin Belli, ed. 1956).

225. Galanter, *supra* note 107, at 97.

The gradual emergence of a sophisticated plaintiffs' bar in the middle decades of the twentieth century began to redress precisely the asymmetries that Galanter's model identified. Viewed from the snapshot of a single case, Galanter posits that the plaintiff's counsel would be systematically at a disadvantage for three reasons. First, they are likely drawn from the "lower echelons" of the bar, educated in lesser law schools, and enjoy lower professional prestige.[226] Second, they have trouble mobilizing a clientele because of "ethical" barriers preventing solicitation and referrals.[227] Third, the "episodic and isolated" nature of the relationship with typical one-shot clients "tends to elicit a stereotyped and uncreative brand of legal services."[228] Galanter acknowledges the possible emergence of a coordinated bar on the claimants' side, but discounts its likely effect.[229] Whatever the gains in expertise and economies of scale, plaintiffs' agents, he contends, will prove incapable "of overcoming the fundamental strategic advantages of [repeat players]—their capacity to structure the transaction, play the odds, and influence rule-development and enforcement policy."[230]

In the settlement markets in which lawyers like Belli and Sindell worked, however, plaintiffs' lawyers were increasingly able to overcome Galanter's barriers. Even prior to the modern modes of communication that have transformed legal practice (and notwithstanding the professional codes of conduct that inhibited robust plaintiffs'-side markets in lawyers' services), the plaintiffs' bar had begun to emerge as entrepreneurial, creative, and—dare we say it—wealthy members of the bar. While the barriers to robust markets in legal services remain significant even today, the increased power and sophistication of the plaintiffs' bar in the middle of the twentieth

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226. *Id.* at 116.

227. *Id.* at 116-17.

228. *Id.* at 117; *see also* Orna Rabinovich-Einy, *Balancing the Scales: the Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape*, 6 YALE J.L. & TECH. 1, 8-9 (2004) ("Winning a lawsuit, or reaching a settlement . . . [in mass harm cases], requires that a plaintiff have enough information to establish her case. In the past, the chances of individual consumers winning defective product claims were slim. The costs of gathering information for a one-shot claimant and her solo practitioner attorney were prodigious and often resulted in either a rejected suit or an agreement to settle the matter confidentially for a sum lower than requested, perhaps lower than the true value of the claim.") (footnote omitted).

229. Galanter, *supra* note 107, at 118.

230. *Id.* For evidence of the Galanter thesis in action, see EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 (1992).

century had begun to turn a diffuse and unorganized client base of one-shot claimants into de facto repeat players.[231]

The development and increased coordination of repeat-play claimants' agents, of course, promoted considerable anguish among certain sectors of the defense bar. Yet as some defense-side agents noted, the presence of bargaining agents who knew the short-cuts, the heuristics, and the rules-of-thumb often made the settlement process considerably more efficient.[232] In Chicago, for example, insurers found that for precisely these reasons, the repeat-play plaintiffs'-lawyer specialist was "an easier man to deal with than a general practitioner."[233] Insurers dealing with such lawyers reported that they were regularly able to strike "'package-deals'" in which they disposed of "a great many cases at one time."[234] Indeed, together the plaintiffs' bargaining agent and the liability insurer's claims adjuster were, as the vice-president of one early casualty insurance organization put it, the "lubricant" that made the law of torts "run with as little friction as possible."[235]

One result was that by the mid-1960s, automobile accident tort claims were being settled with much greater speed than other personal injury tort claims. Indeed, as the table below indicates, in terms of the speed of settlement, automobile accident claims more closely resembled workmen's compensation claims than other personal injury claims.

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231. The corollary of this aggregation is that the plaintiffs' claims are worth more as part of a consolidated portfolio of claims in the hands of experienced counsel than they are if standing alone in inexperienced hands. Charles Silver and Lynn Baker have focused on the gains achieved through representation by counsel with a portfolio of similar claims to challenge one of the vestiges of a purely individual model of representation: the aggregate settlement rule. Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1507 (1998). Under this ethical constraint, counsel must reserve for each individual class member the ability to approve a settlement and may not condition representation upon agreement to collective representation and *ex ante* approval of the best settlement available for the entire group of claims. *Id.* Silver and Baker argue for bringing the ethical rules into conformity with the collective nature of representation where, in fact, individual claimants benefit from being part of a represented group. *Id.*

232. ROSS, *supra* note 23, at 166-67.

233. *Settlement of Personal Injury Cases in the Chicago Area*, Comment, 47 NW. U. L. REV. 895, 904-905 & n.48 (1953).

234. *Id.*

235. *Address of Vice-President J. Scofield Rowe*, 3 INT'L ASSOC. OF CASUALTY AND SURETY UNDERWRITERS CONVENTION 55, 60 (1913).

Percentage of Total Dollars Paid in Months from Date of Injury

	12 Months	*24 Months*	*36 Months*	*48 Months*	*60 Months*
Bodily Injury (Other Than Auto)	16	42	58	75	87
Auto Bodily Injury	26	62	81	90	95
Workmen's Compensation	35	70	83	90	92

Source: Thomas E. Murrin, *Comments on Loss Reserves*, BEST'S INS. NEWS (Fire & Casualty Ed.), May 1966, at 24.

The first two lines of the table compare separate areas of the tort system. The first, miscellaneous bodily injury, comprised an ad hoc array of disparate, non-routinized claims. The relatively slow speed of resolutions in this category of tort claims suggests that they had not been successfully integrated into an efficient claims management process. The settlement market in automobile injury cases, by contrast, appears to have become quite efficient in terms of speed. The striking feature is the similarity of the mature tort injury system in auto claims to the administrative system of workmen's compensation. The time frames in which the two claims management processes paid out claims were remarkably close. The use of administrative grids, whether in the public workers' compensation system or the private auto injury system, seems to have moved both systems toward similarly efficient resolution of claims.[236] By contrast, the non-routinized quality of the miscellaneous, non-auto bodily injury claims category appears to have led to significant delays and inefficiencies in the search for individual compensation assessments.[237]

Convergence in the relative administrative efficiency of tort and workers' compensation is also apparent when we turn to the compensation system. Even as private administrative processing was making the tort settlement system more efficient, observers were noting that claims processing in the workmen's compensation system

236. The Columbia study of automobile accident injury compensation from three decades earlier found somewhat more delay in the settlement process, which is consistent with the evidence indicating that the specialist plaintiffs' bar in the auto injury field became much more robust during the 1950s. Columbia Report, *supra* note 57, at 282.

