

# TORT AS PRIVATE ADMINISTRATION

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*What does tort law do? This Article develops an account of the law of torts for the age of settlement. A century ago, leading torts jurists proposed that tort doctrine's main function was to allocate authority between judge and jury. In the era of the disappearing trial, we propose that tort law's hidden function is to shape the process by which private parties settle. In particular, core doctrines in tort help to structure and sustain the systems of private administration by which injury claims are actually resolved. Though an observer could hardly guess it from judge-centric theories of tort or by reading the typical reported appellate cases, repeat-play stakeholders such as the plaintiffs' bar, insurers, and others are developing and managing claims resolution facilities that have turned the resolution of one-off tort claims in the United States into something akin to aggregate litigation or a public compensation program. Hidden deep in the shadows of the law, private administration is becoming a standard feature of torts practice with substantial implications for the theory of tort law and litigation.*

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## INTRODUCTION

What does tort law do? For decades now, the two leading accounts in the torts literature have adopted first-order answers to this question. Let's call this the first-order debate over American tort law. On one view, tort law is organized around the principle of remedying wrongful losses. Let's call this corrective justice or civil recourse.<sup>1</sup> On the other approach, tort law aims to allocate social resources to their highest value users. Let's call this the efficiency or utility-maximizing account.<sup>2</sup> The struggle between them has long shown signs of being tired. It is near midway through its sixth decade at the very least.<sup>3</sup> A good measure of the debate's exhaustion is the increasingly prominent effort of scholars across generations to

<sup>1</sup> See discussion *infra* subpart III.A.

<sup>2</sup> See discussion *infra* subpart III.B.

<sup>3</sup> See Guido Calabresi, *Toward a Unified Theory of Torts*, 1 J. TORT L. 1, 1 (2007) ("For at least the last 50 years two ways of looking at tort law have struggled for dominance."). For more information on the long history of the debate on tort law principles, see John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 516–21 (2003). See also Michael L. Rustad, *Twenty-First-Century Tort Theories: The Internalist/Externalist Debate*, 88 IND. L.J. 419, 419–26 (2013) (focusing on the more modern incarnation of the debate).

move beyond it, either by declaring a truce or by asserting a third model for the field altogether.<sup>4</sup>

It is a shame that the first-order debate over what tort law does has dominated the scholarly literature, because there is a second-order answer to the question, too, one that offers powerful new illumination of the field. It is not a competitor of the first-order theories, at least not in the first instance. Instead, it is an idea about how the basic structure of tort doctrine sets in motion the processes by which torts advances—or fails to advance—its first-order goals. The idea is that a core function of many substantive tort doctrines is to structure and enable the private administration of the rights and duties that the law of torts sets out. That is to say, tort doctrine structures and sets in motion the process by which disputes over the rights and duties it articulates are resolved.

We refer to this function of tort law as “private administration.” Glimmers of it can be seen in bits and pieces of recent scholarship in torts;<sup>5</sup> considerably more of it can be seen in the

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<sup>4</sup> See, e.g., Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1324–25 (2017) (articulating a theory of tort law as oscillating between competing conceptions of community); see also Calabresi, *supra* note 3, at 9 (“Somewhere in that line of thought . . . lies a unified field theory of torts, the kind of theory to which I believe our scholarship should increasingly turn.”); Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 68–69 (2010) [hereinafter Hershovitz, *Harry Potter*] (explaining that the two competing theories of tort law are incomplete and advancing an expressive view of tort law); Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L.J. 469, 473 (2013) (“There is a further problem with civil recourse theory, and that is the assumption that a single theory could explain all of tort law.”); Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 330 (2007) (explaining that the major competing theories of tort law are incomplete and advancing a pluralistic view of tort law); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (explaining that neither of the two competing theories alone are complete and advancing a mixed theory of tort law); Alex Stein, *The Domain of Torts*, 117 COLUM. L. REV. 535, 611 (2017) (“[O]ur tort system operates in two modes. In some cases, it promotes fairness and corrective justice; in others, it sets up incentives for minimizing the total cost of accidents and accident avoidance.”).

<sup>5</sup> See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 57 (2007); Nora Freeman Engstrom, *An Alternative Explanation for No-Fault’s “Demise”*, 61 DEPAUL L. REV. 303, 312–313 (2012) [hereinafter Engstrom, *No Fault’s Demise*]; Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1491–1492 (2009) [hereinafter Engstrom, *Run-of-the-Mill Justice*]; Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 810 (2011) [hereinafter Engstrom, *Sunlight*]; Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1573 (2004); Samuel Issacharoff, “Shocked”: *Mass Torts and Aggregate Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1927 (2002) [hereinafter Issacharoff, *Asbestos Litigation*]; Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 135

cognate literatures on procedure<sup>6</sup> and the legal profession,<sup>7</sup> for tort's role in private administration arises at the intersection among these fields. Yet make no mistake: private administration has become a central defining feature of American tort law, at least sociologically speaking. For a century, leading torts jurists like Dean Leon Green asserted that a core function of Anglo-American tort doctrine is to allocate decision-making responsibility between judge and jury.<sup>8</sup> Fowler Harper, co-author of the leading torts treatise of the middle of the twentieth century, asserted that "the end to which all doctrines, rules and formulae in current use" in torts cases was "the allocation of work" between "judge and jury."<sup>9</sup> A century ago Green and Harper were right. But today the civil trial has all but disappeared, taking with it tort doctrine's carefully balanced roles of judge and jury.<sup>10</sup> In place of the civil trial exists a sprawling

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(2015); Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 IND. L.J. 543, 550 (2013) [hereinafter Robinette, *Two Roads Diverge*]; John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 261 (2007) [hereinafter Witt, *Bureaucratic Legalism*].

<sup>6</sup> See, e.g., Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335, 337 (2014); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 384 (2000) [hereinafter Erichson, *Informal Aggregation*]; Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1813 (2005); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2020 (1997); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1121 (2010); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 512 (2011) ("[C]lass action settlement funds often resemble 'private' or 'miniature' administrative agencies.").

<sup>7</sup> The considerable literature on the contingency fee is a prime example. See Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 653 (2003); Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 633 (2013); Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 457 (1998); David A. Hyman et al., *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. ILL. L. REV. 1563, 1564 (2015).

<sup>8</sup> See LEON GREEN, *JUDGE AND JURY* 2 (1930); see also KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 103–08 (5th ed. 2017) (explaining the decision-making balance between the reasonable minds of judges and juries).

<sup>9</sup> Fowler V. Harper, *Judge and Jury*, 6 IND. L.J. 285, 285 (1931) (reviewing LEON GREEN, *Judge and Jury* (1930)).

<sup>10</sup> Cases are increasingly settling or being dismissed rather than going to trial. See ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE U.S. COURTS*, 2017 ANNUAL REPORT OF THE DIRECTOR tbl. C-4 (2017), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_c4\\_0930.2017.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2017.pdf) [<https://perma.cc/G642-F2WE>]; Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 129–31 (2009) (finding tort cases to have especially high rates of settlement); Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2131–32 (2018) [hereinafter Eng-

domain of private settlement. And in that domain, the allocation of authority between judge and jury has been replaced by the work of structuring the system of private administration that our tort law has, for the most part, become.

This Article proceeds in three parts. Part I introduces the ways in which American tort law has come to be a law of private administration. We describe the structure of private administration, which is partly bureaucratic, partly managerial, and partly entrepreneurial. We sketch the conditions under which, and the institutions within which, the law gives rise to private administration. And we outline the scope of private administration in the social world of American tort law. Our approach here resembles that of scholars like Martha Chamallas<sup>11</sup> and Jennifer Wriggins,<sup>12</sup> who have long attended to the ways in which tort doctrines function in the actually existing social world. Accordingly, in Part II, we adopt the doctrinal strategy of Green and Harper and account for the ways in which many of the most important doctrines in tort—damages rules, duty rules, causation doctrines, and more—function to structure the world of private administration. Our goal here is to offer an account of one of the crucial things that tort doctrine does in the world and to connect the basic law of torts to the sprawling settlement system that has grown up in its shadow.

Part III takes up the implications of private administration for leading accounts both of American tort law and of the role of

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strom, *The Diminished Trial*]; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012).

<sup>11</sup> See generally Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39 (2018) (advancing a feminist historical approach to tort law's treatment of domestic violence and sexual assault); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998) (advancing a critical approach to tort law's gender and race bias).

<sup>12</sup> See generally MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010) (advancing a critical approach to tort law); see also Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 45–51 (1989) (exploring the connection between tort law and current societal ideas through the intrafamilial immunity doctrine); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1265 (2004) (showing that caps on noneconomic loss damages have a disproportionate adverse impact on women and the elderly); Jane Goodman et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 L. & SOC'Y REV. 263, 270 (1991) (explaining that mock juries award higher damages for men than women in wrongful death cases); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOWARD L.J. 99, 108–10 (2005) (showing that railroads devalued the settlements of the claims of black people).

litigation in American public policy. We contend that to the extent private administration displaces the substantive law of rights and duties in tort, it tends to displace the normative project of corrective justice and to replace that project with an amoral managerial system designed to advance the interests of the private parties who build and manage it, mainly repeat-play defendants, insurance companies, and plaintiffs' lawyers. Private administration restructures tort rights and duties, altering such rights and duties and recreating them in its own image. This is not to say, as we will explain, that the repair of wrongful losses does not offer an account of the normative structure of tort doctrine in the courts; corrective justice may, as Scott Hershovitz has recently put it, offer "a first approximation"<sup>13</sup> of what tort law does. We contend, however, that the first-order corrective justice project is increasingly hedged in on many sides by the consequences of a system of private administration that is either indifferent or outright hostile to the normative project of repairing wrongful losses. Our second-order sociological account of tort law also complicates the efficiency view of tort. The law and economics tradition in tort relies on judge and jury to deploy a public-regarding cost-benefit standard. We observe that in the world of private administration, no actor stands in a position to advance such a public-regarding project, at least not as such. Private administrators on the defense side and the plaintiff side alike aim instead to maximize their private returns. The result is a significant number of places in which the kinds of settlement arrangements characteristic of the world of private administration advance private interests as against the public interest, whether defined as insurance and loss spreading, economic efficiency, or some other policy value.

In the Conclusion, we observe that the view of tort as private administration has significant implications not only in the literatures on the character of tort doctrine, but also for a major debate about the role of litigation in American public policymaking. Part of the difficulty is that tort scholarship, like much legal scholarship more generally, has been too preoccupied with the role of the judge.<sup>14</sup> The literature's thinking about tort law is unduly judge-centric; torts judges like Shaw

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<sup>13</sup> Scott Hershovitz, *What Does Tort Law Do? What Can It Do?*, 47 VAL. L. REV. 99, 99 (2012).

<sup>14</sup> See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that unlike at the founding of the United States, "the People" are absent from the law now).

and Holmes, Cardozo and Lehman, Hand and Friendly, Traynor and Kaye, Calabresi and Posner, loom large. But judge-centrism is exactly the wrong focus if we want to understand tort law in the twenty-first century, for the action in the law is in private administration outside the courtroom. The real question for those interested in shaping and reshaping American tort law is how second-order private administration either vindicates or obstructs tort law's first-order goals. And because private administration is one of the distinctively American ways of public policy, the study of private administration is also vital to explaining how to vindicate first-order public policy goals more generally.

## I

### THE WORLD OF PRIVATE ADMINISTRATION

#### A. Defining Private Administration

Private administration is a mode of claims resolution by which private litigants and their agents settle disputes over legal claims by recourse to privately managed systems of bureaucratic justice. Such systems arise out of American tort law's decentralized structure, its party-driven character, the contractual nature of settlement, and the economies available to repeat players who innovate in designing settlement structures. It is pervasive in American law, it is hard to find, and it is distinctively understudied. It lives and indeed thrives in the shadows of the law.<sup>15</sup>

The scholarly literature more typically depicts the American political system as distinctively characterized by what now goes under the name "adversarial legalism."<sup>16</sup> Adversarial legalism lives in plain view. It features oppositional parties drawing attention to themselves and the wrongs committed by their opponents. Versions of the idea that such legalism plays an unusually large role in the U.S. have existed since Alexis de Tocqueville described the distinctively significant role of law and courts in American democracy in the first half of the nineteenth century.<sup>17</sup> More recently, the literature has organized

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<sup>15</sup> C.f. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1388 (2018) (describing the plea-bargaining regime as arising "beyond the shadow of the law").

<sup>16</sup> ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3-4 (2001).

<sup>17</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 240 (Eduardo Nolla, ed., James T. Schleifer trans., Liberty Fund 2012) (1835) ("From the moment when an individual believes that he sees a law of his state that harms a right . . . he can refuse to obey and appeal to the federal justice system.").

itself around Robert Kagan's canonical definition. Kagan defines adversarial legalism as "a method of policymaking and dispute resolution with two salient characteristics. . . . *formal legal contestation*. . . . [and] *litigant activism*["<sup>18</sup> That is, disputes are resolved by appeals to formal legal rules and penalties and the process is driven by the parties themselves, as opposed to government administrators. A range of interests employ litigation in an adversarial legal system for a range of policy objectives.<sup>19</sup> Though this system benefits from being creative and decentralized, it also has some significant drawbacks as a form of policymaking and dispute resolution. It is inefficient, complex, costly, punitive, and unpredictable.<sup>20</sup>

The literature conventionally imagines public administration as the alternative to legalism. In the administrative state, bureaucratic agencies of course exist for any number of regulatory purposes. At the federal level alone, there are dozens or even hundreds of public agencies, depending on how one counts.<sup>21</sup> The Federal Trade Commission oversees the regulation of antitrust law, the Department of Education administers federal education law, the Social Security Administration manages old age pensions and federal disability insurance; the Department of Veterans Affairs oversees public programs designed for former members of the military. In some areas, such as Social Security, public institutions create administrative institutions to process large numbers of claims.<sup>22</sup> And when they do, they typically rely on bureaucratic rationality, centralization, and state-driven—as opposed to litigant-driven—processes.<sup>23</sup>

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<sup>18</sup> KAGAN, *supra* note 16, at 9.

<sup>19</sup> See THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 7–10 (2002); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 1–10 (2010); KAGAN, *supra* note 16, at 3–4.

<sup>20</sup> See BURKE, *supra* note 19, at 17–18; KAGAN, *supra* note 16, at 3–4.

<sup>21</sup> See DAVID E. LEWIS & JENNIFER L. SELIN, *ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES* 15 (2012), <https://www.acus.gov/publication/sourcebook-united-states-executive-agencies> [<https://perma.cc/XB5C-RTZM>]; Mary Whisner, *Some Guidance About Federal Agencies and Guidance*, 105 L. LIBR. J. 385, 386–90 (2013).

<sup>22</sup> See, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 17–18 (1983) (describing the bureaucracy of social security); PHILIPPE NONET, *ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY* 55–60 (1969) (describing state workers' compensation program); Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 672 (1998).

<sup>23</sup> See 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 992–1002 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al., trans., University of California Press 1978) (1922); JAMES Q. WILSON, *BUREAUCRACY:*



But government actors are not the only ones who design bureaucracies to handle demand for decision-making capacity. A generation ago, the pioneering economic history work of Alfred D. Chandler Jr. showed why bureaucracy arose within the newly giant firms of late nineteenth-century capitalism, the railroads chief among them.<sup>24</sup> Even earlier, the classic scholarship on the structure of the firm explained the conditions under which private organizations would develop bureaucratic features.<sup>25</sup> Private bureaucracies arise when powerful incentives arise to assemble firms in a particular way: the dispersed shareholder model of Adolf Berle and Gardiner Means, for example, or the transaction cost models of Ronald Coase and Oliver Williamson, or the decentralized common property model of Elinor Ostrom.<sup>26</sup> What is true generally for economic activity or commons governance is also true in particular for the economic activity of parties engaging in the purchase and sale of tort claims. Circumstances often make it worthwhile for repeat-players in the system—repeat defendants and their lawyers, insurers, and plaintiffs’ representatives—to establish institutions for smoothing and rationalizing the settlement process. And thus, where government-created administrative institutions do not arise, private actors sometimes create their own private administrative institutions to take advantage of efficiencies in the processing of tort claims.