237. A 1986 study of auto accident dispute resolution by the RAND Corporation supports the conclusions set out above in the text: auto cases produce more streamlined systems of dispute resolution, with lower administrative costs and higher net recoveries as a proportion of total costs and compensation paid, than do the miscellaneous class of undifferentiated tort disputes. JAMES KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION x-xiii (1986).

was slowing down. Claims in workers' compensation were attracting some of the same kinds of repeat-play claims agent practice that characterized the tort system.[238] Indeed, as Philippe Nonet noted of California in the mid-twentieth century, workmen's compensation proceedings were shifting from social work sessions organized around claimants' needs to adversarial hearings with lawyers and claims representatives on both sides.[239]

Convergence between tort and public compensation systems does not mean that the two systems were indistinguishable.[240] As in the employers' liability context, public compensation systems such as workers' compensation are more transparent and should ensure greater systemic rationality in claims processing and provide more publicly available information about the claims resolution system.[241] In the automobile context, the existence of a robust class of plaintiffs' agents brings out a further distinction in the way in which values are assigned to claims in the private settlement market. Workers' compensation and other public compensation programs typically set claims' values through a legislative process. The private settlement market in auto claims, by contrast, sets claims values by the occasional use of adjudication to recalibrate those values—what plaintiffs' lawyer Joseph Sindell called "trial balloon" adjudication.[242]

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238. WALTER F. DODD, THE ADMINISTRATION OF WORKMEN'S COMPENSATION 314-20 (1936); PHILIPPE NONET, ADMINISTRATIVE JUSTICE; ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY 66-97 (1968); WITT, *supra* note 16, at 205.

239. *See* NONET, *supra* note 238; see also WITT, *supra* note 16, at 205.

240. For a powerful accounting of the relative merits of public compensation systems and tort claims settlement markets, see Schuck, *supra* note 27, at 987-88:

> The hybrid character of the mass tort system 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. . . .
>
> 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. These behaviors magnify the notoriously high monitoring costs that any legislature faces in delegating authority to an agency.
>
> In contrast, litigants who negotiate a global settlement are designing a structure to guide their relationship, manage their actual and 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. (Footnotes omitted.)

241. *See supra* text accompanying notes 124-125.

242. *See supra* note 223-225 and accompanying text.

Where workers' compensation grids in the middle of the twentieth century produced notoriously static and ossified claims values,[243] private settlement markets in tort claims developed dynamic grids in which claims values were constantly in flux, responding to changes in the judgment value of the claims in question.[244] As defense lawyer Philip J. Hermann noted in 1962, "[J]ury verdicts change to conform with conditions and attitudes that change with the times."[245] It followed that the "tables" which Hermann and others put to use in settling tort claims "are continuously being revised to reflect these changes."[246]

Yet despite these important differences between private claims settlement practices and public compensation systems, it is no wonder that loss adjusters working on tort claims in the 1950s saw a "trend in claims . . . headed in the direction of specifically charted benefits" and away from the individualized awards of the negligence system.[247] With respect to questions of individuation and aggregation, the marketplace for the settlement of the ordinary tort claims, which we

243. *See, e.g.*, THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT TO THE PRESIDENT, SENATE, AND HOUSE OF REPRESENTATIVES (1972)

244. On our account, it should not be surprising to find trials used as a "pricing" mechanism in many areas of law in which repeat players need to benchmark their settlement practices. For example, Nancy King and Rosevelt Noble report a Kentucky criminal defense lawyer recounting discussions between defense lawyers and prosecutors in which "sometimes both parties will say, we haven't tried an X case in a while. Let's see what a jury says, they take it to trial. They use it to set a benchmark that they'll use in negotiations later on." Nancy J. King & Rosevelt L. Noble, *Felony Sentencing in Practice, A Three-Judge Study*, 57 VAND. L. REV. 885, 953-54 n. 217 (2004).

245. Philip J. Hermann, *Predicting Verdicts in Personal Injury Cases*, 475 INS. L. J. 505, 515 (1962).

246. *Id.* The dynamism of the private settlement grids generated in American automobile injury practice suggests a useful comparison to the Japanese system of automobile injury compensation. In Japan, an influential group of judges handling auto cases in the 1960s created a set of standardized liability and damages rules much like those created in the American claims market, complete with damages rules-of-thumb and "charts setting out the most common accident scenarios." Daniel H. Foote, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, 25 LAW IN JAPAN 19, 27-28 (1995). Once in place, these rules-of-thumb and standardized damages rules produced extraordinarily high settlement rates and a sharp drop off in auto injury litigation. Just as in the U.S., "the remaining cases that reached the court," Professor Foote observes, "were by and large atypical cases that could not easily be resolved by reference to standards." *Id.* at 30. An important difference between the judicially-created Japanese standards and the dynamic market-based standards in the U.S. system, however, is that the Japanese damages standards were quickly eroded by inflation during the 1970s, much as U.S. workers' compensation awards had suffered during the 1950s and 1960s. *Id.* at 33. Damages standards in the American tort claims settlement market, by contrast, were in a much better position to respond to exogenous shocks such as inflation. Many thanks to Curtis Milhaupt for pointing us to this analogy.

247. Charles Gable, *Casualty Loss Adjustments*, BEST'S INS. NEWS (Fire & Casualty Ed.), Apr. 1950, at 38; *see also* Hermann, *supra* note 245, at 516 (stating that "the information now known should enable attorneys and insurance companies to do business in personal injury cases on a sound actuarial basis much like life expectancy tables are now used.").

have dubbed "mature torts," had come to operate much like the public compensation system that had replaced it in the field of work accidents.

III. INTO THE TWENTY-FIRST CENTURY: AGGREGATED SETTLEMENT IN MATURE TORTS

Beginning in the late nineteenth century—virtually coincident with the emergence of the law of torts itself—one can see the emergence of a rough sequence of mature torts that gave rise to aggregated settlement institutions. Work accidents, followed by the early mass disasters and then automobile accidents each provided a new stage on which repeat players emerged to manage the resolution of personal injury disputes.

Three defining features from the historical experience characterize a mature body of tort law, as we are using the term. First, market pressures and the benefits to be gained from economies of scale seem to lead to the concentration of market share on both the plaintiff and defense sides into a small number of repeat actors. Second, as patterns of liability and damages stabilize, trials seem to become increasingly exceptional as claims are handled through routinized negotiations between established representatives. Third, mature torts seem to evolve grid structures for the actuarial treatment of accident claims.

What happens if we bring the analytic framework of these three defining characteristics to bear on the asbestos claims market? Although we could point to any number of mass harms in which claims are settled thousands at a time,[248] asbestos remains the paradigmatic case. Thirty years have passed since the threshold legal determination that asbestos manufacturers would be strictly liable for exposure-related illnesses and death,[249] and more than two decades since the popular revelations of the health hazards of asbestos and the systemic efforts to suppress critical information about those hazards.[250] There is by now little doubt that asbestos harms and the subsequent asbestos litigation are an enormous weight both upon the court system and upon the economy. Hundreds of thousands of asbestos cases clog the courts, with total corporate liability estimated

248. *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 534-35 (describing the prevalence of such mass claims Norplant, Fen-Phen, and similar mass harm cases).

249. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1091-92 (5th Cir. 1973).

250. PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985).

to exceed $200 billion.[251] Since the initial insolvency of Johns Manville in 1982,[252] scores of firms have gone into bankruptcy as a result of asbestos liabilities, and virtually no asbestos producers are still in business.[253] It is also beyond question that asbestos is a public health calamity of major proportions. Approximately 20 million workers suffered occupational exposure in the U.S., some 250,000 have died from that exposure, and hundreds of thousands more have exposure-based illnesses.[254] Beyond the sheer numbers, asbestos has served as the focus for the Supreme Court's most important pronouncements on the procedural dimension of mass torts in *Amchem* and *Ortiz*.[255] It was, after all, in overturning a proposed massive asbestos settlement that Justice Souter invoked the day-in-court ideal and expressed skepticism that lawyers holding huge inventories of individual cases could ever provide adequate representation.[256]

When we test our three historically-derived hypotheses against asbestos litigation, we do indeed find concentrations of claims in particular claimants' agents, very few trials, and standardized treatment of settlement amounts. Our aim, however, is not simply to challenge the Supreme Court's idealized world of individual justice. Focusing on the unexceptional features of class action aggregation in mature torts practice casts in clearer light two features that do distinguish the current mass tort cases from their predecessors in the field of mature torts.

First, the use of the class action as a vehicle for crafting aggregate settlements ushers in exclusivity of representation. No matter how concentrated the market in claims, no matter how centralized dispute resolution may have been in the hands of a translator or other early claims broker, there was always some capacity for a rival representative to challenge the merits of the deals offered. Anti-competitive bar association disciplinary rules, such as prohibitions on advertising and bans on claims-running, posed obstacles to competition in the claims representation market, but the

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251. Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 393 (1993); Roger Parloff, *The $200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 154.

252. *In re* Johns Manville Corp., 57 B.R. 680, 682 (Bankr. S.D.N.Y. 1986).

253. *See* Deborah H. Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1899, 1899 (2001) ("As a result of [asbestos litigation], more than forty corporations have filed for insolvency or reorganization under Chapter 11 of the Bankruptcy Code.").

254. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 631 (1997).

255. *See generally*, *Amchem*, 521 U.S. 591; Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

256. *Ortiz*, 527 U.S. at 846-48.

potential challenge of competition among claims agents existed nonetheless. Placing exclusive rights of representation in class representatives and class counsel, however, serves as an extreme barrier to entry, complicating any challenge to settlement agent misconduct.

Second, whether on the factory floor or in the insurance-driven world of auto accidents, the cost of injury, once routinized, was built into the cost of doing business on a going-forward basis. Firms continued to produce notwithstanding employers' liability; cars continued to roll off assembly lines in the face of products liability for auto manufacturers. In theory, such liabilities prompted increased safety measures as firms internalized the cost of accidents into the costs of doing business.

By contrast, while asbestos litigation shares the central characteristics of the repeat accident cases, it also involves injuries on a scale too great and with latency periods too long to be internalized going forward. Sometimes this results from harm that simply exceeds the capacity of the firm to withstand judgments, as with the bankruptcy of A.H. Robbins because of the Dalkon Shield IUD litigation. In other instances, as with many asbestos manufacturers, a single harmful product so dominates the economic activity of a particular firm that the withdrawal of that product from the market dooms the enterprise. Under such circumstances, not only is the scope of the potential harm likely to dwarf the resources of the negligent firm, but the potential for latent harms makes even a guess at the projected liabilities a hazardous enterprise.[257]

Monopolistic representation and long-tail, firm-killing liability —not aggregation and not the day-in-court ideal—are the features that distinguish the class action from the practices that have long characterized American tort law. We conclude with a discussion of what we take to be the lessons of *Amchem* and *Ortiz*, focusing on these unique features of the class action.

A. The Market for Asbestos Claims

As we set out at the beginning, the day-in-court ideal invoked by Justice Souter in *Ortiz* presupposes the bipolarity of litigation, as the tort scholars would have it. To focus on bipolarity in the context of asbestos, however, is to miss the point. While it is certainly true that

257. The best data emerge from the broad gulf between the 150,000 claims initially projected against the Manville Trust and actual claims to date, which number ten times as many. *See* Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1925, 1930 (2002) (providing data on Manville claims).

any individual's particular exposure, injury, and disease pathology could play out at trial along the customary tort lines of duty, breach, causation, and damages, the sheer volume of claims defines this drama. An estimated 10,000 Americans still die each year from asbestos-related diseases, a number that is expected to hold constant for the next decade.[258] Perhaps even more significant for the prospects of individual litigation, approximately forty firms have gone into bankruptcy as a result of asbestos litigation,[259] forcing all potential claimants into aggregated workouts regardless of hopes for a private day in court. In a system where so many claims raising similar issues compete for the limited resources of a few enterprises, and in which trials cost so much, such claims cannot be widely dispersed among individual lawyers, each representing one plaintiff. Indeed, such a system does not exist. Asbestos cases have even generated claim and client aggregation on the defense counsel side. One need look no further than the record in *Amchem* to find that the ultimately failed national settlement was negotiated between a handful of plaintiffs' lawyers claiming a significant percentage of the asbestos cases on the one hand, and a consortium of asbestos manufacturer defendants on the other. The joint asbestos defense enterprise organized around the Center for Claims Resolution (CCR)[260] functions as the state-of-the-art reincarnation of the Railroad Attorneys' Conference of 1906.[261]

While both the plaintiffs' and defense bars in mass harm cases such as asbestos gravitate toward the concentration of claims in a few hands, this is accomplished in different ways. In the defense context, one or more powerful institutional actors select lawyers to serve as organizers of their defense across a large number of cases.[262] Through in-house counsel or through an oversight law firm, these institutional actors (like the Dwight Manufacturing Company a century ago) readily discern the aggregate nature of the claims against them. Indeed, the disclosure requirements of modern financial markets have made the aggregate character of mass torts all the more apparent. Insurers, the Security and Exchange Commission, investment banks, accounting firms, and many of the other financial intermediaries with

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258. JoAnne Allen, *Study Warns U.S. Facing Asbestos Crisis*, (March 9, 2004) (reporting on a report by the Environmental Working Group), *available at* http://www.asbestostoday.com/news/000004.html .

259. DEBORAH HENSLER, ET AL., RAND INSTITUTE, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE, PRELIMINARY RESEARCH RESULTS, 14 (2001), *available at* http://www.rand.org/publications/DB/DB362.0/DB362.0.pdf.

260. 521 U.S. at 599-601.

261. *See supra* note 58 and accompanying text.