Students of aggregate litigation and mass torts will find much to recognize in this claim. The aggregation literature in civil procedure has long dealt with institutions designed to identify efficiencies in the processing of mass tort claims. As the number of claimants rises, the much heralded adversarialism of the American legal system often gives way under the weight of pragmatic considerations. Litigants, lawyers, judges,

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WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 32, 35 (1989); Jeb Barnes, *In Defense of Asbestos Tort Litigation: Rethinking Legal Process Analysis in a World of Uncertainty, Second Bests, and Shared Policy-Making Responsibility*, 34 *LAW & SOC. INQUIRY* 5, 15–16 (2009). *But see* NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* 360 (2013) (“In American government . . . we observe frequent departures from centralization, hierarchy, [and] instrumentally rational hiring . . .”).

<sup>24</sup> See ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 79–81 (1977).

<sup>25</sup> See, e.g., ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 84–90 (1932); R. H. Coase, *The Nature of the Firm: Origin*, 4 *J.L. ECON. & ORG.* 3, 388–89 (1988).

<sup>26</sup> On more recent models of collective governance, see ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 7, 15–21 (1990) and Oliver Williamson, *Corporate Governance*, 93 *YALE L.J.* 1197, 1200–01 (1984).

and other parties involved in the litigation typically cooperate to establish administrative bodies, often called claims resolution facilities, capable of dispensing compensation without the acrimony, expense, and uncertainty of a formal trial.<sup>27</sup> The reduced uncertainty and saved time and money of such a system can be immense. Thus, the question facing most lawyers in mass tort cases “is not *whether* to proceed in the aggregate, but *how* to properly structure the inevitable aggregation of these cases.”<sup>28</sup> The material realities of litigation create new constituencies, driving repeat players to fashion a new legal regime out of the tools provided by adversarial legalism.<sup>29</sup>

The aggregate litigation literature addresses the more visible, higher profile versions of a dynamic that much more pervasively structures tort adjudication. Legally-minded entrepreneurs recognize recurring patterns and parties between cases and create mechanisms to capitalize on these regularities. For cases emerging from a single product or accident, these institutions are often the freestanding claims resolution facilities covered in literature on mass torts.<sup>30</sup> Often, however,

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<sup>27</sup> See NAGAREDA, *supra* note 5, at 67–70; David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1577–78 (2017); Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253, 1263–64, 1271–73 (2014); Deborah R. Hensler, *Alternative Courts? Litigation-Induced Claims Resolution Facilities*, 57 STAN. L. REV. 1429, 1430–31 (2005) [hereinafter Hensler, *Alternative Courts*]; Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1362–70 (2005) [hereinafter McGovern, *Facilities*].

<sup>28</sup> See Issacharoff, *Asbestos Litigation*, *supra* note 5, at 1927 (discussing this issue in relation to asbestos cases).

<sup>29</sup> This cooperation does not necessarily entail an alignment of interests. Sometimes plaintiffs’ attorneys who manage a large number of claims collude with defendants, increasing the compensation across their entire portfolio of cases at the expense of one or all of their clients. See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 127–34 (2017); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1366–384 (1995) (identifying these potential conflicts of interest in a class action context); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 113–16 (2006) (discussing the agency cost theory of attorney-client relationships); Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1394–1402 (2000); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3167 (2013) (acknowledging the “agency problems of faithless representatives” in the context of aggregate settlements).

<sup>30</sup> See, e.g., Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79, 93–97 (1990); Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 398–402 (2014); Stephanie Garlock, Start Me Up: A Portrait of Attorney Control in a Multidistrict Litigation, 12–16 (January 5, 2019) (unpublished article) (on file with authors).

similar fact patterns arise out of completely unrelated incidents. Attorneys and litigants who deal with these kinds of cases can also capture the same efficiency gains if they can agree on rules to simplify the litigation process. Entrepreneurs in these situations can establish their own mechanisms to manage claims.<sup>31</sup> On the defense side, large companies who face routine lawsuits may develop legal departments to settle claims based on a selected set of heuristics.<sup>32</sup> On the plaintiffs' side, so-called "settlement mills" that settle large numbers of claims can play the same role as the "wholesaler" lawyer in class action lawsuits, specializing in finding victims of certain kinds of torts and settling their claims quickly at a discount with defense-side repeat players.<sup>33</sup> On the insurers' side, active subrogation practices can collect together large numbers of claims. In each of these areas, cases may formally share no facts and have no clearly identifiable class of claimants. As a result, the private administrative institutions created to manage such cases cannot rely on the more formal mechanisms underlying other mass tort resolutions, like settlement class actions or all-or-nothing settlements.<sup>34</sup> However, they can still use promises of speed and certainty as well as sheer economies of scale to get individual litigants to acquiesce to the arrangement. Under such a regime, going rates, rules of recovery, and

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<sup>31</sup> See Issacharoff & Witt, *supra* note 5, at 1599–1602.

<sup>32</sup> See, e.g., H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 96–106 (1970) (discussing auto insurers' settlements); Tom Baker & Charles Silver, *How Liability Insurers Protect Patients and Improve Safety*, 68 DEPAUL L. REV. 209, 212–13 (2019) (discussing "patterns" in the payments health liability insurers make to injured patients); Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 12 AM. B. FOUND. RES. J. 351, 371–72 (1987) (explaining the systematic approach railroads adopted to claims payment); Robert J. Kaczorowski, *From Petitions for Gratuities to Claims for Damages: Personal Injuries and Railroads During the Industrialization of the United States*, 57 AM. J. OF LEGAL HIST. 261, 301–05 (2017) (discussing railroad settlements); Remus & Zimmerman, *supra* note 5, at 141–48 (discussing "corporate settlement mills"); William C. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 85 (1968) (discussing auto manufacturer settlements).

<sup>33</sup> See Engstrom, *Run-of-the-Mill Justice*, *supra* note 5, at 1491–1501 (discussing settlement mills); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 313 (1996) (discussing wholesale lawyers).

<sup>34</sup> An all-or-nothing settlement is when a defendant refuses to settle with any plaintiffs unless all or nearly all of the plaintiffs agree to the settlement. See Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1948–52 (2017); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 981–82 (2010) [hereinafter Erichson, *All-or-Nothing*].

procedural rights are typically part of an ongoing negotiation between repeat players in the system.<sup>35</sup>

These changing dynamics of negotiation alter how claims are valued in at least two ways. First, population-level heuristics replace individualized claim valuations. Repeat players typically agree on certain relevant types of fact patterns and sort claims into categories based on their relevant facts.<sup>36</sup> Damages are often assessed using a grid that assigns values based on a claimant's category. This process homogenizes previously disparate claims and allows for the speedy dispensation of large portfolios of cases on both sides. Second, private administration changes the institutions responsible for valuing claims. Moving cases into private administrative bodies delegates much of the individual-level claims valuation to agents within the private bureaucracy. Privatization makes a difference. Over time, such repeat players often develop going rates for certain fact patterns, eventually indexing their valuations to previous settlements, not to trials.<sup>37</sup> Going rates may not be consistent. There is little transparency in the private claims process. Research on the question, as well as informal conversation with participants, suggests that settlement values often vary between institutions or even between evaluators at the same facility.<sup>38</sup> Privatization may speed legal processes. But it also moves private lawmaking into opaque backrooms. And it substitutes forms of market accountability for the political accountability of public administration. Both forms of accountability have their flaws, of course. Individual litigants within a market-based system, for instance, may not be able to access the information needed to figure out how much their claim is

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<sup>35</sup> See Issacharoff & Witt, *supra* note 5, at 1610–14; ROSS, *supra* note 32, at 150–59.

<sup>36</sup> See Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 124 (2012) (describing the negotiated rules of recovery in mass settlements generally); Issacharoff & Rave, *supra* note 30, at 412 (describing the “categories of claims” paid by the Deepwater Horizon class settlement).

<sup>37</sup> See, e.g., Engstrom, *Run-of-the-Mill Justice*, *supra* note 5, at 1490 (claims valued by reference to past settlements); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 98 (1989) [hereinafter Hensler, *Resolving Mass Toxic Torts*]; Remus & Zimmerman, *supra* note 5, at 137 (corporate settlement mills “offer non-individualized remedies”); Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275, 2277–79 (2017) [hereinafter Zimmerman, *Bellwether*].

<sup>38</sup> See *infra* notes 118–120 and accompanying text (describing the inconsistency of settlement values).

worth and may have limited opportunity to weigh in on any deliberations that might occur.<sup>39</sup>

Aggregating the process of valuing claims has distributive implications as well. Bargaining conventions, such as the rule calculating nonpecuniary damages by the “three-times-three” rule shape settlement values.<sup>40</sup> Other rules of thumb, such as the common practice of awarding settlements to those who are rear ended in automobile cases, introduce substantive new liability rules.<sup>41</sup> But more subtly, the process of homogenizing claims for settlement en masse alters the distribution of compensation within a given run of claims. Claims homogenization typically involves the discarding of certain pieces of information and indexing around a few aspects of any given claim. Private administration thus redistributes value among the class of claims.<sup>42</sup> Most often, the homogenization of private administration redistributes from high-value claims to low-value claims.<sup>43</sup> And finally, because the agents of private administration—insurers, repeat-play defendants, and high-volume plaintiffs’ lawyers—bargain across portfolios, individual claim-

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<sup>39</sup> See Sybil L. Dunlop & Steven D. Maloney, *Justice Is Hard, Let’s Go Shopping! Trading Justice for Efficiency Under the New Aggregate Settlement Regime*, 83 ST. JOHN’S L. REV. 521, 541–42 (2009) (noting that Merck & Co. used a “secret formula” to distribute the Vioxx settlement); Engstrom, *Sunlight*, *supra* note 5, at 837–38; Remus & Zimmerman, *supra* note 5, at 155–58.

<sup>40</sup> John Fabian Witt, *The King and the Dean: Melvin Belli, Roscoe Pound, and the Common-Law Nation*, in PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 211, 270 (2007) [hereinafter WITT, PATRIOTS AND COSMOPOLITANS]; see Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 787 (1995) (“It is a common settlement practice to compute pain-and-suffering damages to be computed as some multiple of the out-of-pocket medical and related financial expenses incurred by the plaintiff.”). While the idea of the three-to-one bargaining convention is widespread in the literature and folklore of the settlement bar, evidence suggests that in civil trials juries award less in noneconomic damages than the bargaining convention provides. See Herbert M. Kritzer et al., *An Exploration of “Noneconomic” Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 1017–19 (2014).

<sup>41</sup> See *infra* note 243 (discussing how private administrators create new rules).

<sup>42</sup> See Engstrom, *Run-of-the-Mill Justice*, *supra* note 5, at 1535–42; Rony Kishinevsky, Note, *Damage Averaging—How the System Harms High-Value Claims*, 95 TEX. L. REV. 1145, 1146 (2017).

<sup>43</sup> In the words of Michael J. Saks, this “pattern of overcompensation at the lower end of the range and undercompensation at the higher end is so well replicated that it qualifies as one of the major empirical phenomena of tort litigation ready for theoretical attention.” 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, 1218 (1992). Admittedly, jury awards also tend to undercompensate large damages. See Frank A. Sloan & Stephen S. van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 LAW & CONTEMP. PROBS. 131, 133 (1991).

ants will often see the value of their claims altered in pursuit of the maximum aggregate value across a given portfolio of claims.<sup>44</sup>

And here's the striking thing: for nearly two centuries, American tort doctrine has been shaping and usually fostering and facilitating the process by which these forms of private administration have come about.

## B. Origins of Private Administration

Forms of private administration arose almost simultaneously with the beginning of modern tort law. For nearly a half-century now, scholars have located the origins of modern tort law in the middle of the nineteenth century.<sup>45</sup> For one thing, the legal forms of the modern tort cause of action emerged out of the procedural thicket of the medieval forms of action in this period.<sup>46</sup> But just as significantly, the modern social practice of tort claims and repeat players developed as well. Causes of action by employees against employers and passengers against railroads introduced for the first time the basic structure of modern litigation's repeat players.<sup>47</sup> Historians haven't found the first tort settlement. They almost certainly never will.

Already by the second half of the nineteenth century, the social practice of tort in the United States substantially involved private settlement. Courts readily enforced tort settlements, deeming them ordinary contracts settling private

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<sup>44</sup> See Burch, *supra* note 29, at 127–32 (noting that sometimes repeat players design settlements so that they reap the “peace premium” instead of the plaintiffs); Issacharoff & Witt, *supra* note 5, at 1592–93 (describing how plaintiffs'-side claims brokers and insurers considered the full run of their portfolios when settling cases).

<sup>45</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 443 (1973) (“For the nineteenth century, it is hard to think of a body of new judge-made law more striking than tort law.”); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 42–51 (2004) [hereinafter WITT, *ACCIDENTAL REPUBLIC*]. *But see* JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 25–37 (2020) (tracing the principle of civil recourse theory to the Founding Era).

<sup>46</sup> See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, 78–79 (2d ed. 1994); ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 6, 26, 96 (1938).

<sup>47</sup> Compare CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 337–47 (1993) (outlining the early social and legal relationship between railroad employers and employees in the personal injury context) with Gary T. Schwartz, *The Character of Early American Tort Law*, 36 *UCLA L. REV.* 641, 651–53, 673 (1989) (describing the different legal regime governing railroad liability towards passengers and society in general).

concerns.<sup>48</sup> A separate line of cases cast doubt on the enforceability of settlements that were against public policy.<sup>49</sup> And a few cases fit into a narrow exception for incapacity to enter a contract at the time the parties made the settlement.<sup>50</sup> But with great speed, the enforceability of settlements became a central feature of torts practice in the United States.

Courts went to great lengths to uphold private resolutions to tort claims. Courts enforced settlements even where the injury was substantial and the settlement paltry and the plaintiff alleged that the settlement had been induced by fraudulent representations about the likelihood the plaintiff would prevail at trial.<sup>51</sup> The Massachusetts Supreme Judicial Court held in 1842 that the discovery of subsequent facts altering the value of the claim did not change the enforceability of a settlement.<sup>52</sup> By 1884 it was settled law in Missouri and elsewhere that compromise of even a doubtful claim was valid.<sup>53</sup> The Indiana Supreme Court insisted on strict pleading requirements for parties seeking to disown settlement contracts; it rebuffed a plaintiff who alleged that the railroad had taken advantage of him when he was *non compos mentis* after the accident on the grounds that his pleading included neither an allegation that he was now of sound mind, nor that he had subsequently rejected the settlement.<sup>54</sup>

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<sup>48</sup> See *Taylor v. Galland*, 3 Greene 2, 26 (Iowa 1851) (“[T]he parties to the agreement were plaintiff and defendant in action at law; they had a right to compromise and put an end to the litigation pending between them.”); *Sanford v. Huxford*, 32 Mich. 313, 319–20 (Mich. 1875); *Hays v. Lusk*, 2 Rawle 24, 26 (Pa. 1829) (“Agreements are not to be set aside on slight grounds. . . .”); *Reid v. Hibbard*, 6 Wis. 175, 190–191 (Wis. 1858); *Lake Erie v. Sellman*, 51 Ill. App. 617, 620 (Ill. App. Ct. 1893).

<sup>49</sup> See *Moore v. Adams*, 8 Ohio 372, 374–75 (Ohio 1838) (explaining that a settlement was against public policy and thereby unlawful but refusing to intervene, thereby leaving the settlement as the court found it).

<sup>50</sup> See *Citizens’ St. R.R. Co. v. Horton*, 48 N.E. 22, 23 (Ind. App. 1897).

<sup>51</sup> See *Johnson v. Chicago, R.I.*, 77 N.W. 476, 477–78 (Iowa 1898) (upholding a settlement for \$200 after Plaintiff’s leg was amputated and finding that the railroad did not make fraudulent representations). As a general matter of law, however, plaintiffs and defendants could rescind tort settlements that the opposing party fraudulently induced. See *Obert v. Landa*, 59 Tex. 475, 480 (Tex. 1883) (noting that the plaintiff may set aside a settlement made under grossly fraudulent pretenses).

<sup>52</sup> *Barlow v. Ocean Ins. Co.*, 45 Mass. (4 Met.) 270, 276 (Mass. 1842) (“An agreement so made is upon a substantial consideration; and why should it not be enforced?”).

<sup>53</sup> See *Rinehart v. Bills*, 82 Mo. 534, 538 (Mo. 1884); 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 438–39, (6th ed. 1873).

<sup>54</sup> See *Louisville, New Albany & Chicago Ry. Co. v. Herr*, 35 N.E. 556, 557 (Ind. 1893).

Upholding settlement contracts represented a crucial commitment to the private resolution of tort claims, and no private actor played a larger role in the early days of tort than the American railroad. The business historian Alfred Chandler wrote decades ago that railroads led the way in developing modern managerial systems in the modern business firm.<sup>55</sup> They did the same in the management of tort claims, too. Before long, railroads in particular dedicated substantial resources to handling personal injury claims effectively, which almost always meant inexpensively. Sometimes this entailed the creation of internal offices dedicated to managing claims.<sup>56</sup> Other railroads relied on outside counsel.<sup>57</sup> Either way, the railroads pioneered the management of personal injury costs.<sup>58</sup>

Private administration offered real advantages to the railroad manager. Significantly, from virtually the very start of the modern era in tort, the private management of personal injury costs entailed considerations beyond the purely legal. Legal historian Robert J. Kaczorowski's important new study suggests, as he puts it, that mid-century railroads organized their employment practices around a "moral dimension" that produced compensation, at least in modest amounts, above and beyond tort liability.<sup>59</sup> Kaczorowski's "moral dimension" was an early form of private administration. Railroad managers—who cited "the good will of the public" and the "interest" of the firm—adopted a collective, long-term relationship with the run of injury claims arising out of their businesses.<sup>60</sup>

By the turn of the twentieth century, business archives reveal, informal settlement of claims, with its mix of settlement contracts and occasional interested benevolence, was maturing into systems of private administration.<sup>61</sup> As the nineteenth century wore on, large employers like textile mills developed more elaborate and formal mechanisms for resolving tort

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<sup>55</sup> CHANDLER, *supra* note 24, at 79–81, 105.

<sup>56</sup> See BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION 1865–1920, 105–06 (2001) (discussing the creation of "claims departments"); Kaczorowski, *supra* note 32, at 295–96.

<sup>57</sup> See WILLIAM G. THOMAS, LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH 38 (1999). And sometimes, railroads relied on both, hiring the best local council to prevent them from working for the opposition, while handling much of the actual legal work internally. *Id.* at 43–44.

<sup>58</sup> Cf. JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 216–17 (2001) (discussing how railroads settled cases and created relief associates to manage the cost of personal injury cases).

<sup>59</sup> Kaczorowski, *supra* note 32, at 267–71.

<sup>60</sup> See *id.* at 268, 277.

<sup>61</sup> See *id.* at 292 (noting that the railroads' handling of personal injury cases was "informal, decentralized, and, . . . haphazard").



claims. Sometimes this meant working closely with repeat-claimant-side representatives to bring some semblance of peace to the entire class of claims.<sup>62</sup> Sometimes it meant formal accident compensation programs by which employees traded their right to sue up front in return for the promise of compensation in the event of injury.<sup>63</sup> The participants in the late nineteenth-century accident crisis experimented with a whole host of programs.<sup>64</sup> But typically they shared certain key features: in place of individualized treatment they moved to take cases in bulk and to treat them with systems.

With the advent of union representation, the plaintiffs' bar, and the rise of a variety of claimants' representatives, repeat players appeared on both sides of accident claims. And with the rise of repeat players, the structure of claims settlement changed. Repeat players, unlike one-shot participants in the tort system, have reasons to take a systemic view of the claims as opposed to an individualized view. Ongoing relationships between the repeat players, often combined with the sheer number of claims<sup>65</sup> in the United States' exceptionally dangerous era of industrialization,<sup>66</sup> pressed claims settlement practices to adopt an aggregate structure. By the 1890s, the Illinois Central Railroad was processing around 1,500 injury and death claims each year.<sup>67</sup> At this scale, railroad administrators sacrificed individualized inquiry to what one New Haven line manager called a "general rule" and what Kaczorowski calls "[s]tandardization of procedures and formal rules."<sup>68</sup> As the numbers grew, claim value became not only a reflection of the merits, but also a function of each claim's situatedness in a portfolio of claims, which defendants had an incentive to re-

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<sup>62</sup> See Issacharoff & Witt, *supra* note 5, at 1614.

<sup>63</sup> WITT, ACCIDENTAL REPUBLIC, *supra* note 45, at 113–17. The courts did not enforce the ex ante contractual waivers of the right to sue as reliably as ex post settlement contracts. See *id.* at 68; Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, in *THE STATE AND FREEDOM OF CONTRACT* 161, 176–84 (Harry N. Scheiber ed., 1998).

<sup>64</sup> Further examples include employer-sponsored hospitals and worker-side mutual benefit associations. See JONATHAN LEVY, *FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA 191–200* (2012); WITT, ACCIDENTAL REPUBLIC, *supra* note 45, at 113–23; Friedman, *supra* note 32, at 372–73.

<sup>65</sup> For docket counts, see RANDOLPH E. BERGSTROM, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870–1910* 16, 20–21 (1992); Friedman, *supra* note 32, at 361–63, 368; Frank W. Munger, Jr., *Commercial Litigation in West Virginia State and Federal Courts 1870–1940*, 30 AM. J. LEGAL HIST. 322, 333–36 (1986).

<sup>66</sup> WITT, ACCIDENTAL REPUBLIC, *supra* note 45, at 24.

<sup>67</sup> See Kaczorowski, *supra* note 32, at 308.

<sup>68</sup> *Id.* at 313–14.

solve, and which repeat-play plaintiffs' representatives could bundle and settle en masse.

The culmination of generations of efforts at private administration in the work-accident domain was workers' compensation laws. The workers' compensation statutes, enacted in every state in the country beginning in the 1910s, formalized for work accidents what virtually private and more or less decentralized mechanisms had been trying to achieve for half a century and more.<sup>69</sup> The statutes created programs that dealt with injuries at work in bulk. Gone was the pretense of individualized inquiry. Gone was the searching analysis of the relative fault of the parties. In the place of individualized evaluations came a one-size-fits-all rule of compensation, with the benefit levels pegged to the worker's weekly average wage.<sup>70</sup>

If workers' compensation statutes brought closure to generations of efforts toward private administration in work accidents, other fields such as passenger injuries, automobile accidents, and slip-and-falls remained in the common law framework.<sup>71</sup> The story of many domains in tort in the twentieth century is the story of enterprising repeat players on the defense and the plaintiffs' sides identifying ways to take advantage of the same scale economies that employers first pioneered in work accidents. The workers' compensation bar's trade association, the National Association of Claimants' Compensation Attorneys, began developing strategies for doing small-scale aggregation in common law tort litigation.<sup>72</sup> Member lawyers began collecting portfolios of claims against certain defendants, developing routinized methods for trying particular kinds of cases and evaluating damages.<sup>73</sup>

In automobile injuries, the project of processing claims at scale and in the aggregate was so successful that it held at bay a generation of efforts to adopt automobile injury reform.<sup>74</sup> And it should be no surprise that in the 1970s, '80s, and '90s aggregate tort litigation exploded onto the scene in American

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<sup>69</sup> See WITT, ACCIDENTAL REPUBLIC, *supra* note 45, at 103–13.

<sup>70</sup> See Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 206 (1952).

<sup>71</sup> See, e.g., Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 313 (observing the failure of no fault in the automobile context and thus the continued survival of a regime of tort liability) [hereinafter Engstrom, *When Cars Crash*].

<sup>72</sup> See WITT, PATRIOTS AND COSMOPOLITANS, *supra* note 40, at 268–71 (2007); see also Joseph A. Page, *Roscoe Pound, Melvin Belli, and the Personal-Injury Bar: The Tale of an Odd Coupling*, 26 T.M. COOLEY L. REV. 637, 639–49 (2009).

<sup>73</sup> See WITT, PATRIOTS AND COSMOPOLITANS, *supra* note 40, at 271–75.

<sup>74</sup> See Engstrom, *No Fault's Demise*, *supra* note 5, at 307–08.

law.<sup>75</sup> The big cases of the era—*asbestos*,<sup>76</sup> *Agent Orange*,<sup>77</sup> *tobacco*,<sup>78</sup> and more—were the results of terrible scourges, to be sure. But such cases moved forward as they did because the ground had been prepared by nearly a century of decentralized private administration. The treatment of personal injuries at scale had been quietly going on for decades before the era of mass torts brought it into the open.

### C. Institutional Foundations of Private Administration

Private administration in American tort law arises in a marketplace. But it does not arise spontaneously. Instead, its particular American form is contingent on many factors. It is made possible by at least two interconnected legal premises. And it rests on at least five social conditions. The two legal premises are (1) a party-driven claims process, with litigant discretion over decisions to commence and end a tort claim, and (2) state enforcement of contracting in claims, ranging from the simple settlement contract to the contingent fee, subrogation, and litigation finance. The five important social conditions are (3) repeat-play actors on both sides, including insurers and the plaintiffs' bar; (4) commonality among classes of claims; (5) numerosity of classes of claims; (6) settlement orientation of the relevant parties; and (7) the absence of competing forms of public administration, which might otherwise crowd out private forms.

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<sup>75</sup> See, JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 123–26, 135 (1995); Marcus, *supra* note 27, at 1570; Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659–61 (1989); Linda S. Mulenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 414 (1999).

<sup>76</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *In re Owens Corning*, 419 F.3d 195, 200 (3d Cir. 2005); DEBORAH HENSLER ET AL., *RAND INST. FOR CIV. JUST., ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE 2* (2001), [https://www.rand.org/pubs/documented\\_briefings/DB362z0.html](https://www.rand.org/pubs/documented_briefings/DB362z0.html) [<https://perma.cc/J2YE-296N>].

<sup>77</sup> See *In re "Agent Orange" Prod. Liab. Litig.*, 517 F.3d 76, 82 (2d Cir. 2008); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 4–5 (1987).

<sup>78</sup> See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996); *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. Dist. Ct. App. 1996); MARTHA A. DERTHICK, *UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS* 27 (2002).

### 1. *Party-Driven Claims Processes*

American tort law's allocation to litigants of near-total control over the trajectory of a tort claim is a critical premise for the project of private administration. Such control is not inevitable.<sup>79</sup> German judges, for instance, famously exercise considerably more power over the trajectory of a case than American judges do.<sup>80</sup> Japanese judges are even empowered to tell both parties their likely judgment, thus driving them to settle on the judge's terms.<sup>81</sup>

Under American law, individual litigants are formally in charge of initiating and closing out their own claims with little outside interference, meaning that they may decide how and on what basis to proceed, guided to be sure by the considerable influence of their lawyers.<sup>82</sup> Party discretion creates agents with the legal capacity to pursue and discharge claims. By contrast, in a world where public officials had substantial power over claims, it would be substantially harder—almost by definition—to establish a private resolution of a claim. But because claims holders and defendants are empowered to drive litigation outside the supervision of state officials, they are empowered to build mechanisms and institutions with which to clear the market and settle claims.

Most importantly, parties with the formal discretionary authority to resolve their own claims are parties formally empowered to contract over their claims.

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<sup>79</sup> Even within the American legal system, judges may sometimes intercede to prevent settlements they view as unfair or which impede on the interests of third parties. Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 56 (1999); Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 328–29 (2011).

<sup>80</sup> See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826 (1985); Basil S. Markesinis, *Litigation-Mania in England, Germany and the USA: Are We So Very Different?*, 49 CAMBRIDGE L.J. 233, 251–52 (1990) (discussing German inquisitorialism and court encouragement of settlements).

<sup>81</sup> See Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 730 (2005). Consider also the Japanese practice of "Benron-ken-Wakai," in which judges and lawyers combine oral arguments and settlement negotiations, often collaborating to pressure clients into settlement. Koichi Miki, *Roles of Judges and Attorneys Under the Non-Sanction Scheme in Japanese Civil Procedure*, 27 HASTINGS INT'L & COMP. L. REV. 31, 34–35 (2003); Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AM. J. COMP. L. 561, 568–69 (2001).

<sup>82</sup> See Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 988 (2018).

## 2. *Contracting in Claims*

Not only are parties vested with the discretion to move ahead with their claims as they see fit, they are empowered to sell their claims in a variety of different ways. As we shall see in this subsection, some ways of selling claims—some of them relatively new and increasingly sophisticated—facilitate the private aggregation of claims on which private administration thrives. But we start with the simplest form of sale: the standard settlement contract.

It is, of course, not inevitable that courts will deem settlement contracts enforceable. Even a regime that allows substantial party discretion over the prosecution of a claim need not have the kind of formally free access to settlement that American law vests in its claimsholders. Indeed, the law's willingness to enforce agreements not to sue emerged over time: state and federal courts were not always comfortable allowing people to contract away their claims in advance of adjudication.<sup>83</sup> Alienation of tort claims by settlement contract is the very heart of private administration. Absent such alienability, it would be much more difficult to construct private administrative systems for settling claims. The enforcement of settlement contracts thus forms the legal foundation of private administration. It allows private administrators to rest assured that they will be able to streamline and rationalize the process of tort claims.

The combination of party-driven litigation and litigant discretion, on the one hand, with the ability to contract around litigation via settlement, on the other, effectively creates a market in legal claims. But contracts of settlement are only one way that parties may contract over their claims. A second form of contracting in claims powerfully shapes private administration in American tort law as well: contracting for ownership stakes in the claim.

The contingent fee contract is the most famous type of contract for ownership stakes in the claim. This arrangement, too, has not always been enforceable in American law. Many American jurisdictions in the early nineteenth century viewed contingent fees as champertous and thus prohibited.<sup>84</sup> Only

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<sup>83</sup> See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, 201–07 (1977) (overviewing courts' progression towards allowing private agreements to suspend obligations imposed by law).

<sup>84</sup> See BERGSTROM, *supra* note 65, at 88–92; Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 *DEPAUL L. REV.* 231, 233, 241 (1998).

toward the end of the century did these prohibitions give way to the pressure of a growing number of indigent victims of industrial accidents, to the demands for justice among the injured, and to the practical difficulty of regulating lawyers' fees. But since then, the contingent fee contract has allowed plaintiffs to use equity in their claim to gain the services of repeat-play lawyers in the tort claims market. Less remarked upon, but just as important, the class of specialist plaintiffs' personal injury lawyers would very likely not exist but for the contingent fee arrangement.<sup>85</sup> Contingent fees create the opportunity to become a plaintiff's-side repeat player with expertise in the tort claims marketplace. Such repeat-player plaintiffs lawyers markedly increase the capacity of the parties to reach settlement.<sup>86</sup> Moreover, they have powerful incentives to assemble portfolios of tort claims such that they, too, like the repeat-play defendants and insurers on the other side, have an interest in developing streamlined systems for clearing the market in unliquidated tort claims.<sup>87</sup>

Creativity of the market in and around tort claims has invented further contracts for ownership stakes, too. Subrogation arrangements in insurance policies are a classic form. An insurer whose obligations on a policy are triggered by a tortious harm may be subrogated by the insurance contract to part or all of its insured's tort claim. The insurer essentially takes an ownership or equity interest in the claim to recoup its policy obligations.<sup>88</sup> In doing so, the insurer creates yet another repeat-play participant on the plaintiff's side of the tort claim equation: another party with an interest in streamlined aggregate systems for resolving such claims.

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<sup>85</sup> See Karsten, *supra* note 84, at 256–57.

<sup>86</sup> See Catherine T. Harris et al., *Does Being A Repeat Player Make a Difference? The Impact of Attorney Experience and Case-Picking on the Outcome of Medical Malpractice Lawsuits*, 8 YALE J. HEALTH POLY. L. & ETHICS 253, 259 (2008); Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39, 44 (2002).

<sup>87</sup> See HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 181–91 (2004); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677 (1986); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 303–05 (1998); Witt, *Bureaucratic Legalism*, *supra* note 5, at 267–71.

<sup>88</sup> See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 3.10, at 219 (1988); Fernando Gomez & Jose Penalva, *Tort Reform and the Theory of Coordinating Tort and Insurance*, 43 INT'L REV. OF L. AND ECON. 83, 84 (2015).