262. For a description of the various techniques of coordination used by defense firms, *see* Erichson, *supra* note 12, at 401-08.

which firms routinely do business typically require overall risk assessments as to liability exposure. In turn, accountants and actuaries estimate potential liabilities from firm- and industry-wide data on type of use of asbestos, on the years of exposure, and on the state of employee industrial protections as awareness of risk improved.[263]

Coordination on the plaintiffs' side is more difficult. Unlike the accident markets of old, contemporary mass harms are likely to have nationwide impact. The simple face-to-face and word-of-mouth strategies that worked to create networks of claimants in Massachusetts textile mills, Wisconsin dam breaks, and Tennessee coal mine explosions are unlikely to achieve the consolidation necessary for the effective management of mass harm cases on the plaintiffs' side. The sophisticated epidemiological studies and other costly undertakings typical to such cases all too often overwhelm relatively isolated local plaintiffs' counsel. While certain pioneers of centralized information, such as Melvin Belli, foresaw the need for these approaches, communication and information-sharing were significant barriers. Routine access to fax machines dates back only a little more than two decades, and electronic transmission of data goes back only one decade as an integral part of legal practice. In asbestos, for example, only an external shock brought about the initial national coordination among the leading plaintiffs' firms. As the central plaintiffs' lawyer in *Amchem* and *Ortiz* observed:

> it was only when we arrived at the Manville bankruptcy hearings [in 1982 or so] and saw lawyers from all over the country pursuing the same cases with the same issues that we realized that we needed a nationwide strategy. We realized that Manville had a nationwide approach to the cases and that we needed to have one as well.[264]

Even before asbestos, the plaintiffs' bar had made a number of halting but significant steps toward specialization and the bundling of claims to amortize costs. Howard Erichson quotes one leading plaintiffs' lawyer aptly summing up the bottom line: "If you can't sign up enough plaintiffs, the economics don't work."[265] As bar association

263. *See, e.g.*, Susan L. Cross & John C. Doucette, *Measurement of Asbestos Bodily Injury Liability*, CASUALTY ACTUARIAL SOC'Y F., Summer 1994, at 189, *available at* www.casact.org/pubs/forum; Kevin M. Madigan & Claus S. Metzner, *Reserving for Asbestos Liability*, CASUALTY ACTUARIAL SOC'Y FORUM (Casualty Actuarial Society, Arlington, VA), Fall 2003, at 193-208, *at* www.casact.org/pubs/forum. There is a burgeoning market in econometric studies of mass tort liability for firms and their insurers. For promotional literature of leading economic consulting firm advertising proprietary analyses for forecasting future product liability exposure of an enterprise, see Brochure, National Economic Research Associates, Product Liability and Mass Torts Valuation 4-5 (2004), *available at* http://nera.com/image/6501.pdf.

264. Interview with Joseph F. Rice, Attorney, Motley Rice LLC, in New York, N.Y. (Feb. 7, 2002).

265. Erichson, *supra* note 12, at 547 (quoting Alexander MacDonald).

rules on referrals and advertising were liberalized, the plaintiffs' bar began to divide between firms that actually handled cases and those that served primarily as the initial contact for plaintiffs, often the photogenic entrepreneurs of late-night television.[266] What has emerged is a widespread "hub-and-spoke structure in which referring lawyers remain involved in a limited capacity in their clients' cases, serving as the primary client contact, while the lawyer to whom the cases are referred performs the bulk of the work in litigation and negotiation."[267] The law has evolved to the point that lawyers who refer work to each other may, in some jurisdictions, claim quantum meruit recovery for the value of their services, even absent contractual agreement from the client.[268]

Specialization and concentration, however, are double-edged swords. While a mature tort with clear liability rules and relatively settled expectations of damages rewards the entrepreneurial skill of the aggregators of claims, the earlier stages of untested mass harm claims pose grave risks for the initial bundlers of claims. Few individual plaintiffs' firms in the early years of plaintiffs'-side aggregation in mature torts could withstand the potential risk of investing sufficiently to challenge a defendant whose existence might be on the line in a mass harm case. A firm that specialized in a high-risk new tort claim and invested the resources necessary to develop the litigation potential of the claim would find itself in violation of the basic portfolio precepts of any Finance 101 course, or the more quotidian admonition not to put all your eggs in one basket. The lack of diversification and the sheer magnitude of the risk created the kinds of pressures toward quick (and cheap) settlement identified in some of the academic commentary.[269]

A second step in plaintiffs'-side aggregation emerged in the aftermath of the Manville bankruptcy and accelerated through improvements in communications technology: the litigation

266. Referral fees are a traditional source of controversy, as with the current proposed rule 8a of the Texas Rules of Civil Procedure, in which referrals are associated with claims runners and the frowned-upon practices of trolling for claims – vilified as the practices of the ambulance chaser. The historic origins of the practice are actually more complicated and may reflect the split nature of the bar in England, with referring country solicitors, managing town solicitors, and barristers, all of whom shared in the resulting fees. JULES H. COHEN, THE LAW: BUSINESS OR PROFESSION? 226 (1916); Thomas J. Hall & Joel C. Levy, *Intra-Attorney Fee Sharing Arrangements*, 11 VAL. U. L. REV. 1, 2 (1976).

267. Erichson, *supra* note 12, at 536.

268. Huskinson & Brown, LLP v. Wolf, 84 P.3d 379 (Cal. 2004).

269. *See* Coffee, *Class Wars*, *supra* note 112, at 1363-64; Bruce Hay & David Rosenberg, *Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1378 (2000); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 430 (2000).

consortium.[270] Either formally through the Multi-District Litigation process, or informally through private agreement, or more likely through both, plaintiffs' firms undertook joint ventures to pool risk and capitalize expensive litigation efforts. The by-product was further coordination and concentration of related claims. In a sense, the plaintiffs'-side litigation consortium is the late twentieth and early twenty-first century maturation of the consolidations that we observed going back to the nineteenth century.

In the case of asbestos, the result is a highly concentrated market in which roughly ten firms account for more than 50 percent of the asbestos claims in the country and fifty firms effectively control the market.[271] The best documentation comes from the Manville Trust, which has the longest history of public accounting for the processing of asbestos claims. According to Manville Trust documents, fifty-five firms represent approximately 85 percent of all claimants to Trust assets.[272] Similarly, the most recent Rand Institute study of asbestos litigation reports approximately the same number of firms controlling the same percentage of the docket today.[273]

An interesting illustration of the effect of the centralization and coordination of the plaintiffs' bar comes from the venturesome, if ultimately doomed, effort of Owens Corning to protect itself from insolvency. Under the innovative National Settlement Program, general counsel Maura Abeln Smith sought to use the concentration of the plaintiffs' bar to create a sustainable cash flow for asbestos claims.[274] Smith first arranged for the acquisition of Fibreboard by Owens Corning to create, in effect, the largest concentration of asbestos liability since the bankruptcy of Johns Manville.[275] Smith then negotiated a structured workout of yearly claims with a cash flow cap for any given year.[276] Plaintiffs' firms with large inventories would then have had incentives to avoid busting the bank on any large judgment, and to bring all new claimants into the settlement structure, for fear that a bankruptcy of the newly minted Owens

270. The evolution is discussed in Erichson, *supra* note 12, at 546-47.

271. Issacharoff, *supra* note 257, at 1930; STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT, RAND INSTITUTE FOR CIVIL JUSTICE (2002).