Newer forms of litigation finance have built on contingency contracts and subrogation claims to take contracting in claims to new heights. Litigation finance entails third-party investors taking stakes in inchoate tort claims, either as equity or as debt.<sup>89</sup> Such stakes further displace the one-shot tort claimant with sophisticated repeat players who have less interest in the individualized resolutions of any one run-of-the-mill tort claim and more interest in systems of private administration that maximize value over the run of claims.<sup>90</sup>

### 3. *Repeat Players: Insurers and the Bar*

A few key actors play a disproportionate role in private administration. Liability insurers were one of the first institutions of private tort claim administration; they are the quintessential private administrative institutions. Their business model rests on the law of large numbers. Insurers are statistically certain to face a substantial number of tort claims. As a result, insurers will tend to develop strategies for managing claims in such a way as to minimize the total cost of claims over the entire claims population, subject to the constraint of their good faith duty to defend their insureds.<sup>91</sup> To manage this caseload, they typically turn to claims adjusters<sup>92</sup> who often simplify the law into a few key principles, and largely resolve claims on the basis of clearly defined rules and concrete evi-

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<sup>89</sup> See STEVEN GARBER, RAND INST. FOR CIV. JUST., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN 1–2 (2010), [https://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2010/RAND\\_OP306.pdf](https://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf) [<https://perma.cc/5XHM-NTPV>]; Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11, 11–19 (2014); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275–77 (2011).

<sup>90</sup> Recent scholarship suggests litigation financiers have powerful roles to play as claims aggregators. See Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 736 (2005) (“A tort claim . . . will often be a significant asset in a plaintiff’s portfolio, while a purchaser of tort claims may be able to diversify—for example, by purchasing a variety of different tort claims. . . .”); Elizabeth Chamblee Burch, *Financiers As Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1312 (2012); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 101 (2010) (arguing that allowing plaintiffs to sell their claims would solve the imbalance between “one-time, risk-averse plaintiffs” and “repeat-player, risk-neutral defendants”).

<sup>91</sup> On insurers’ obligations of good faith and their settlement strategies, see *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419–20 (2003); *Am. Guarantee & Liab. Ins. v. U.S. Fid. & Guar. Co.*, 668 F.3d 991, 1002–03 (8th Cir. 2012); RESTATEMENT OF THE LAW OF LIABILITY INSURANCE § 24–27 (AM. LAW INST. 2017). On ways insurers manage claims and structure policies in order to minimize costs, see Baker & Silver, *supra* note 32, at 211–13.

<sup>92</sup> See ROSS, *supra* note 32, at 25.

dence of tangible harms, especially medical bills.<sup>93</sup> Interestingly, insurance companies seem to have gotten better at managing these settlements over time: since the 1950s, the share of tort costs attributable to administrative costs has fallen by almost 25 percent.<sup>94</sup>

The plaintiffs' bar is a central player in the world of private administration, too. Moves to deregulate the market in legal services over the past four decades have allowed lawyers to advertise for clients, develop increasingly sophisticated referral networks, and coordinate more effectively.<sup>95</sup> The size of plaintiffs' firms has increased, as has their capitalization and level of specialization.<sup>96</sup> All three of these changes have helped the plaintiffs' bar facilitate the administration of the claims that fall into their portfolios. Concentrations of claims allow firms to see returns from the efficiency benefits of private administration.<sup>97</sup>

#### 4. Commonality

Even where litigation is party-driven, even where settlement contracts are enforceable, and even where there are repeat players poised to capture gains from administration, only certain social situations offer fertile soil for the production of

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<sup>93</sup> See *id.* at 21.

<sup>94</sup> TOWERS WATSON, UPDATE ON U.S. TORT COST TRENDS 8 (2011). These data are highly contested. See, e.g., J. ROBERT HUNTER AND JOANNE DOROSHOW, TOWERS PERRIN: "GRADE F" FOR FANTASTICALLY INFLATED "TORT COST" REPORT: (2010) (criticizing the Towers Watson methodology). Nonetheless, only a consortium of insurers is in any position to be able to see the contours of the privately administered systems of tort settlement in the United States. See Witt, *Bureaucratic Legalism*, *supra* note 5, at 275–76.

<sup>95</sup> On advertising, see Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1996 (2004) [hereinafter Yeazell, Brown]. But see Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1244–45 (2004) (indicating that referrals account for 75.8% of auto specialists' business). Direct advertising may be more important for some types of practice than it is for the profession in general. See, e.g., Nora Freeman Engstrom, *Legal Access and Attorney Advertising*, 19 AM. U.J. GENDER & SOC. POL'Y & L. 1083, 1090 (2011) (discussing advertising and settlement mills). On referral networks and coordination in the plaintiffs' bar, see WITT, PATRIOTS AND COSMOPOLITANS, *supra* note 40, at 240–50; Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 256–64 (2006); Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 200–05 (2002).

<sup>96</sup> See Parikh, *supra* note 95, at 247–51 (describing the stratification of the plaintiffs' bar and referral networks); Yeazell, Brown, *supra* note 95, at 1991–2000; Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiff's Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 227–32 (2001) (describing the specialization and stratification of the plaintiff's bar).

<sup>97</sup> See Engstrom, *Run-of-the-Mill Justice*, *supra* note 5, at 1493, 1547.



private administrative institutions. Private administration, at least in the prototypical form we mean to describe here, requires a class of cases with similar, though typically not identical, fact patterns. Commonality among claims offers the opportunity to develop rules of thumb for handling settlement. Completely disparate fact patterns make it much harder to establish durable private administrative efficiencies. But American tort lawyers have been remarkably creative in identifying ways of forging commonality in classes of seemingly disparate claims.

Consider automobile accident cases, for example. Third party compensation claims for auto accident injuries, the “800-pound gorilla” of the American tort system, account for nearly two-thirds of all injury claims, three-quarters of all damage payouts, and three-quarters of all lawyers’ fees in the tort system.<sup>98</sup> Each of these cases might be valued by its own costly trial to ascertain who was at fault.<sup>99</sup> Instead, claims adjusters often come up with rules that generally predict outcomes of cases, instantly paying those who were rear ended or refusing to pay anyone who violated a traffic law, for instance, often without significant additional factfinding. In high-value cases, these rules of thumb may break down, but for many cases, they significantly reduce the costly investigative work that would otherwise be necessary to assess the strength of a claim.<sup>100</sup>

The commonality requirement for private administration evokes the commonality requirement for class action treatment under Rule 23 of the Federal Rules of Civil Procedure.<sup>101</sup> But it is importantly different. The Rule 23 commonality test is applied by judges, with commonality protecting class members’ right to effective representation.<sup>102</sup> In private administration,

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<sup>98</sup> Engstrom, *When Cars Crash*, *supra* note 71, at 295; JAMES M. ANDERSON ET AL., RAND INST. FOR CIV. JUST., THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE 1 (2010), [https://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND\\_MG860.pdf](https://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG860.pdf) [<https://perma.cc/GV7M-GXX5>].

<sup>99</sup> And indeed, many do. Cohen estimates that nearly sixty percent of tort trials were over automobile accidents. See THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS BULLETIN: TORT BENCH AND JURY TRIALS IN STATE COURTS, 2005 1 (2009), <https://www.bjs.gov/content/pub/pdf/tbjtsc05.pdf> [<https://perma.cc/4V3Z-W9D2>].

<sup>100</sup> See *infra* note 243.

<sup>101</sup> FED. R. CIV. P. 23(a)(2).

<sup>102</sup> See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1424 (2003) (noting that the four requirements, including the commonality requirement aim “at insuring that the named plaintiff can be trusted to represent the interests of his fellow class members.”). *But see* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93

commonality is a functional constraint on the achievement of economies of scale. The only commonality obligations in private administration are ones that private and well-incentivized actors (ranging from repeat-play defendants to insurers, the plaintiffs' bar, and litigation investors) need in order to achieve economies of scale in the private administration of their claims. Commonality imperatives in the world of private administration are not legal tests. They are legally-constructed sociological facts.

Class actions play another role, too. At the opposite extreme, where claims become so similar as to be essentially the same injury,<sup>103</sup> class actions are often the superior mechanism for claims resolution. When claims have substantial common features but do not produce good vehicles for class treatment, conditions are ripe for private administration and informal aggregation.<sup>104</sup>

### 5. *Numerosity*

Private administration also typically requires a sufficiently high volume of claims with substantially common features. One-off cases are one-off cases. They are exceedingly difficult to rationalize or aggregate. Absent substantial numerosity of claims, rationalized management struggles to produce returns to scale. The considerable costs of creating a system of private administration will prove not worth the investment, since there will be no further claims in which to amortize the up-front costs.

Actors build private administrative institutions when they can capture the economies of scale. When the "market" for

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B.U. L. REV. 441, 459–63 (2013) (noting that the commonality standard simply requires the named plaintiff to bring "issues for the court's determination that would arise in the adjudication of each class member's claims were they litigated separately.").

<sup>103</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) ("Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. . . .") (internal quotations omitted); *Sykes v. Harris & Assocs.*, 780 F.3d 70, 84 (2d Cir. 2015) (noting the 23(a)(2) requirement "obligates a district court to determine whether plaintiffs have suffered the same injury") (internal quotations omitted).

<sup>104</sup> See *Erichson, Informal Aggregation*, *supra* note 6, at 469. There are two main types of cases where this condition tends to be true. First, in areas where disputes between actors tend to follow similar patterns, as with auto accidents. And second, in mass tort cases, especially after *Amchem* and *Ortiz*, where a class action cannot be certified due to lack of commonality; here, private administrative institutions often emerge in the wake of multi-district litigation proceedings. See *id.* at 412–13.

legal claims exhibits commonality and numerosity, the potential for large returns exists.

## 6. *Settlement Orientation*

The potential for private administration will only come to fruition, of course, if parties in a position to put such administration in place desire faster, cheaper, and more predictable dispute resolution. If key parties have some systemic reason for not settling claims, private administration will typically not arise.

Consider, for example, doctors in medical malpractice cases, who are often reluctant to settle cases in which they expect to come out the winner.<sup>105</sup> A party managing the expected financial costs and benefits of litigation will typically be willing to settle winners and losers alike, so long as the expected value of settlement is higher than the net value of going to trial. But medical malpractice defendants appear to resist settling with expected winners, so as to avoid the reputational effects of settlement in the medical care marketplace. Stated more generally, cases involving parties like doctors with reasons, such as reputation, to attend individually to the particular circumstances of an individual claim are less likely to participate in the construction of private administrative settlement systems that deal with claims en masse rather than individually.<sup>106</sup>

## 7. *Public Competitors*

Lastly, private administration in tort will typically emerge when the government has not created a public regime to rationalize the common law claims process. Public systems like the National Vaccine Injury Compensation Program<sup>107</sup> or no-fault

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<sup>105</sup> See Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1459–63 (2007); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 40–41 (1984); see also Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1172–85 (1990) (describing consent-to-settle clauses in medical malpractice liability insurance arrangements).

<sup>106</sup> See Herbert M. Kritzer, *Defending Torts: What Should We Know?*, 1 J. TORT. L. 1, 10 (2007). Priest and Klein speculate that defendants in product liability suits might be more likely to settle losers and fight winners because the precedent set by the cases will affect whether they can win future cases. This dynamic, they believe, might explain why product liability win rates are so low for plaintiffs. Priest & Klein, *supra* note 105, at 40–41.

<sup>107</sup> National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10 to 300aa-34 (2018). See Lainie Rutkow et al., *Balancing Consumer and Industry Interests in Public Health: The National Vaccine Injury Compensation Program and Its Influence During the Last Two Decades*, 111 PENN. ST. L. REV. 681, 693 (2007).

workers' compensation programs<sup>108</sup> will often crowd out the demand for private administrative institutions.

The class action and multi-district litigation in the federal courts are two further ways the legal system facilitates the administration of claims. Administrative systems often flourish in these settings. Class treatment, in particular, at least before it was closed off to most tort claims, seemed to offer a way of forcing all the parties into a settlement system. But even while a class action is often deeply public, the compensation systems, provisionally put in place under the class action, nonetheless rely heavily on techniques of private administration.<sup>109</sup> They closely resemble the settlement systems of less formalized private administration. The MDL system even more so.<sup>110</sup> Class actions and MDL treatment do not so much replace private administration as facilitate it.

Conversely, when private administration thrives, it can sometimes obstruct the enactment of public alternatives. States that did not adopt no-fault liability seem not to have done so at least in part because of the development of private administrative systems that produced in common law automobile cases something approaching what the public alternative promised.<sup>111</sup> And history suggests that private administration is a fierce competitor. States that did enact public no-fault programs soon found enterprising plaintiffs' attorneys engineering creative ways to litigate around them, pushing cases back into a private system of litigation that also came to be characterized by forms of private administration.

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<sup>108</sup> *E.g.*, N.Y. WORKERS' COMP. LAW. §§ 1-401 (McKinney 2018). See Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U.L. REV. 891, 1000-01 (2017).

<sup>109</sup> See NAGAREDA, *supra* note 5, at 76-77.

<sup>110</sup> See Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 95 (2018) (noting that, under a system of MDLs, "each plaintiff is handed a ready-made case") (quoting John Logan O'Donnell, *Pretrial Discovery in Multiple Litigation from the Defendants' Standpoint*, 32 ANTI-TRUST L.J. 133, 139 (1966)); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1678 (2017) (comparing MDLs to administrative agencies and noting how they empower parties to "find more efficient paths" to claims resolution than formal trial procedures).

<sup>111</sup> See Engstrom, *No Fault's Demise*, *supra* note 5, at 342, 362-64, 373-74 (discussing how compulsory insurance laws and the repeal of common law impediments to tort recovery drove tort systems to converge with no fault systems, becoming less adversarial and offering broader but shallower compensation).

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To recap, we contend that private administration rests on a foundation of party-driven claims processes and formal freedom to alienate tort claims. Moreover, we expect private administrative bodies to develop in areas where repetitive fact patterns with important common features recur in substantial number; where repeat players who value efficiencies are present; and where the government has not displaced them.

Lo and behold, and as the next section describes, this pattern is precisely what we see in the world.

#### D. The Scope of Private Administration

One of the most important features of American tort law is how little we know about it. A quarter century ago, Michael Saks asked whether we really knew anything about the behavior of the tort litigation system at all.<sup>112</sup> In some respects, our knowledge about the tort system today is worse than it was when Saks wrote, because the number of trials—the number of public data points—has continued to decline in the intervening years.<sup>113</sup> There is in this sense even less information about tort outcomes in the public domain. Settlement is private and opaque; it happens with nary a public trace. And so, tort law in the age of private administration has what Professor Nora Engstrom calls an “invisibility problem.”<sup>114</sup>

Private administrative institutions are created in the shadow of the law by private actors for private ends. They do not publicize their results, because they do not answer to anyone other than the private players who operate them: insurers and plaintiffs’ lawyers chief among them. This lack of data on the settlement phase has “hidden” the “largest phase of the litigation process,” in the words of one scholar of the American torts system.<sup>115</sup>

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<sup>112</sup> See Saks, *supra* note 43, at 1147.

<sup>113</sup> Engstrom, *The Diminished Trial*, *supra* note 10, at 2131. Heroic acquisition of plaintiff’s lawyer practices and insurer data sets by intrepid scholars has pushed in the other direction. See, e.g., Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & SOC’Y REV. 275, 276, 278 (2001); Bernard Black et al., *The Effects of “Early Offers” in Medical Malpractice Cases: Evidence from Texas*, 6 J. EMP. LEGAL STUD. 723, 724 (2009); Engstrom, *Run-of-the-Mill Justice*, *supra* note 5, at 1488; David A. Hyman et al., *Settlement at Policy Limits and the Duty to Settle: Evidence from Texas*, 8 J. EMP. LEGAL STUD. 48, 49–50 (2011).

<sup>114</sup> Engstrom, *Run-of-the-Mill Justice*, *supra* note 5, at 1514.

<sup>115</sup> Saks, *supra* note 43, at 1212.

Nonetheless, researchers have developed some estimates about the scale of the settlement system in the United States. Because private administrative institutions tend to emerge where there is a large volume of settlement, a sense of the market for settlements should offer a rough sense of the possible scope of private administration.

Estimates of settlement in the United States range and vary by type of claim, but the evidence suggests the rate of settlement has increased in the past few decades. In the federal court system, 0.9 percent of filed cases were resolved by trial in 2017, down from 11.5 percent in 1962, with the decline beginning in the mid-1980s.<sup>116</sup> Once cases are filed, tort suits are among the most likely to settle, with an estimated seventy to eighty percent of filed claims ending in settlement.<sup>117</sup>

Settlement numbers like these are especially interesting in the torts field, for reasons evident in the torts literature. Claims valuation in tort can be inordinately complex. Because so few of these cases go to trial, negotiators often lack reliable information about how much a claim is worth. Saks compares this situation to “that of a blindfolded archer who is permitted to see the target only 5% of the time, and then only through a fog at dusk.”<sup>118</sup> In lieu of reliable information about trial outcomes, negotiators typically rely on limited data and pure intuition. In one survey, a lawyer described their process for determining the value of a claim as “a gut feeling”; another as “common sense.”<sup>119</sup> When the RAND corporation asked sixteen members of the Los Angeles Claims Managers Association to evaluate the same hypothetical claim, assessments generally ranged from \$50,000 to \$150,000, but others went as low as \$6,000 and as high as \$750,000.<sup>120</sup> Despite such haphazard

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<sup>116</sup> ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2017 ANNUAL REPORT OF THE DIRECTOR tbl. C-4 (2017), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_c4\\_0930.2017.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2017.pdf) [<https://perma.cc/WL6E-Q9YQ>]; Engstrom, *The Diminished Trial*, *supra* note 10, at 2131; Galanter, *supra* note 10, at 459.

<sup>117</sup> Eisenberg & Lanvers, *supra* note 10, at 133. Of course, estimating settlement rates is a highly fraught process. See Eisenberg & Lanvers, *supra* note 10, at 114 (“No single, agreed method of computing settlement rates exists. . . .”); Saks, *supra* note 43, at 1212 (“Parties control knowledge about settlements, while trial data are owned by the public.”).

<sup>118</sup> Saks, *supra* note 43, at 1223.

<sup>119</sup> Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 6 (1991).

<sup>120</sup> See MARK A. PETERSON, RAND INST. FOR CIV. JUST., NEW TOOLS FOR REDUCING CIVIL LITIGATION EXPENSES 3 (1983), <https://www.rand.org/pubs/reports/R3013.html> [<https://perma.cc/5SGZ-APC3>]; see also GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).

and variable processes of valuation, however, settlement ultimately requires a convergence in claims evaluations between the two sides. This is where private administration answers a pressing need. The fact that settlement happens in such a high percentage of cases despite grave valuation problems suggests that the institutions at work producing bargaining conventions, in turn, allow for convergence in claims valuation. The work of creating the patterns, routines, and rules of thumb for claims settlement is the work of private administration.

In state and federal courts alike, private administration has grown to encompass crucial swaths of the tort docket. Federal courts now self-consciously and unabashedly rely on private administration to resolve the multidistrict litigation actions that now constitute nearly forty percent of the federal docket.<sup>121</sup> Federal district judges managing MDLs self-consciously attempt to drive mass tort cases to resolution by settlement and view remanding cases back to the referring courts for trial as a failure.<sup>122</sup> Resolution in the MDL context typically means the production of some kind of a classic mass tort managed grid or matrix that allows the parties to match certain kinds of injuries to certain dollar valuation ranges.<sup>123</sup> Indeed, settlement in the MDL context virtually necessitates the development of private administrative institutions, especially in the larger cases, as judges try to drive hundreds or even thousands of actions into settlements.

In the state courts, automobile injury cases are the paradigm private administration cases. Jennifer Wriggins has deftly demonstrated that state tort doctrines and regulations

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<sup>121</sup> See Judith Resnik, "Vital" *State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1767 (2017).

<sup>122</sup> See Gluck, *supra* note 110, at 1673. The MDL courts have largely been successful in this: only 2.6 percent of actions have been remanded to trial in the history of MDL. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at tbl. S-20, [https://www.uscourts.gov/sites/default/files/jb\\_s20\\_0930.2017.pdf](https://www.uscourts.gov/sites/default/files/jb_s20_0930.2017.pdf) [<https://perma.cc/972E-U5NT>]. The report gives three categories of actions: those remanded for trial (16,600), those terminated in the transferee court (486,136), and those still pending (124,202). Cases terminated in federal court are either settled or dispensed with in pretrial proceedings. Admittedly, however, it is unclear how many of these 486,136 actions are settled as opposed to dispensed with. See also Gluck, *supra* note 110, at 1673 ("As one judge put it, . . . . [Y]ou have failed if you transfer [a case] back' [to the trial court]").

<sup>123</sup> See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 308 (2011); Kishinevsky, *supra* note 42, at 1147 ("[D]amage averaging has become a highly used . . . device for apportioning settlement proceeds among claimants."); Alexandra D. Lahav, *The Case for "Trial by Formula"*, 90 TEX. L. REV. 571, 591-94 (2012) [hereinafter Lahav, *Trial by Formula*].

ensure that almost all automobile accidents are covered by insurance; the law, she argues, gives auto torts “most-favored injury status.”<sup>124</sup> Because insurance is so prevalent, victims—and the repeat play lawyers who can make a living representing them—can expect to be compensated for their injury.<sup>125</sup> And because defendants are almost always insured, the law creates a powerful repeat player on the defense side with a strong incentive to settle cases. In part, because of this social and legal architecture, automobile accidents comprise an overwhelming majority of state tort cases.<sup>126</sup> To cope with this high volume of cases, automobile insurers have largely turned to private administration.<sup>127</sup>

And automobile cases are not alone. Before the widespread implementation of workers’ compensation regimes, large industrial employers regularly relied on private administrative strategies to settle their employees’ claims.<sup>128</sup> Vestiges of such institutions still persist in the railroad industry today, where torts are governed by federal law and thus not covered by most state worker’s compensation schemes.<sup>129</sup> Attorneys in product liability cases, which settle at disproportionately high rates, often litigate with the goal of finding privately adminis-

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<sup>124</sup> Jennifer B. Wriggins, *Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts, and Changing the “Choice Architecture” of Auto Insurance Pricing*, 44 *LOY. L.A. L. REV.* 69, 71 (2010).

<sup>125</sup> See *id.*; KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY*, 133 (1986) (“Over the past few decades the growth in the amount and kinds of insurance that are now commonplace has been enormous.”).

<sup>126</sup> See *supra* notes 98–100 and accompanying text.

<sup>127</sup> See ROSS, *supra* note 32, at 98–101; Engstrom, *No-Fault’s Demise*, *supra* note 5, at 318–322.

<sup>128</sup> See WITT, *ACCIDENTAL REPUBLIC*, *supra* note 45, at 115–125 (documenting private settlement systems adopted by large American employers in the years before workers’ compensation statutes); Issacharoff & Witt, *supra* note 5, at 1618 (documenting a world of private claims management at the turn of the twentieth century); Kaczorowski, *supra* note 32, at 289.

<sup>129</sup> Federal Employers’ Liability Act, 45 U.S.C. § 51–60 (2018); ELY, *supra* note 58, at 219 (explaining that railroads are still not covered by workers’ compensation today). In lieu of workers’ compensation, many railroads seem to have created a system of private administration to handle tort claims. Jerry J. Phillips, *An Evaluation of the Federal Employers’ Liability Act*, 25 *SAN DIEGO L. REV.* 49, 57–61 (1988) (describing a system where cases overwhelmingly settle, few plaintiffs have lawyers, and settlements are structured to emulate workers’ compensation regimes).



tered resolutions of individual cases.<sup>130</sup> The same holds for certain other types of mass tort cases, too.<sup>131</sup>

So, here we are. Tort law in the United States has produced a sprawling, far-flung, and decentralized system of private claims administration, which has in turn generated de facto liability norms and damages rules that are both structured by and depart from the rules of the substantive law of torts. And because so many domains of tort law are producing such privately administered outcomes, it is time to update Leon Green's question about tort doctrine for a new century. Green's question was how American tort doctrine allocates authority in the jury trial. A century later, the analogous question is how American tort doctrine facilitates and conditions private administration.

## II

### THE DOCTRINES OF PRIVATE ADMINISTRATION

Foundational doctrines in American tort law foster and sustain the world of private administration. In particular, tort doctrine in the United States facilitates private administration by allocating responsibility to repeat players (often regardless of fault) and by subtly promoting the use of statistical techniques in damages and settlement calculations.

#### A. Respondeat Superior

The single most important doctrine of private administration in tort is surely the rule of respondeat superior, which holds employers liable without regard to their fault for the tortious conduct of employees acting within the scope of their employment.<sup>132</sup> Respondeat superior is, as the late great tort jurist Gary Schwartz once put it, the "hidden and fundamental

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<sup>130</sup> See, e.g., *supra* notes 71–78. According to one estimate, product liability cases account for around 5.7% of tort dispositions but only 0.6% of tort trials, implying that they settle at a much higher rate than average. COHEN, *supra* note 99, at 14.

<sup>131</sup> See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 973 (1993) (noting that offers to "settle claims for small amounts quickly, based on only minimal supporting information from plaintiffs" has become a "staple" of mass tort litigation); Remus & Zimmerman, *supra* note 5, at 130–48 (describing "corporate settlement mills"); Byron G. Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 MISS. C. L. REV. 255, 271 (2011).

<sup>132</sup> See RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006).

issue” in tort doctrine.<sup>133</sup> William O. Douglas grasped the basic point, too. Douglas, who was an erratic but sometimes visionary agency law scholar before becoming an erratic and sometimes visionary justice of the Supreme Court,<sup>134</sup> understood that vicarious liability was fundamental to what he called the tort system’s “administration of risk.”<sup>135</sup>

Employers’ vicarious liability for the torts of their employees systematically structures settlement in vast swaths of the torts landscape. The conventional wisdom in the field holds that respondeat superior claims constitute the lion’s share of tort suits in the United States.<sup>136</sup> Precise estimates of exactly how many tort claims involve respondeat superior vary. The private structure of tort settlement makes it essentially impossible to establish certainty on the point. But scholars seem to agree that most cases involve institutional defendants.<sup>137</sup>

Yet the pervasiveness of vicarious respondeat superior cases raises a puzzle for tort doctrine. Harold Laski observed it a century ago, noting that the “seeming simplicity” of vicarious liability “conceals in fact a veritable hornet’s nest of stinging difficulties.”<sup>138</sup> For even though vicarious liability cases are ubiquitous, and even though vicarious liability is a long-standing bedrock concept in tort doctrine, the basic principle sits awkwardly in the landscape of tort.

Vicarious liability is one of the few areas in the entire field of tort law in which the wrongfulness of the conduct of the

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<sup>133</sup> See Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1739 (1996) [hereinafter Schwartz, *The Hidden and Fundamental Issue*].

<sup>134</sup> See LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, 85–87 (1986); JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 103–13 (1980). For examples of Douglas’ tort scholarship, see William O. Douglas, *Vicarious Liability and the Administration of Risk I*, 38 YALE L.J. 584, 584 (1929) [hereinafter Douglas, *Administration of Risk*]; William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 195–205 (1929).

<sup>135</sup> Douglas, *Administration of Risk*, *supra* note 134, at 587–88.

<sup>136</sup> See Alan Calnan, *The Distorted Reality of Civil Recourse Theory*, 60 CLEV. ST. L. REV. 159, 181 (2012).

<sup>137</sup> See Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual Organizational Litigants and the Disposition of Federal Cases*, 57 STAN. L. REV. 1275, 1298 (2005) (“[O]rganizations are defendants in more than 80% of all federal civil litigation.”); Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (noting that 96% of surveyed tort suits were for negligence of employees or children); Peter Siegelman & Joel Waldfogel, *Toward a Taxonomy of Disputes: New Evidence Through the Prism of the Priest/Klein Model*, 28 J. LEGAL STUD. 101, 110 (1999) (noting that 72.6% of tort defendants are “institutional” as opposed to individual).

<sup>138</sup> Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 106 (1916).

responsible actor is irrelevant to the analysis. Why is this so? Tort jurists often assert that employers should be liable for the risks they create.<sup>139</sup> For example, Judge Henry Friendly in *Ira S. Bushey & Sons, Inc. v. United States* famously claimed that respondeat superior rests “in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”<sup>140</sup> But why does the law attribute the risk to the activity of being an employer, rather than the activity of being an employee, or to whatever activity the plaintiff was engaged in? Vicarious liability doctrine, at least on its surface, contains no answers. And falling back on the Latin maxim of respondeat superior, as Laski noted, “may bring us comfort but it will not solve our problems.”<sup>141</sup>

Some efforts to explain vicarious liability draw on the nineteenth-century principle that the master and servant were the same legal entity, a fictional creature Ernest Weinrib has cumbersomely named “the-employer-acting-through-the-employee.”<sup>142</sup> But as critics have long observed, the legal fiction of unity begs the question of why the law treats employer and employee as the same person—and why it sometimes doesn’t!<sup>143</sup> Nor can the identity argument explain why employers are liable for the torts of an employee who is acting in some fashion unrelated to the interests of the employer,<sup>144</sup> including

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<sup>139</sup> See P.S. ATIYAH, VICARIOUS LIABILITY IN THE LAW OF TORTS 13, 17–18 (1967). Douglas refers to this principle as the “entrepreneur theory.” Douglas, *Administration of Risk*, *supra* note 134, at 586.

<sup>140</sup> 398 F.2d 167, 171 (2d Cir. 1968).

<sup>141</sup> Laski, *supra* note 138, at 107.

<sup>142</sup> ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 186 (1995). See David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2197–98 (2005) (recounting the nineteenth century principle); John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)’s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1232–34 (2009) (discussing respondeat superior as a case of “fusion of agency”).

<sup>143</sup> *E.g.*, Laski, *supra* note 138, at 106–07 (“It is the merest dogma, and in no sense explanation.”); see Robinette, *supra* note 4, at 351 (“There is no moral imbalance to correct between the plaintiff and the employer.”); Schwartz, *The Hidden and Fundamental Issue*, *supra* note 133, at 1752 (“[I]nsofar as [respondeat superior] does rest on a fiction, the rule itself obviously calls for normative justification.”).

<sup>144</sup> See *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995) (finding trawler owner liable where crew intentionally destroyed lobster traps, motivated by the infamous “tension that raged between lobstermen and draggers”); *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 667, 669 (Tex. 1990) (employer may face punitive damages where sales manager physically assaults a convenience store owner while filling in for a vacationing delivery truck driver).

in a fashion squarely opposed to the employer's interests<sup>145</sup> or even directly against employer instruction.<sup>146</sup>

Economics-based tort theory also has a difficult time justifying respondeat superior. The traditional justification on efficiency grounds is that firms are well positioned to spread the risks of their employees' behavior and manage and optimize the costs and benefits of their employees' conduct.<sup>147</sup> But this rationale holds puzzles, too, for the doctrine doesn't purport to allocate the costs of a firm to the firm. Instead, tort doctrine typically only holds employers liable for costs to others when their employees happen to have committed some wrongful act. Vicarious liability is both too far from traditional requirements of wrongfulness and too close to those requirements to make sense. In addition, the public policy justifications of loss-spreading and deterrence do not always hold true; they hold only under certain contingent assumptions. In many contexts, for instance, firms cannot effectively monitor their employees. And in some instances, the injury victims themselves (or perhaps the employees) will be more effective loss spreaders. The law of respondeat superior is indifferent to these variations. It is a one-size-fits-all rule whose doctrinal justifications are weak at best.

Yet if the proffered explanations struggle to account for the doctrine of vicarious liability, its social functions in the world of private administration are powerful and far more certain.<sup>148</sup>

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<sup>145</sup> See *Costos v. Coconut Island Corp.*, 137 F.3d 46, 48–49 (1st Cir. 1998) (noting motel is liable where its manager breaks into a woman's room and sexually assaults her).

<sup>146</sup> See *Moecker v. Honeywell Int'l Inc.*, 144 F. Supp. 2d 1291, 1312 (M.D. Fla. 2001) (noting that an employer can be held liable for the torts of her employee "even if the alleged wrong was a crime, was not authorized by the employer, or was forbidden by the employer.").