272. Issacharoff, *supra* note 257, at 1930 n.21 (quoting Manville Trust General Counsel David Asutern, presenting at Seminar on Contemporary Controversies in Complex Litigation, Columbia Law School, Apr. 4, 2002).

273. CARROLL ET AL., *infra* note 278.

274. Issacharoff, *supra* note 257, at 1933 n. 39

275. George M Cohen, *The "Fair" is the Enemy of the Good:* Ortiz v. Fibreboard Corp. *and Class Action Settlements*, 8 SUPREME COURT ECON. REV. 23, 88 n. 167 (2000).

276. This parallels what was attempted in both *Amchem* and *Ortiz*.

Corning Fibreboard would compromise the yearly payment stream to thousands of their existing clients.

The Owens-Corning plan sought to return the mass tort asbestos cases to the ongoing basis of earlier mass harm experiences such as the work accident toll of a century ago, and to do so without the class action device. The plan ultimately failed.[277] Absent the coercive powers associated with class action status, adverse-selection effects kept the high-end cases out of the deal. But what is significant for our purposes is just how concentrated the bulk of the asbestos bar proved to be—in effect, the centralization of plaintiffs' claims was the predicate for Smith's bold gambit. According to Smith, to settle 176,000 claims—nearly 90 percent of the claims pending against OCF—she needed to negotiate with only fifty law firms, something she was able to accomplish in the short space of two months.[278]

B. The Disappearing Trial

In the real world of asbestos, the "day-in-court ideal" of *Ortiz* is the rare exception. There is no doubt that asbestos *claims* are flooding the courts. By one estimate in 1994, fifty new asbestos cases were being filed each day in the U.S.[279] Estimates suggest that the total number of claims is likely to reach as high as 2.5 million before the epidemic recedes.[280] But the press of litigation should not be confused with large numbers of trials. According to data collected by the Rand Institute, between 1993 and 2001, despite hundreds of thousands of cases on file, many actively litigated, there were a grand total of 527 trial verdicts involving 1598 plaintiffs in the entire country.[281] This is an average of about sixty asbestos trials a year.

C. Administrative Damage Models

The "day-in-court" ideal is further complicated by the rise of damage models that diverge from the norm that individualized justice should inform the disposition of mature tort claims.[282] Among the most notable trends is the rise of administrative grids similar to those used in workers' compensation and auto accidents to manage

277. Issacharoff, *supra* note 257, at 1937-1938.

278. *See* Hensler, *supra* note 253, at 1913; Issacharoff, *supra* note 257, at 1937.

279. Hensler, *supra* note 253, at 1900.

280. Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr 10, 2002, at A1.

281. CARROLL ET AL., *supra* note 273.

282. Issacharoff, *supra* note 257, at 1936.

settlements. Since *Cimino v. Raymark Industries*,[283] the use of such grids—despite significant legal challenges—has come to represent the tool of choice for plaintiffs' attorneys pursuing mature asbestos claims.[284]

Cimino was the first attempt to bring the valuation grids used in workers' compensation and other mature repeat claims into the aggregate trial resolution of a class of all pending claims in the Eastern District of Texas.[285] The experiment turned on the ability to jump-start a stalled market in asbestos claims by filling in directly the valuations for each cell in a damages grid. What had been the norm in mature areas of tort claims, such as the industrial accidents and auto cases that we have previously discussed, was now brought out into the open as an experimental trial mechanism. To accomplish this end, in *Cimino*, each plaintiff's claim was reduced to a common set of variables often used in settling cases such as length of exposure, severity of disease, and the plaintiff's smoking history. The proposed plan of aggregation would then have categorized all class members to establish classes of claims and in turn to select representative cases for trial from among the general mass of cases then pending in Eastern District of Texas.[286] Special trials of representative claims would then have been held to establish a set of benchmark or model valuations for each class of claims.

Although the Fifth Circuit ultimately rejected this approach,[287] *Cimino* brought to light previously private settlement practices of evolved tort markets. Having been brought into the open and adopted by at least one court, *Cimino*-styled grids have now been integrated into every important attempt to craft a litigation-based workout of the asbestos mess.[288] In *Amchem Products, Inc. v. Windsor*, for example, CCR (which coordinated settlements on behalf of twenty major

283. 751 F. Supp. 649 (E.D. Tex. 1990).

284. *Id.* On the evidentiary sources, see Peter Blanck & Micheal Saks, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992); Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 VA. L. REV. 405 (2002). For an account of the theory of the *Cimino* case, sampling trial strategy, see generally Shari Diamond et. al., *Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297 (1998); Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – and Why Not?*, 140 U. PA. L. REV. 1147 (1992); Jack Ratliff, *Special Master's Report in* Cimino v. Raymark Industries, 10 REV. LITIG. 521 (1991).

285. One of the authors worked as a special master in the design of the Cimino trial model. Samuel Issacharoff, *Administering Damages in Mass Tort Litigation*, 10 REV. LITIG. 463, 463 n. a (1991).

286. *Id.* at 464.

287. *In re* Fibreboard Corp., 893 F.2d 706, 710-11 (1990).

288. Issacharoff, *supra* note 257, at 1936-40.

asbestos defendants) developed injury matrices using the same criteria as in *Cimino*.[289] Calculating from historic averages for each injury grid point, CCR then discounted to reflect the fact of settlement.[290] A similar approach was later incorporated in *Ortiz v. Fibreboard*, where structured settlements of Fibreboard served as a template for assigning value to present and future claims against the trust negotiated and agreed upon in case.[291]

Grids do not in themselves produce settlement.[292] Plaintiffs, defendants, and insurance providers will often not come to the settlement table unless a mass tort is "sufficiently mature so that all the players had some common estimation of the value of the underlying individual tort claims."[293] Indeed, detailed knowledge of the nature of the claim agreement on a claim's value is often a crucial variable not only for plaintiffs, but also for defendants, in inducing momentum for a settlement class.[294]

Myriad factors have contributed to—and continue to inform—the routinized valuation of claims, particularly in the asbestos context. Lawyer specialization is perhaps the least surprising.[295] As trial lawyers become more experienced in trying cases, they become more adept at assessing injuries and the value of those injuries at trial.[296] Some of this expertise comes from the personal experience attributable to successful lawyers' development: as lawyers become repeat players, they come to better understand the science behind a particular injury, as well as the risks and chances of success of pursuing different litigation strategies.[297] With better information, claim valuation paradoxically becomes more accurate as a gauge of settlement values in the claims market, even as it becomes more

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289. 521 U.S. at 599-604.

290. *Id.*

291. Issacharoff, *supra* note 257, at 1937.

292. Some commentators have focused on the use of grids not only to establish valuations for those with compensable injuries, but also to limit recoveries to claimants unable to manifest harms. *See* George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 545 (1997) ("Many features of modern class actions which seem to violate procedural values may serve to better align class action outcomes with the substantive goals of tort law."); Nagareda, *supra* note 117, at 763-67 (focusing on the ability of grids to exclude, for example, those with exposure but no impairment).

293. Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 633 (1997).

294. *Id.*

295. THOMAS WILLGING, TRENDS IN ASBESTOS LITIGATION 21 (Federal Judicial Center 1987).

296. *Id.* (noting that "[o]rganization of lawyers into specialists promotes simplification" as "[e]valuations of cases and development of settlement formulae become easier").

297. *Id.* (explaining that a reduction of parties to a litigation leads to simplification of the litigation process because parties deal with one major adversary on a repeated basis).

standardized through the application of rules-of-thumb and settlement grids. Significantly, an attorney's trial experience may play only a minor role in the routinization of claims valuation, particularly given the small number of cases that actually go to trial in a mass harm as well matured as asbestos. More important is the expanding universe of auxiliary service providers who collect and disseminate the information lawyers use to value claims in what has become a nearly $200 billion industry.[298] As the roster of potential defendants has expanded beyond first-line asbestos manufacturers to include blue-chip companies, insurance companies, and re-insurers, a vast supporting cast has arisen to provide information to plaintiffs' and defendants' claims agents.[299] Outsourced actuaries and economists,[300] as well as accounting firms,[301] provide important information for plaintiffs, defendants, and insurers about claim valuation, risk of liability, and adverse court decisions. In the process, they guide parties towards efficient disposition of claims.

On both the plaintiff and defendant side of settlement disputes, economic consulting firms estimate the aggregate extent of future and pending economic liability facing companies and insurers.[302] They use various "top down" and "bottom up" actuarial strategies to analyze the aggregate risk environment facing companies and individual asbestos defendants. Top down analysis evaluates the number of plaintiff personal injury filings through epidemiological analysis of the disease in question. It accounts for personal experiences and claimants' mortality rates. It also examines average indemnity awards by disease and future trends in order to help insurance companies retain sufficient reserves for remaining solvent. Bottom up analysis involves the construction of databases of defendant experience by tier and incorporates information such as number of filings and average

298. Michael E. Angelina & Jennifer L. Biggs, *Sizing up Asbestos Exposure*, 3 EMPHASIS 26 (Tower Perrin Companies Journal), 26, (Mar. 2001), *available at http://www.towersperrin.com/tillinghast/publications/publications/emphasis/Emphasis_2001_3/2002041814.pdf*.

299. Issacharoff, *supra* note 257, at 1931.

300. *See, e.g.*, http://www.nera.com, a web page provided by NERA, economic consultants, advertising both economic and actuarial services for law firms, companies, insurers and reinsurers in calculating asbestos liability and supporting commercial litigation [hereinafter NERA].

301. Here large accounting firms have developed considerable practices offering services designed to assist insurers and other companies in understanding their asbestos liability both in and out of the litigation context. *See, e.g.*, PriceWaterhouseCoopers' actuarial and insurance management web page, *at http://www.pwcglobal.com/Extweb/service.nsf/docid/48FBB9EA28AE371085256C6C00000A13* (noting the firm's assistance in claim validation in the context of insurance coverage or reinsurance contract disputes and settlement agreements).

302. See *supra* notes 261-265 and accompanying text.

indemnity by degrees of severity, as well as expense to indemnity ratios.[303]

As in the formulation of settlement grids, such forecasts adopt a routinized accounting of individual factors in assessments of claim viability and value. Forecasts comprise an estimation of the number of people ever exposed to asbestos, as well as the rate at which they sue (as well as the causes for the rate).[304] Thus, one part of the analysis involves exposure—often carried out by epidemiologists, demographers, and even dermatologists—to evaluate the causes and distribution of diseases.[305] Next, forecasters extrapolate the rate at which individual subsets sue and their probability of success.[306] Factors include duration of exposure, age of the plaintiff, and smoking habits.[307] Elderly patients usually receive lower awards in settlement given their shorter life expectancy.[308] Similarly, smokers will be less likely to succeed against an asbestos defendant because of the likely causal role of tobacco and widespread jury beliefs that smokers bear some responsibility for their own predicament.[309]

Such claims evaluation processes elaborate on actuarial practices that arose in the insurance industry in the mid-twentieth century. More than fifty years ago, actuaries' estimates of insurers' exposure for the purposes of creating reserve funds were used as mechanisms for monitoring the work of insurance claims adjusters.[310] Today, economists and other consultants make much more sophisticated forecasts available to defense lawyers. And though the forecasts are most often used to predict claims totals and aggregate exposure, they are regularly incorporated into claims and litigation strategies just as the claims reserves estimates shaped the settlement strategies of an earlier generation of insurance claims adjusters.[311]

Less dramatically, comparisons among jury verdicts make it possible to take the routinization of claims to individual cases. Large consulting firms do this for client law firms,[312] though it may also be

303. Angelina & Biggs, *supra* note 298.

304. *Id.*

305. Brochure, *supra* note 263, at 4.

306. Frederick C. Dunbar, *Forecasting Mass Tort and Liability Claims* 31 VIEWPOINT (The Marsh McLennan Companies Journal) 9, 11 (concluding that "forecasters quantify the cause-and-effect relationships of the principals in mass torts" to make accurate predictions of future claims), *available at* http://nera.com/image/5393.pdf.

307. *Id.*

308. *Id.*

309. *Id.* at 15.

310. *See supra* notes 218-223 and accompanying text.

311. *See, e.g.*, Brochure, *supra* note 263, at 4..

312. *Id.* at 5-6.

carried out by individual lawyers. The electronic reference guide "What's it Worth" provides through Lexis a wide range of data as to the market value of various injuries due to asbestos.[313] Through this service, a plaintiff's lawyer can discover in seconds various jury verdicts against defendants in, for example, asbestosis claims brought by working class carpenters and laborers. Short profiles then provide a baseline for appraisals of the value of individual claims in dispute.[314] These electronic databases provide up-to-the-minute information for lawyers in prosecuting their claims or defending their clients. In short, they behave like analysts for investment banks: they provide information for specialists to apply their expertise and make a "bid" or offer to which a counter-party responds.

Professional organizations further aid in disseminating information. Where once individual entrepreneurs like Belli ran seminars for plaintiffs' lawyers, now Mealey's, a for-profit clearinghouse, offers seminars on asbestos litigation.[315] Individual sessions focus entirely on the valuation of claims, as well as on techniques that heighten plaintiffs' chances of success.[316] Results of the conference are then available for purchase nationwide to interested members of the bar.[317]

The same consulting firms that forecast claims also model the litigation decision process itself, comparing the costs and benefits to defendants of alternative litigation strategies.[318] Furthermore, the growth of claims management facilities on the defense side has led to not only the reporting and analysis of claims, but also a one-stop online resource for outsourced settlement negotiation.[319] These administration services also provide historical data reconciliation and conversions, thus providing defendants with their own baselines for monitoring claims, estimating their value, and preventing fraud.[320]

As a result, there is now a predictable pattern to the mass workouts that accompany mass harms. Peter Schuck argues that the

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313. *See* LEXIS database, available at www.lexis.com .

314. Such an approach was presaged by Glen O. Robinson & Kenneth S. Anderson, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1492 (1992) (recommending the use of statistical claim profiles to set baseline appraisals of the value of individual claims).

315. *See, e.g.*, MEALEY'S ASBESTOS LITIGATION 101 CONFERENCE (Feb. 23-24, 2004), audio recording *available at* http://mealeys.com/conferences_ontape.html.

316. *Id.*

317. *Id.*

318. *See* NERA, *supra* note 300.

319. *See, e.g.*, *http://www.navigantconsulting.com/A559B1/navigant.nsf/fCNTDspMain?OpenForm&Cat1=Galt2&Cat2=Page6&Cat3=Sub1* (demonstrating the services provided by the Navigant claims facilities).

320. *Id.*

predictability of the form of mass tort settlement structures is itself evidence of the maturation of the field of mass torts:

> 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.[321]

D. The Class Action as Hybrid between Litigation and Administration

Although the claims settlement process in asbestos and other contemporary mass torts resembles in many respects the basic patterns of claims aggregation apparent from the very beginnings of American tort law, there are two critical differences. Significantly, neither of them emerges from either the fact of aggregation or the reality of settlement. Those are and have been the norms in any developed area of tort law.

First, the class action confers a state-created monopoly on representation.[322] In the historical examples of aggregation through market forces, legal barriers to entry for rivals in the market for representation were only partially realized. To be sure, many features of legal practice created obstacles that impeded the free flow of information to potential claimants. For example, there are and have been prohibitions on lawyer advertising, or the identification of possible cases by claims runners, or the inability to incentivize private parties through fee-sharing agreements. Whether we examine the translators in immigrant factory communities or the consolidators of streetcar accidents, the market placed some (admittedly imperfect) constraints on agent opportunism. Too much collusion, too high a fee, and suddenly market rivals would appear. Unlike the coordination on the defense side through contract, the certification of a class confers exclusivity of representation on a non-contractual basis. In turn, the exclusivity of the class action defeats the markets in mature claims that have so long characterized American tort law.[323]

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321. Schuck, *supra* note 27, at 962.

322. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148, U. PA. L. REV. 2119, 2145-48 (2000) (arguing that class actions are state-enabled litigation).

323. Because of the potential for market alternatives, it is easier to fit even mass representation within a traditional attorney-client contractual relation than it is in class actions. *See* Nagareda, *supra* note 117, at 768 (Although there may be "little or no supervision of

In this light, the real insight of the Supreme Court's asbestos cases is not the invocation of individualized justice but the insistence in both *Amchem* and *Ortiz* on "structural assurances of fairness,"[324] something that would seem an odd concern were the Court really to have sought to restore individualized norms of representation. This focus on fairness rather than individuation helps to explain recent reforms such as securing a second chance to opt out of a proposed class action settlement.[325] It also reinforces the centrality of accountability and other governance norms as the key to the settlement class action.[326] The erosion of market checks on inadequate representation and the role of the state in conferring a binding structure formally align the settlement class action more closely to the administrative models than the sometimes robust, sometimes anemic, private tort markets of old.[327] The need to focus on the incentives facing representatives in the absence of potential market challenges to class counsel is well captured by Richard Nagareda:

> The point [of class action law] is not to preserve some idealized day in court for individual class members. The goal instead is to discern a set of principled and institutionally appropriate checks upon the exercise of monopoly power by class counsel over the representation of class members.[328]

Accordingly, "An understanding of the class action as a monopoly naturally raises the question of how to discipline the exercise of monopoly power by class counsel."[329] Using a single-shot trial as the appropriate baseline for comparison has all the allure of

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plaintiffs' counsel by the client in mass representation, the consensual nature of the attorney-client relationship nonetheless is what gives aggregate settlements their legitimacy.").

324. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 595 (1997); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 855 (1999).

325. FED. R. CIV. P. 23(e)(3). *See also* John Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 377-79 (2000) (giving theoretical account for why the opportunity for relational exit promotes agent loyalty). Even this small increment in individual autonomy has been criticized as an efficiency loss for the class action resolution of broad-scale harms. David Rosenberg, *Adding A Second Opt-Out To Rule 23(B)(3) Class Actions: Cost Without Benefit*, 200 U. CHI. LEGAL F. 19 (2003).

326. *See* Issacharoff, *Class Action Conflicts*, *supra* note 112, at 818 ("[T]he issue in legitimately litigated class action settlements is to develop a halfway point that allows assurances of fairness while at the same time not burdening the settlement process so completely that it breaks down of its own weight."); *see generally*, Nagareda, *supra* note 117, at 782-83 (discussing fairness in settlement claims).

327. For attempts to impose models of administrative legitimacy on the settlement class, see Nagareda, *supra* note 117, at 751-52 (agreeing that different settlements have their own nuances, but arguing that all aspire to create some form of private administrative system that would pay compensation to claimants according to a pre-established grid.).

328. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUMBIA L. REV. 149, 168 (2003).

329. *Id.*

trying to understand Microsoft by reference to a street-corner lemonade stand.

Second, the inability of many firms to internalize the costs of mass torts on a going-forward basis requires settlements that close out future liabilities. It is therefore not surprising that the most difficult features of mass tort class actions deal with future claimants, whether as a matter of formal representation[330] or as a matter of ensuring sufficient reserves to pay latent claims.[331] Where solvency allows the firm to internalize future costs, creative governance mechanisms have salvaged some settlement class actions, even in sweeping mass torts.[332] Where such internalization is not possible, as in asbestos, the picture is decidedly less rosy.

How the mass tort settlement class will ultimately be managed is beyond the scope of this Article. The historical record from the last century of practice in the area of mature torts, however, powerfully suggests that it will not be on the basis of individual claimants, individually represented, seeking their day in court. As Richard Nagareda aptly summarizes the world of the mature, mass harms in aggregated proceedings: "Transactions, not trials are overwhelmingly the endgame of class lawsuits."[333] And in many ways, this is a good thing, too, for reasons of both administrative efficiency and intra-class equity.

Although for the most part we have focused on the institutional efficiencies that propel aggregate settlement, we would be remiss if we did not also address gains in equity that emerge from aggregation. To return to Frederick Schauer's recent reminder, many seemingly individualized assessments of risk and responsibility are crude renditions of probabilistic reasoning.[334] Tort law adopts probabilistic methods either covertly in the probabilistic factual determinations that juries must make or overtly in cases that turn on epidemiological or otherwise statistical proofs.

Unfortunately, as a statistical matter, the probabilistic accounts that undergird much of tort law translate poorly down to a

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330. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627-29 (1997) (discussing inherent conflicts between current and future victims of asbestos-related disease and the need for separate representation).