<sup>147</sup> See ATYAH, *supra* note 139, at 13, 23 (noting that employers were deep-pocketed and well-positioned to spread risk); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 121 (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 170–75 (1987); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 514, 543 (1961); Douglas, *Administration of Risk*, *supra* note 134, at 586.

<sup>148</sup> The rule conditioned the basic structure of the twentieth-century firm and helped produce a modern regime of management. It contributes today to some post-modern firms' efforts to remain decentralized and operate through independent contractors, whose torts are not imputed back to the firm. Even before a single risk is realized, an entire world of private organization arises out of the basic tort rule's allocation of responsibility. See, e.g., SALLY H. CLARKE, *TRUST AND POWER: CONSUMERS, THE MODERN CORPORATION, AND THE MAKING OF THE UNITED STATES AUTOMOBILE MARKET* 61–63, 145–46, 168–69 (2007) (explaining how reallocating liability from contractors to firms caused auto manufacturers to develop private internal inspection agencies and create a market for product liability insurance); Sally H. Clarke, *Unmanageable Risks: MacPherson v. Buick and the Emergence of*

Respondeat superior pervasively structures the private administration of risks after the fact of an injury. Functionally, respondeat superior institutionalizes large sections of tort law's world of private administration by replacing one-off single-shot employee defendants with repeat-play defendants capable of settling claims at scale. Without respondeat superior, claims litigation would formally target employees rather than firms, at least absent the fault of the employer. Firms would sometimes indemnify their employees, of course. But the indemnification practices of state and local governments in litigation over Section 1983 claims, where there is no vicarious liability doctrine, offer good evidence that considerable confusion would follow.<sup>149</sup> There are considerable obstacles to systemic indemnification clauses, not least of which is the difficulty of monitoring employees who can operate free of the fear of tort liability.<sup>150</sup> And such litigation in Section 1983 cases is, as a result, ad hoc, badly rationalized, and variable from jurisdiction to jurisdiction. Even with the possibility of indemnification, the absence of vicarious liability substantially complicates the administration of such cases.

The respondeat superior doctrine is an end-run around the cumbersome and inevitably uneven practice of indemnifica-

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*a Mass Consumer Market*, 23 LAW & HIST. REV. 1, 20, 50 (2005) (discussing how the threat of vicarious employee liability shaped the structure of early auto manufacturing firms).

<sup>149</sup> Rules about who pays for how much of a judgment (police officers, police departments, the municipal general fund, etc.) vary by jurisdiction. See Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1165–73 (2016). Perhaps as a result, many police departments have no idea which lawsuits are brought against them and make little effort to collect and analyze data about any but the most high-profile cases. See Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1082 (2015) (“run-of-the-mill cases are largely ignored”) [hereinafter Schwartz, *Introspection*]; Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1045–52 (2010) [hereinafter Schwartz, *Myths*]. Even when police departments are eager to rationalize their settlement process and internal structure, the attorneys defending the city or the individual officers often refuse to turn over relevant information for fear that internal investigations might harm their pending cases and because they believe the police departments have little financial stake in the litigation. See Schwartz, *Introspection*, at 1098–101; Schwartz, *Myths*, at 1065–66.

<sup>150</sup> See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 932 (2014) (discussing how city risk managers often refuse to finalize indemnification decisions until after negotiations have concluded for fear that indemnification agreements will raise payouts) [hereinafter Schwartz, *Police Indemnification*]; Schwartz, *The Hidden and Fundamental Issue*, *supra* note 133, at 1753 (“[I]ndemnification claims by employers against negligent employees are exceedingly rare. . . .”). Admittedly, however, employers may still indemnify their employees in lieu of a contractual obligation. *Id.* at 912.

tion. As Joanna Schwartz has shown, for example, the absence of vicarious liability in the Section 1983 context systematically reduces settlement values in civil rights claims by rendering uncertain the pool of assets available to fund a damages award.<sup>151</sup> Even where indemnification is nearly universal, the web of indemnification relationships creates disconnects between payers and negotiators, meaning those who are negotiating often lack information about expenses or incentives to reduce the transaction cost of negotiation; meanwhile, those who are paying often lack the control or incentive to build more efficient settlement institutions.<sup>152</sup> And indeed, in their study of settlement rates, Eisenberg and Lanvers found the settlement rate for 1983 actions to be significantly lower than for tort claims more generally.<sup>153</sup> The structure offered by respondeat superior, by contrast, instantly creates a larger-scale party on the defense side of the equation. It means that tort claimants are able to identify an entity on which to make claims, typically a repeat-play entity. Notably, absent vicarious liability, victims would often lack the information to know which specific actors are responsible. Vicarious liability renders recovery more certain and less tenuous. The rule gives one single, central entity control over the disposition of a large number of claims. Respondeat superior makes the firm itself a repeated party in each of these suits. A centralized body of professional managers can gather information and devise a single set of objectives and best practices for dealing with liability.

Respondeat superior creates a powerful economic interest in and opportunity for efficiencies in how claims are processed. A single firm bears the cost of repeated negotiations, adverse judgments, and litigation generally. Repeat-play employers thus have strong incentives to invest resources to manage the settlement process in the aggregate and over time.

Such firms have good reason to promulgate internal rules and guidelines for settling claims. Having settled a large number of claims, such firms can gather information about the going rates for different types of claims. They can establish internal law departments to routinize the process of settling claims. They can replace uncertain one-off negotiations with simple rules of thumb. Some firms replace lawyers with claims

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<sup>151</sup> See Schwartz, *Police Indemnification supra* note 150, at 931–37.

<sup>152</sup> See *supra* note 149.

<sup>153</sup> See Eisenberg & Lanvers, *supra* note 10, at 130 (“Constitutional tort[s]” consistently settle at lower rates than “Tort[s]” more generally). The category of “Constitutional tort” is “dominated by actions brought under 42 U.S.C. Section 1983.” *Id.* at 125–26.

adjusters—many of whom have little to no formal legal training at all—to settle lawsuits. Consider, for example, railroad employee injuries under the Federal Employers' Liability Act and outside of workers' compensation. Railroad employers are barred by statute from creating fully ex ante alternatives to tort claims.<sup>154</sup> Nonetheless, in cases where employees have been exposed to known risks, employers approximate these ex ante alternatives with ex post administered settlement systems. Prospective railroad defendants still look for and find creative ways to offer contractually predefined benefit schemes in exchange for employees' agreements not to sue should they develop work-related injuries in the future.<sup>155</sup>

Individuals, of course, typically have neither the resources nor the reason to establish a system of private administration. But firms typically do. They have administrative capacity and economic motives. Vicarious liability takes advantage of these features of the firm to support a regime of private administration in the settlement of tort claims.

## B. Collateral Source Rule and Subrogation

Tort law is embedded in a broader system of accident compensation and risk management.<sup>156</sup> Workers' compensation, private insurance, social welfare programs, and other forms of redress collectively help bear the costs of injury in America, providing an estimated \$1.1 trillion in benefits to victims.<sup>157</sup> Including the cost of administering these programs, America spends \$1.7 trillion per year making injury victims whole.<sup>158</sup> Tort accounts for about ten percent of overall spending and

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<sup>154</sup> See Federal Employers' Liability Act, 45 U.S.C. § 55 (2018).

<sup>155</sup> These contracts often require creative lawyering, as the FELA prevents "[a]ny contract . . . to enable any common carrier to exempt itself from any liability created by" the act. *Id.* Courts have even had to directly regulate private administration, deciding what separates a permissible settlement from an impermissible waiver. See *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 720 (3d Cir. 1998); *Babbitt v. Norfolk & W. Ry. Co.*, 104 F.3d 89, 93 (6th Cir. 1997); Brooke Granger, Comment, *Known Injuries vs. Known Risks: Finding the Appropriate Standard for Determining the Validity of Releases Under the Federal Employers' Liability Act*, 52 HOUS. L. REV. 1463, 1476, 1481–82 (2015).

<sup>156</sup> See KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, 201 (2008) [hereinafter ABRAHAM, *THE LIABILITY CENTURY*] (comparing tort liability's share of expenditures with other forms of compensation); Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 94–98 (1993); Baker & Silver, *supra* note 32, at 211–14 (explaining how tort law interacts with liability insurance).

<sup>157</sup> ABRAHAM, *THE LIABILITY CENTURY*, *supra* note 156, at 201.

<sup>158</sup> See *id.*

eight percent of benefits.<sup>159</sup> As they interact, the programs constituting America's system of accident compensation may facilitate or frustrate one another. Consequently, important legal rules, institutional practices, and informal norms manage the interaction between these programs.

In particular, the law of subrogation and the rules about collateral sources are two principal domains that coordinate tort law with the broader system of accident compensation.<sup>160</sup> Collateral source rules govern the implications of a third party's payment to the plaintiff of some or all of the plaintiff's damages. Traditionally, the collateral source rule treats compensation to the plaintiff from a third party as irrelevant in calculating the damages owed by the defendant to the plaintiff.<sup>161</sup> The law of subrogation comes into the picture, in turn, once a third party has made a collateral payment. The law of subrogation deals with the tort claims rights of third parties making payments, determining when and how they can step into the shoes of a plaintiff for purposes of pursuing a tort claim against the tortfeasor.<sup>162</sup>

The first-order debates over subrogation and the collateral source rule take up the question of how these doctrines relate to the goals and normative commitments of tort law. Corrective justice scholars and some courts observe that the combined effect of the collateral source rule and subrogation is to increase the likelihood that wrongdoers and only wrongdoers repair the losses caused by their wrongful conduct. A set of fine theoretical questions arise out of subrogation actions about the extent of a defendant's duty.<sup>163</sup> In turn, efficiency-minded ac-

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<sup>159</sup> *Id.*

<sup>160</sup> See Gomez & Penalva, *supra* note 88, at 83–84. See also, ABRAHAM, THE LIABILITY CENTURY, *supra* note 156, at 202–11 (listing collateral source rules and subrogation as doctrines which coordinate between tort law and insurance).

<sup>161</sup> Thus, if a plaintiff sustains \$100 of damage and receives \$50 in insurance, she could still sue the tortfeasor for \$100. See RESTATEMENT (SECOND) OF TORTS § 920A(2) (AM. LAW INST. 1979). For a survey of first-order justifications and critiques of the collateral source rule, see Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 MCGEORGE L. REV. 965, 969–77 (2012).

<sup>162</sup> See *supra* note 88 and accompanying text.

<sup>163</sup> Do tortfeasors really owe duties of care to victims' insurers? Traditionally, the answer to this question is that subrogation allows the insurer to "succeed[] to the rights of the" insured and sue in their name. *State Auto. & Cas. Underwriters v. Farmers Ins. Exch.*, 282 N.W.2d 601, 603 (Neb. 1979) (internal quotation marks omitted). For defenders of subrogation, see *3105 Grand Corp. v. City of New York*, 42 N.E.2d 475, 477 (N.Y. 1942) (noting that subrogation ensures that "the one who in good conscience ought to pay should be compelled ultimately to discharge the obligation"); KEETON & WIDISS, *supra* note 88, § 3.10, at 220–21 ("Thus, subrogation . . . plac[es] the economic responsibility for injuries on the



counts of the collateral source rule focus on the importance of maintaining deterrence incentives by internalizing to defendants the full cost of their wrongful conduct.<sup>164</sup> Deterrence-oriented justifications of the subrogation action focus on allowing insurers to recoup losses so as to allocate injury costs to the best cost avoiders and to permit efficient pricing of insurance.<sup>165</sup> From a compensation perspective, subrogation actions also limit double-recovery windfalls for tort claimants, especially in cases in which the claimant has not paid premiums for the compensation in question.<sup>166</sup>

In addition to these first-order functions, however, the subrogation and collateral source rules also have crucial second-order roles. Like respondeat superior, they shape the interactions among administrators of the broader system of accident compensation and risk management.

Without the traditional collateral source rule, for example, a plaintiff's claims against a defendant are complicated by their interaction with payments to the plaintiff by one or more third parties. Defendants may resist settlement in order to await third-party payments. Certain third-party payers might slow-walk their payments in order to facilitate greater tort recovery.

For its part, the subrogation rule introduces a powerful new player into the world of private administration. If respondeat superior adds repeat players on the defense side, subrogation adds repeat players to the plaintiff side. Insurer-subrogees have powerful incentives to learn to resolve claims quickly and at low cost.<sup>167</sup> Most plaintiffs are one-shot plaintiffs, unless they are terribly unlucky. By contrast, insurers

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party whose fault caused the loss without also allowing a [double] recovery . . . that would violate the principle of indemnification.”).

<sup>164</sup> KEITH N. HYLTON, *TORT LAW: A MODERN PERSPECTIVE* 400 (2016).

<sup>165</sup> Alan O. Sykes, *Subrogation and Insolvency*, 30 J. LEGAL STUD. 383, 386–90 (2001) (noting that subrogation generally prevents skewed incentives for insureds); A. Mitchell Polinsky & Steven Shavell, *Subrogation and the Theory of Insurance When Suits Can Be Brought for Losses Suffered*, 4, 22–23 (Nat'l Bureau of Econ. Research, Working Paper No. 23303, 2017). (noting that subrogation can lower insurance premiums and lead to more positive-value tort suits); *But see* ABRAHAM, *supra* note 125 at 155 (noting that subrogation results in less effective risk pooling and may leave insureds undercompensated).

<sup>166</sup> *See* KEETON & WIDISS, *supra* note 88, § 3.10, at 220–21.

<sup>167</sup> HYLTON, *supra* note 164, at 424 (“The subrogating entity may be able to litigate less expensively than the victim can because it is a ‘repeat player’ in litigation . . . .”); Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1347–48 (1993) [hereinafter Schwartz, *National Health Care*] (noting how large insurers and governments resolve claims smoothly and with little apparent hassle).

and other subrogees can accumulate and aggregate their tort claims. A subrogee with a portfolio of claims is much like a repeat-play tort defendant. Both manage portfolios of claims, and both have powerful incentives to manage those claims in the aggregate. It is no coincidence that specialized subrogation professionals increasingly help insurers resolve a high volume<sup>168</sup> of cases and spread information about subrogation through specialized professional networks.<sup>169</sup> In some areas, to be sure, the cost of monitoring claims brought by policyholders means that insurer-subrogees may not be able to exercise their subrogation rights effectively.<sup>170</sup> But in others—including some like health insurance that were once thought not to be susceptible to subrogation claims<sup>171</sup>—subrogation is now a standard part of the administration of tort, accounting for about \$2 billion annually, according to one estimate.<sup>172</sup>

An observer can get a sense for the full extent to which private administration characterizes the world of tort from the arbitration agreements insurers use to manage the relationship between their property policies and their liability policies. The same insurers who sell first-party policies to protect victims against accidents often also insure potential tortfeasors against liability. Because they are on both sides, such insurers have an incentive to build efficient private administrative bod-

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<sup>168</sup> See Jeffrey M. Baill, *Confessions of an Insurance Subrogation Attorney*, PROPERTYCASUALTY360 (Nov. 22, 2013, 9:32 AM), <https://www.propertycasualty360.com/2013/11/22/confessions-of-an-insurance-subrogation-attorney/> [https://perma.cc/P7FJ-X8K2]; LATITUDE SUBROGATION SERVS., <https://www.latitudeubro.com/> [https://perma.cc/J5L3-WB4A] (last visited Mar. 16, 2020); NAT'L SUBROGATION SERVS., LLC, *Benefits of Subrogation*, <https://www.nationalsubrogation.com/benefits-of-subrogation> [https://perma.cc/T3E3-QPBA] (last visited Mar. 16, 2020) (discussing the benefits of “[o]utsourced subrogation”).

<sup>169</sup> See Baill, *supra* note 168, at 30 (detailing how the National Association of Subrogation Professionals has fostered a sense of “understanding”); NAT'L ASS'N OF SUBROGATION PROFESSIONALS, <https://www.subrogation.org/> [https://perma.cc/E366-E7HP] (last visited Mar. 16, 2020); WHITE & WILLIAMS L.L.C., THE SUBROGATION STRATEGIST, <https://subrogationstrategist.com/> [https://perma.cc/9C2B-QFXL] (last visited Mar. 16, 2020).

<sup>170</sup> AM. LAW INST. REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 161, 170 (1991) (“[T]he costs of monitoring lawsuits brought by policyholders . . . undoubtedly preclude full enforcement of subrogation rights in cases involving small sums . . .”).

<sup>171</sup> *Id.* at 172 (“[S]ubrogation/reimbursement probably has little impact on health and disability insurance costs . . .”).

<sup>172</sup> MICHAEL J. BRIEN & CONSTANTIN W.A. PANIS, U.S. DEP'T OF LABOR, TRENDS AND PRACTICES IN HEALTHCARE SUBROGATION 3 (2013), <https://www.dol.gov/sites/default/files/ebsa/researchers/analysis/health-and-welfare/trends-and-practices-in-healthcare-subrogation.pdf> [https://perma.cc/2A8N-BMPZ]. Subrogation recoveries seem to have grown considerably over the past decade. See *id.* at 21.

ies in anticipation of litigation<sup>173</sup> and to precommit to settling claims through them.<sup>174</sup> Such agreements may further reduce costs by establishing uniform proceedings<sup>175</sup> that emphasize speed and simplicity over formal procedural safeguards.<sup>176</sup> In short, subrogation creates sustained demand for private administration by creating a class of repeat plaintiffs who value the speed, thrift, and certainty of private administration.

### C. Damages

Few developments in American tort law have done more over the past century to increase the importance of private administration than the general increase in damages awards. By increasing defendants' and insurers' financial stake in litigation, rising damages awards have created powerful incentives to develop economies of scale and systems for managing damages risk.

And make no mistake, despite a slowdown in the past decade or two, the story of damages over the past century has largely been one of expansion. In the 1950s, the money moving through the tort system amounted to fewer than two billion dollars, or less than one percent of GDP.<sup>177</sup> Although estimates vary, sources generally agree that the money in the tort system today amounts to hundreds of billions of dollars, or around two percent of GDP. As Ken Abraham puts it, this is "a more than one-hundred-fold cost increase since 1950."<sup>178</sup>

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<sup>173</sup> See Robert J. Demer, *Inter-Company Arbitration Revisited*, 52 JUDICATURE 111, 113 (1968) ("Usually the representatives of signatory carriers in a locality will . . . establish the administration of an arbitration unit."). On the theoretical incentives, see Kenneth S. Reinker & David Rosenberg, *Unlimited Subrogation: Improving Medical Malpractice Liability by Allowing Insurers to Take Charge*, 36 J. LEGAL STUD. S261, S273-74 (2007).

<sup>174</sup> See Demer, *supra* note 173, at 115 (showing that the 1967 Nationwide Inter-Company Arbitration Agreement system dispensed with 86,118 cases for a total of around \$32 million claimed); Schwartz, *National Health Care*, *supra* note 167, at 1348 (showing that such agreements are prevalent among auto insurers in southern California); N. Morgan Woods, *Nationwide Inter-Company Arbitration Agreement*, 1956 INS. L.J. 47, 49-50 (1956).

<sup>175</sup> See Demer, *supra* note 173, at 112 ("Pleadings are uniform, brief, and free from technical detail and limited in extent.").

<sup>176</sup> See, e.g., *id.* at 112-13 ("Time within which to respond to an application is usually limited closely."); Stephen H. Lash, *Arbitration of Medical Malpractice Disputes as a Response to the Medical Malpractice Crisis: Panacea or Pandora's Box for Insurers*, 46 INS. COUNS. J. 102, 105 (1979) ("[L]awyers are rarely involved" in inter-company arbitration agreements); Woods, *supra* note 174, at 50 ("[S]implicity was again the watchword.").

<sup>177</sup> See *supra* note 94.

<sup>178</sup> ABRAHAM, THE LIABILITY CENTURY, *supra* note 156, at 3.

Part of the “slow, determined march”<sup>179</sup> to higher damage awards was driven by creative entrepreneurial trial lawyers, who breathed life into old nineteenth-century doctrines governing pain and suffering damages, turning a relatively minor feature of torts practice into a driver of billions of dollars of tort damages.<sup>180</sup> Part of the process has no doubt also been the dynamic expansion of liability insurance. As more tortfeasors are insured, the returns to litigation increase. As enterprising attorneys find new ways of holding defendants liable, more people buy larger insurance policies. And so on as the cycle continues.<sup>181</sup> And part of the damages increase has been the costs themselves. Rising wages since World War Two (even if stagnant since the early 1970s for most Americans) have increased the value of wage replacement, even accounting for inflation.<sup>182</sup> Still more importantly, sharply rising medical care costs have put medical damages front and center.<sup>183</sup> New medical innovations, for example, mean costly new procedures that can be billed to the tortfeasor to make the plaintiff whole.<sup>184</sup> To be sure, many states have tried to quell the rising tide of tort damages, often with some success.<sup>185</sup> But no one can doubt that the damages landscape is still radically different than it was at the midpoint of the twentieth century.

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<sup>179</sup> Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 885 (2002).

<sup>180</sup> John Fabian Witt, *The Political Economy of Pain*, in MAKING LEGAL HISTORY: ESSAYS IN HONOR OF WILLIAM E. NELSON 235, 237 (Daniel J. Huselbosch & R. B. Bernstein eds., 2013).

<sup>181</sup> See generally ABRAHAM, THE LIABILITY CENTURY, *supra* note 156, at 1–12 (discussing the relationship between the insurance and tort industries).

<sup>182</sup> See ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR 541–43 (2016).

<sup>183</sup> See Victor R. Fuchs, *The Health Sector's Share of the Gross National Product*, 247 SCI. 534, 535 (1990) (showing that American medical care costs grew at a rate of 5.7% per year versus 4.1% per year for the rest of the economy); Ctrs. for Medicare & Medicaid Servs., *Historical*, NAT'L HEALTH EXPENDITURE DATA (Dec. 11, 2018, 10:44 AM), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html> [<https://perma.cc/MXP6-FG49>].

<sup>184</sup> Consider the debate over whether to allow victims of toxic tort exposure to recover the cost of decades of diagnostic tests necessary to catch medical conditions before they become too acute. One set of commentators referred to such tests as potentially “Tort Law’s Most Expensive Consolation Prize.” Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law’s Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 522, 526, 549–50 (2000).

<sup>185</sup> See Drucilla K. Barker, *The Effects of Tort Reform on Medical Malpractice Insurance Markets: An Empirical Analysis*, 17 J. HEALTH POL., POLY., & L. 143, 158 (1992) (finding that tort reforms lowered liability insurance risk and increased profitability); Ronald M. Stewart, et al., *Malpractice Risk and Cost Are Significantly Reduced after Tort Reform*, 212 J. AM. C. SURGEONS 463, 463–67 (2011).

Private administration is like a system of dams and levees by which the American tort system tamed and channeled the deluge of new damages and rendered it manageable. From the perspective of enabling private administration, the key pieces of the damages landscape are the make-whole rule, the actual damages rule, and the lump-sum rule.

### 1. *Make-Whole*

Tort damages aim to make the plaintiff whole.<sup>186</sup> The classic Harper, James, and Gray treatise puts it this way: tort damages promise to deliver compensation “making [a plaintiff] whole as nearly as that may be done by an award of money.”<sup>187</sup> The “make-whole” principle is often cited as an underpinning to the efficiency-motivated account of tort law. The premise of the efficiency view is that damages reasonably approximate the losses suffered by the plaintiff; such damages (and only such damages) will internalize to a defendant the costs of her behavior and thus prompt her to take those precautions worth taking.<sup>188</sup> The make-whole principle accommodates the corrective justice approach to tort as well: when a tortfeasor pays damages, she restores the resources she appropriated and in so doing repairs the wrongful loss she imposed on another.<sup>189</sup>

What is less apparent in the literature, but crucially important in tort practice, is that the make-whole principle also usefully structures the private administration of tort law. Compare the alternative approach articulated brilliantly by Goldberg and Zipursky. They argue that in practice, juries ought to and do set damages that are “fair” and “reasonable,”

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<sup>186</sup> RESTATEMENT (SECOND) OF TORTS § 901(a) (AM. LAW INST. 1979) (One of the purposes of tort damages is “to give compensation, indemnity, or restitution for harms . . . .”); DAN B. DOBBS & CAPRICE L. ROBERTS, *LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION* § 8.1, at 667 (3d ed. 2018) (“[A]wards are aimed at compensating the victim or making good the losses proximately resulting from the injury.”); FOWLER V. HARPER ET. AL, 4 THE LAW OF TORTS § 25.1, at 574 (2d ed. 1986) (“The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury.”). *But see* Maria Guadalupe Martinez Alles, *Tort Remedies as Meaningful Responses to Wrongdoing*, in *CIVIL WRONGS AND JUSTICE IN PRIVATE LAW*, 231, 235–43 (John Oberdiek & Paul Miller eds., 2020) (arguing for a more punitive understanding of tort damages).

<sup>187</sup> HARPER ET AL, *supra* note 186, § 25.1, at 578.

<sup>188</sup> Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 *STAN. L. REV.* 1303, 1337 (2015) (“[S]etting damages equal to harm fully internalizes the externality caused by the harmful act and thereby induces socially optimal behavior.”); Posner, *supra* note 137, at 32. *See generally* GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) (providing an economic efficiency analysis of the rules of tort law).

<sup>189</sup> *See* JULES L. COLEMAN, *RISKS AND WRONGS* 437–39 (2002).

not damages that aim to be fully compensatory.<sup>190</sup> Let's call this the "make-fair" principle.<sup>191</sup> The make-fair principle has some support in formal tort doctrine, at least when it comes to intangible pain and suffering damages;<sup>192</sup> Goldberg and Zipursky contend further that make-fair is more consonant than make-whole with the basic structure and logic of the tort cause of action. But the law is make-whole, at least for the most part.<sup>193</sup> And make-whole facilitates private administration of tort claims in ways that make-fair never could.

For settlement to work, parties need to be able to arrive at a shared sense of value on their claim. The make-whole principle anchors damages values more securely in concrete, calculable expenses with relatively predictable damages.<sup>194</sup> To be sure, noneconomic damages remain open-ended, even on a make-whole rationale. But with respect to special damages like lost wages and medical care costs, make-whole authorizes tort to rely on an entire world of independently existing actuarial predictions about human life and well-being. It authorizes the law to rely on wage and hour data, medical cost projections, and even mortality predictions.<sup>195</sup> By contrast, make-fair would leave the system with open-ended and unguided jury verdicts. Jury verdicts are already notoriously difficult to predict.<sup>196</sup>

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<sup>190</sup> JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 345 (2010).

<sup>191</sup> See John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 *DEPAUL L. REV.* 435, 438–47 (2006) (arguing in favor of the make-fair principle).

<sup>192</sup> See *RESTATEMENT (SECOND) OF TORTS* § 912, cmt. B (AM. LAW INST. 1979) (explaining that the "only standard" for noneconomic harms to body, feelings and reputation is that damages should be "such an amount as a reasonable person would estimate as fair compensation").

<sup>193</sup> See GOLDBERG & ZIPURSKY, *supra* note 190, at 345 (asserting that "'make-whole' has come to be the standard way of expressing the measure of tort damages").

<sup>194</sup> See Phillip J. Hermann, *Predicting Verdicts in Personal Injury Cases*, 20 *J. MO. B.* 135, 142 (1964) ("[J]uries presented with the same injury, facts, and economic loss . . . tend to render awards remarkably consistent in size."); Michael J. Saks, et al., *Reducing Variability in Civil Jury Awards*, 21 *LAW & HUM. BEHAV.* 243, 244 (1997) ("Using anywhere from just one to a small number of predictor variables, several studies have been able to account for half or more of the variation in awards in sampled cases."); Sloan & van Wert, *supra* note 43, at 133 ("Several studies . . . have found that . . . compensation rises with economic loss.").

<sup>195</sup> See DOBBS & ROBERTS, *supra* note 186, § 8.4, at 704–07 (showing that tort law authorizes the use of mortality tables to establish life expectancy for the computation of lost wages and medical expenses); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 *OHIO ST. L.J.* 661, 671–77 (2017); Vincent C. Immel, *Actuarial Tables and Damage Awards*, 1958 *INS. L.J.* 535, 535 (1958).

<sup>196</sup> See Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 *LAW & CONTEMP. PROBS.* 43, 84–85 (1991). *But see* Hermann, *supra*

Make-fair would exacerbate the difficulty.<sup>197</sup> By contrast, make-whole supplies private administrators with benchmarks in crafting the settlement values that make private administration function.

## 2. Actual Damages

Related to, but conceptually distinct from, the make-whole principle is the principle of actual damages. Even when tort doctrine adopts the make-whole principle, there are still multiple ways the law could aim to make a plaintiff whole. Consider here two such ways. Some years ago, Kathryn Spier distinguished between “finely tuned” damages and “flat” damages.<sup>198</sup> “Finely tuned damages” are the prototypical mode of awarding tort damages in the courtroom.<sup>199</sup> They are custom tailored to a victim’s actual damages through detailed individualized inquiry. In theory, though not always in practice, finely-tuned damages increase the accuracy available to any one damages valuation.<sup>200</sup>

A “flat damages” approach, by contrast, relies heavily on averages as an administrative-cost-reducing mechanism.<sup>201</sup> Flat damages are typically set in advance and are one-size-fits-all. They might be set equal to a victim’s ex ante expected level of damage (as in the “very specific” guidelines for determining damages outlined in the Longshore and Harbor Workers’ Compensation Act)<sup>202</sup>, or to a defendant’s ex ante expected level of harm. Typically, they are defined by statute.<sup>203</sup> Flat damages sacrifice the possibility of perfect accuracy in any one case, often in return for the prospect of less expensive proceedings

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note 194, at 142 (indicating that sometimes juries seem to behave somewhat predictably).

<sup>197</sup> For instance, introducing damage caps for noneconomic damages (which are already awarded according to make-fair principles) reduces the time needed to settle a case. See Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J.L. ECON. & ORG. 517, 537 (2003).

<sup>198</sup> Kathryn E. Spier, *Settlement Bargaining and the Design of Damage Awards*, 10 J.L. ECON. & ORG. 84, 85 (1994) [hereinafter Spier, *Settlement Bargaining*].

<sup>199</sup> See Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 603 (2008).

<sup>200</sup> See Spier, *Settlement Bargaining*, *supra* note 198, at 85.

<sup>201</sup> See *id.* at 93.

<sup>202</sup> *Id.* at 85.

<sup>203</sup> See *id.* Such systems are also common in British personal injury law. See *id.*

with the same aggregate level of damages for particular classes of plaintiffs and defendants.<sup>204</sup>

Tort chooses finely-tuned damages, at least as a doctrinal matter. But there is an irony at work in the law's finely-tuned damages regime. The high cost of determining finely-tuned damages in any one case has helped push the actual practice in the field ever further toward the flat-damages approach.

Consider the flat-damages strategies that have flourished in certain statutory regimes. They are almost impossible to defend on a purely individualized corrective justice basis.<sup>205</sup> They treat plaintiffs and defendants in the aggregate. They aim to do the work of administration inside the law itself. That is to say, they are systems of public—not private—administration. Workers' compensation is perhaps our best example.<sup>206</sup>

Of course, flat damages regimes exhibit a variety of defects. They have all too often failed to include mechanisms for updating values over time. That is why workers' compensation damages schedules fell so badly behind inflation in the 1970s and 1980s.<sup>207</sup> The actual damages rule, by contrast, offers a built-in mechanism for resetting the price of settlements. The occasional trial produces new information about values, which in turn filter into the settlement system. The trial lawyers who first erected the system of private administration aptly called these cases "trial balloon litigation";<sup>208</sup> in their view, the function of the occasional trial was much like the bellwether case in modern aggregate litigation contexts.<sup>209</sup> Its goal was to re-

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<sup>204</sup> See *id.* at 94 (finding that flat damages facilitate settlement and reduce administrative costs).

<sup>205</sup> See Lahav, *supra* note 199, at 596–97 (2008) (“[A]n individual responsibility paradigm for torts does not permit collective resolution of mass tort cases.”). But see Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering”*, 83 NW. U. L. REV. 908, 912 (1989) (arguing jury awards for non-economic losses are untethered to any objective basis and so would be more accurate if statutorily defined).