331. See, for example, the miscalculation in the Manville Trust and the diminution from paying 100 percent of assessed claim value to paying 5 percent. For an analysis of *Amchem* and *Ortiz* focusing on the futures issue as the critical failing in the proposed settlements, see Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1901-15 (2000).

332. *See* Nagareda, *supra* note 117, at 820-21.

333. Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 289 (2003).

334. *See* SCHAUER, *supra* note 33, at 103-05.

sample size of only one individual case. In any individual trial, the plaintiff will either win or lose. In turn, the plaintiff will claim fully compensatory damages in case of victory and get nothing in case of defeat. This leaves similarly situated individuals at risk of dramatically different results depending on the lottery effect of whether they find themselves on the fortunate side of the draw. By contrast, aggregate settlements are often able, like workers' compensation and administrative systems, to smooth the probabilities across the range of similarly situated claimants.[335] Thus, if judgment to trial of all similar cases would result (at great expense) in plaintiffs winning 60 percent of the time and receiving zero the other 40 percent, a mature settlement system will often allow settlements across a wide range of claimants at 60 percent of what a judgment would render. The system gains not only the efficiency of lower transaction costs, but the equitable treatment of similarly situated claimants spared from the litigation lottery.

IV. CONCLUSION

The term "inevitability" in the title of this Article is intended to provoke controversy. What would it mean to say that the world of tort compensation for mature injuries "inevitably" devolves into a system of private resolution relatively immune from public oversight? Our claim is not that this is the only system that could emerge, or even that it is necessarily the best system for compensating the victims of mass society. Indeed, one need only look to the public compensation systems in Western Europe or New Zealand to imagine a different set of institutions for injury compensation.[336] One could also readily imagine a legal system premised on litigation that would nonetheless adopt more thoroughgoing controls over private settlement markets. The great irony then is that aggregated settlements are inevitable in a system committed to litigant autonomy. Mass settlement structures emerge out of the play of precisely the private interests to which American tort law claims allegiance.

In some ways this ought not be especially surprising. Tort law, after all, emerged as a distinct branch of municipal law in the era of

335. Schuck, *supra* note 27, at 959 (stating that "[t]he mass tort system increasingly generates predictable claim values for particular torts").

336. *See generally* P.R. KAIM-CAUDLE, COMPARATIVE SOCIAL POLICY AND SOCIAL SECURITY: A TEN-COUNTRY STUDY 290-312 (1973); G. Palmer, *New Zealand's Accident Compensation Scheme: Twenty Years On*, 44 U. TORONTO L. REV. 22 (1994); G. PALMER, COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA (1979).

mass industrialization.[337] It would be odd if the very industrialization processes that generated a crisis for Victorian individualism had in turn also brought into being a peculiarly individualized field of legal practice.

Why, then, are the myths of individuation and the day-in-court ideal so persistent? One possible explanation is that the world of privatized aggregation and settlement we have described here exists outside of the universe of legal materials from which torts jurists have traditionally drawn their descriptions of the law of torts. Aggregated settlement happens virtually unseen and unobserved in the deepest shadows of the law of torts. Indeed, in this sense the publicly imposed closure provided by the class action device in cases such as *Amchem* and *Ortiz* would have played the salutary function of imposing some transparency on a world that is otherwise largely immune from scrutiny.

Another possible explanation may be, paradoxically, the selling of corrective justice by entrepreneurial plaintiffs' and defense bar alike. It is striking that much of the evidence that can be gleaned about nineteenth and early twentieth century aggregation is to be found in cases on lawyer discipline:[338] constituencies within the bar have had a vested interest in the day-in-court myth because it obstructs transaction-cost-minimizing reform.[339] A combination of institutional conservatism and self-interest has therefore often united the defense and plaintiffs' bars in defeating efforts to replace the tort system with alternative arrangements, including comprehensive administrative measures such as auto no-fault systems.[340] These same impulses may explain some of the resistance to formal recognition of how aggregation has fundamentally reshaped the practice of American tort law. Once we bring into view the institutional dynamics of aggregation in private settlement markets, however, it is difficult to view uncritically the ways in which the bar has championed the "moral and ethical foundations"[341] of tort, the

337. *See* Grey, *supra* note 38.

338. *See supra* notes 129-33 & 141-42; *see also* Raymond N. Caverly, *What Constitutes Practice of Law*, BEST'S INS. NEWS (Fire & Casualty Ed.), May 1938, at 7 (describing "the adjustment and settlement of claims" by non-lawyers as "the unauthorized practice of law")

339. *E.g.*, John Alan Appleman, *Jury Verdicts and Insurance Rates*, BEST'S INS. NEWS (Fire & Casualty Ed.), Oct. 1962, at 53 (insurance industry article defending the civil jury)

340. *E.g.*, Edward C. Stone, *Compulsory Automobile Liability Insurance*, 27 BEST'S INS. NEWS (Causalty, Surety & Misc. Ed.), Feb. 1927, at 283-284, 286 (arguing against auto no-fault laws); Guy E. Mann, *Compensating Auto Accident Victims*, BEST'S INS. NEWS (Fire & Casualty Ed.), Dec. 1965, at 14 (same). *See generally* WITT, *supra* note 16, at 194-96 (describing the opposition of the bar to no-fault compensation systems for automobile accidents in the 1930s); Simon, *supra* note 154, at 528 (same).

341. *What Does the Future Hold?*, 1 FOR THE DEF. 9, 10 (1960).

"moral principle"[342] of fault, and the significance of "preserv[ing] and maintain[ing] the very institution of trial practice itself."[343] It is particularly difficult to accept these arguments when they are raised as dispositive defenses against public compensation systems, even as proponents know full well that in practice the tort system looks much like the compensation regimes against which it is so often arrayed.

Our focus on the institutional dimension of the tort system is not intended as advocacy for any particular model of how courts should decide any individual tort case. Indeed, limitations on the institutional competence of tort judges to manage the far-flung system of private settlement suggest that courts may be best advised to decide individual cases by reference to long-standing, traditional tort standards, without regard to the private settlement institutions that will emerge in their shadow. Our claim, however, is that this aspect of tort is at best partial. Torts jurists in the law schools and in the courts have for the most part either ignored, missed the significance of, or maybe even been unaware of, the practices that animate the resolution of large swaths of mature tort claims. All too often, the consequence has been a misleading description of our torts practices and a misleading account of the distinctive features of mass tort class actions.

Following the von Clausewitz-inspired idea of a leading claims adjuster from the middle of the twentieth century, we might even say that "adjusting stands in the same relation to law as politics to the art of war."[344] Aggregate claims settlement practices are tort law by other means.

342. *Justice in Court After the Accident*, 9 FOR THE DEF. 9, 11 (1968).

343. *Coordination of Defense Publications*, 4 FOR THE DEF. 14, 14 (1963).

344. JOHNS, *supra* note 182, at 395.