<sup>206</sup> See ABRAHAM, *supra* note 8, at 214; LINDA DARLING-HAMMOND & THOMAS J. KNEISNER, *THE LAW AND ECONOMICS OF WORKERS’ COMPENSATION* 35–37 (1980); Spier, *Settlement Bargaining*, *supra* note 198, at 85.

<sup>207</sup> See McCluskey, *supra* note 22, at 810 (“Most states traditionally did not regularly adjust these maximum benefit levels for inflation, with the result that from 1940 to 1972 maximum benefit levels *decreased* as a proportion of average wages in most states.”).

<sup>208</sup> TRIAL AND TORT TRENDS: THROUGH 1955 307 (Melvin M. Belli ed., 1956) (“[T]he expression is used ‘to send up a trial balloon’ to see . . . how the juries are reacting to the particular values and the injuries that they are told about and shown.”) (quoting plaintiff’s lawyer Joseph Sindell). See also Issacharoff & Witt, *supra* note 5, at 1612.

<sup>209</sup> See, e.g., *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998) (bellwether trial); *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (same);



calibrate the values being used to resolve cases outside the courtroom in the system of private administration.<sup>210</sup>

And herein lies the irony of the finely tuned damages rule of tort. Its vast cost gives rise to a privately administered flat-damages regime. The finely-tuned and individually-tailored damages system of the common law of torts constructively shapes the system of private administration. When confronted with the huge costs of determining finely-tuned damages, and their huge uncertainty,<sup>211</sup> private administrators respond by doing their own flattening, creating grids of settlement values based on the severity of the claim that resemble the legislatively-defined damage schedules.<sup>212</sup> And in some respects the private administrators do their public competitors one better. Private settlement matrixes constructed in the shadow of the law are more dynamic and responsive to changing times than the most prominent schedules constructed by statute.<sup>213</sup> Private administration thus does something quite remarkable. It accomplishes privately and in the shadow of the courthouse what the law on its own has considerable difficulty achieving publicly and inside the courtroom.

### 3. Lump Sums

One last damages doctrine warrants attention: namely, the rule that tort damages are awarded in a lump sum, rather than periodically over time.<sup>214</sup>

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Lahav, *Trial by Formula*, *supra* note 123, at 609 (discussing the informational purposes of bellwether trials). Although increasingly, many litigants are dispensing with even bellwether trials, indexing on a few settlements instead. See Zimmerman, *supra* note 37, at 2290.

<sup>210</sup> See Daniels & Martin, *supra* note 95, at 1247–48 (suggesting a connection between jury verdicts and insurance settlement values); Issacharoff & Witt, *supra* note 5, at 1612.

<sup>211</sup> See Bovbjerg et al., *supra* note 205, at 919–24.

<sup>212</sup> See Engstrom, *Run-of-the-Mill Justice*, *supra* note 5, at 1534 (“[T]he system is, in the words of Sledge, ‘a grid.’”) (footnotes omitted); Issacharoff & Witt, *supra* note 5, at 1617 (discussing the prevalence of grids in private settlement markets); McGovern, *Facilities*, *supra* note 27, at 1372; Witt, *Bureaucratic Legalism*, *supra* note 5, at 268–69.

<sup>213</sup> See Issacharoff & Witt, *supra* note 5, at 1617; see also TRIAL AND TORT TRENDS: THROUGH 1955, *supra* note 208, at 306–07.

<sup>214</sup> See DOBBS & ROBERTS, *supra* note 186, § 8.1, at 667 (“Personal injury awards are lump-sum awards; unlike workers’ compensation awards, they are not paid out in weekly or monthly sums.”); Stephen Sugarman, *Damages*, in JOHN G. FLEMING, *THE LAW OF TORTS* § 10.20, at 262 (Carolyn Sappideen & Prue Vines, eds., 10th ed. 2011) (“The only form of compensation known to the common law is a lump sum award.”).

Public systems of administration like workers' compensation adopt a periodical strategy.<sup>215</sup> Unemployment compensation systems do the same.<sup>216</sup> Such systems bring their own managerial bureaucracies to the public law of the claim, often managing cases for years, monitoring the plaintiff, calculating damages, dispensing payments, and litigating subsequent developments such as downstream injuries.<sup>217</sup> Where tort has front-end uncertainty over how much the court will rule damages to be, compensation systems with period payments have back-end uncertainty of how much the injury will ultimately cost.<sup>218</sup>

In tort law, by contrast, the lump sum rule is foundational.<sup>219</sup> It powerfully conditions the system of private administration that manages tort claims. The lump sum rule avoids the systems of claims management that persist for months and years after a claim is presented. It avoids such cumbersome systems of public claims management, however, at the cost of requiring the costly calculation of highly uncertain future damages at trial. The lump sum rule produces trials with armies of dueling experts and statisticians testifying to future probabilities, expected wages, life expectancies, and more.<sup>220</sup>

To focus on trial, however, is to miss the way in which the lump sum rule interacts with private administration and in particular with the private administration of structured settlements. One thing the lump sum rule does is allocate to the private sphere the conversion of tort damages from stocks into flows. Private administration manages to accomplish a periodic payment structure for those plaintiffs who desire it. A crucial institution in the world of private administration is the structured settlement.<sup>221</sup> Structured settlements are private periodic payment systems, purchased with lump sum

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<sup>215</sup> See DOBBS & ROBERTS, *supra* note 187, § 8.1, at 667.

<sup>216</sup> See Samuel A. Rea, Jr., *Lump-Sum Versus Periodic Damage Awards*, 10 J. LEGAL STUD. 131, 153 (1981).

<sup>217</sup> See ONTARIO COMMITTEE ON TORT COMPENSATION, REPORT [OF THE] COMMITTEE ON TORT COMPENSATION 10–13 (1980) (outlining the administrative costs of variable payments); Rea, Jr., *supra* note 216, at 144; Sugarman, *supra* note 214, at 263.

<sup>218</sup> See Margaret Beazley, *Damage*, in THE LAW OF TORTS, *supra* note 214, at 255.

<sup>219</sup> See DOBBS & ROBERTS, *supra* note 186, § 8.1, at 667.

<sup>220</sup> See Rea, *supra* note 216, at 133 (showing that anticipatory damages require a “forecast of future losses” involving “expert testimony”). For a sense of the numerous, complicated issues involved in such a calculation, see Michael I. Krauss & Robert A. Levy, *Calculating Tort Damages for Lost Future Earnings: The Puzzles of Tax, Inflation and Risk*, 31 GONZ. L. REV. 325, 328–29 (1995–96).

<sup>221</sup> See DANIEL W. HINDERT ET AL., STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT JUDGEMENTS § 1.03(1) (2017); see also HARPER, JAMES, & GRAY, *supra* note

awards.<sup>222</sup> First entering the scene in the 1960s and 70s,<sup>223</sup> structured settlements took off in the 1980s<sup>224</sup> and by 2016, “an estimated \$5.8 billion of annuities were purchased to fund 25,201 structured settlement obligations.”<sup>225</sup> One study in 2011 found they account for about seven percent of eligible cases, a number that goes up as the size of the damages increases.<sup>226</sup> These data support the idea that companies use structured settlements as a way to cope with the liability intermittently imposed by the lump sum rule. By “stretching out”<sup>227</sup> large judgments, insurers can reduce their reserves and increase their profits,<sup>228</sup> and large companies can avoid bankruptcy and take advantage of the preferential tax and bankruptcy treatment given to such arrangements.<sup>229</sup> When damages are smaller, however, insurers can close out a case quickly from existing funds without having to establish additional reserves for the future.<sup>230</sup> Where the tort system imposes the risk of large lump sum judgments, private actuaries create institutions to systematize it.

Structured settlements are often prepared and administered by specialized insurers, who largely sell them to defendants.<sup>231</sup> Alternatively, plaintiffs receiving lump sum settlement awards or damages awards at trial are free to go into the annuity market and turn their lump sum into a privately adminis-

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186, § 25.2, at 501 n.8 (proposing structured settlement as a possible alternative to lump sum damages).

<sup>222</sup> Brent B. Danninger et al., *Negotiating A Structured Settlement*, 70 AM. B. ASS'N J. 67, 67 (1984) (“[O]nce there is agreement on a payout schedule, that schedule is fixed.”).

<sup>223</sup> See HINDERET ET AL., *supra* note 221, at § 1.02(4) (“The first reported uses of periodic payments to settle personal injury cases were in the 1960’s.”).

<sup>224</sup> Danninger et al., *supra* note 222, at 67 (“In 1979 no more than 3,000 cases were resolved in structured settlements, but in 1983 more than 15,000 cases were concluded with them. Defendants spent approximately \$1.5 billion on premiums in 1983 to purchase these settlements.”).

<sup>225</sup> HINDERET ET AL., *supra* note 221, at § 1.03(1)(a). Other sources put the number a bit higher, with one claiming that “[b]etween 50,000 and 60,000 tort claims were settled via structures in 2001.” See Scales, *supra* note 179, at 882.

<sup>226</sup> Patricia Born, *Periodic Payments Reform: Who Benefits?*, 30 J. INS. REG. 197, 210, 216 (2011).

<sup>227</sup> Henry E. Smith, *Structured Settlements as Structures of Rights*, 88 VA. L. REV. 1953, 1953 (2002).

<sup>228</sup> Claude C. Lilly, *Alternatives to Lump Sum Payments in Personal Injury Cases*, 44 INS. COUNS. J. 243, 244 (1977).

<sup>229</sup> See Smith, *supra* note 227, at 1962–67.

<sup>230</sup> See Born, *supra* note 226, at 201; Sugarman, *supra* note 214, at 277 (“[D]efendant insurers are eager to get these small claims off their books while keeping their administrative costs as low as possible.”).

<sup>231</sup> See Dominic P. Carestia, *Structured Settlements in Practice*, 46 MONT. L. REV. 25, 26 (1985).

tered periodic payment system. Either way, the lump sum rule helps to sustain elaborate private bureaucracies of settlement and insurance. The lump sum doctrine undergirds an elaborate structure of private administration.<sup>232</sup>

#### D. Reasonable Care

The basic duty of reasonable care interacts with and facilitates private administration, too. Reasonableness is the quintessential duty of the common law of torts, the duty to exercise the care that is due under the circumstances.<sup>233</sup> And all by itself, the reasonableness standard creates powerful incentives to produce systems to administer it outside the individualized inquiries of the courts.

First-order analysis of the reasonableness rule is ubiquitous in the literature. Some jurists focus on the wrongfulness of a person's failure to conduct oneself reasonably.<sup>234</sup> Other first-order interpretations of the reasonableness standard concentrate on the incentives the standard creates to avoid undue risks.<sup>235</sup> Each of these accounts treats the core feature of the reasonableness test as a kind of fortuitous accident. The heart of the reasonableness test is its variability and flexibility. What is reasonable at one place or time may or may not be reasonable elsewhere or at a different time. As Learned Hand put it in his famous *Carroll Towing* opinion, there is "no general rule" for negligence—only particularized judgments of negligence under the circumstances.<sup>236</sup> It all depends. And therein lies an opportunity for private administration. The uncertainty of the reasonableness rule creates space for private institutions to move in and cash out case-by-case uncertainty over the run of a portfolio of cases, turning expensive, individualized, and un-

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<sup>232</sup> See HINDERT ET AL., *supra* note 221, at § 4.06(1); Danninger et al., *supra* note 222, at 70 (referring to "annuity brokers" who "assemble settlement packages").

<sup>233</sup> See WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 169 (5th ed. 1984).

<sup>234</sup> GOLDBERG & ZIPURSKY, *supra* note 45, at 244 (forthcoming 2019) ("[T]he duty issue is the issue of whether a certain kind of obligation is owed by a [defendant] to certain [plaintiffs]."); WEINRIB, *supra* note 142, at 147 ("[W]rongdoing consists of the failure to live up to the standard of reasonable care.").

<sup>235</sup> See, e.g., Posner, *supra* note 4, at 469 ("[T]he instrumental theory of law . . . essentially penalizes economically wasteful activity . . . and, by thus making it more costly, tends to reduce, by deterrence, the amount of wasteful behavior in the future.").

<sup>236</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) ("[T]here is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings.").

certain inquiries—what Holmes referred to as the “featureless generality”<sup>237</sup> of reasonableness—into an administratively streamlined, rule-based process.<sup>238</sup> Offering proof for such a fact-intensive test involves substantial costs, and those costs in turn create an environment in which efficient private administration is often able to achieve considerable economies.<sup>239</sup>

The negligence standard also produces uncertainty. As Robert Rhee observes, this greater uncertainty helps drive risk-averse plaintiffs into the settlement system with its private administrative features.<sup>240</sup>

For both of these reasons—administrative costs and uncertainty—the Holmesian featureless generality of the negligence standard produces powerful inducements to enter into privately administered arrangements. Private administration, it seems, reduces the generality of the public standard to a private and dynamic set of rules designed to save time and money across the run of cases.<sup>241</sup>

Indeed, as it has turned out, private administration performs the very role Holmes thought judges well-positioned to perform. In 1881, Holmes imagined that it was judges who would rely on “experience” to reduce standards to rules—that it would be judges who would take a “state of facts often repeated in practice” and draw from jury verdicts a particular lesson about what reason required under that state of facts.<sup>242</sup> It turns out that judges are not the only ones who can save time and effort by promulgating a system of rules. Indeed, in the American tort system, it has been the people who manage tort’s systems of private administration who do the work Holmes described.<sup>243</sup>

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<sup>237</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 111 (1881).

<sup>238</sup> See PROSSER & KEETON, *supra* note 233, § 32, at 173. See also Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 563 (1992) (arguing that although rules are typically more costly to create than standards, standards are more difficult to apply to a particular case than rules).

<sup>239</sup> See Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 421–22 (1997) (helping create the “settlement surplus” for those who choose to forego trial).

<sup>240</sup> See Robert J. Rhee, *Tort Arbitrage*, 60 FLA. L. REV. 125, 129 (2008).

<sup>241</sup> See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 145–49 (1991).

<sup>242</sup> HOLMES, *supra* note 237, at 123.

<sup>243</sup> For instance, H. Laurence Ross found that auto claims adjustors often agreed to pay based on whether a policyholder violated one of several rules, “regardless of intention, knowledge, necessity, and other such qualifications” as might be normal components of a tort claim. As applied, their accident law included such rules as whether the claimant was rear ended, favored by a stop sign, favored by a green light, or hit by someone making a left into oncoming

### E. Duty and the Assault on the Citadel

In 1931, Justice Benjamin Cardozo observed that the “assault upon the citadel of privity is proceeding in these days apace.”<sup>244</sup> For a century, the doctrine of privity of contract had shielded manufacturers by asserting that product sellers and manufacturers had no duty of care other than to those with whom they had contracted directly.<sup>245</sup> Cardozo’s opinion in *MacPherson v. Buick* had substantial consequences. For one thing, it touched off a multi-decade wave of scholarship using extended citadel metaphors to describe the doctrinal shift Cardozo had set in motion.<sup>246</sup> More importantly, a string of early twentieth-century decisions expanded liability beyond direct purchasers, authorizing suits by people injured by a product, regardless of privity.<sup>247</sup>

The scholarship in product liability has understandably focused on the doctrinal expansion of products doctrine in the decades after *MacPherson*, from Justice Roger Traynor’s early concurring opinion in *Escola v. Coca-Cola Bottling Co.* to the *Second Restatement* in 1964 and beyond.<sup>248</sup> The arc from *MacPherson* to no-fault products liability is an oft-chronicled sequence in the doctrinal history of American private law.<sup>249</sup>

traffic. See ROSS, *supra* note 32, at 98–101. See also McGovern, *Facilities*, *supra* note 27, at 1370–72 (stating how claims resolution facilities devise heuristics that are not “fuzzy or expensive to apply”).

<sup>244</sup> *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931).

<sup>245</sup> See *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402, 402–05; 10 M. & W. 109, 109–16; Michael Trebilcock, *The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada*, 57 U. TORONTO L.J. 269, 269 (2007).

<sup>246</sup> See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1055 (N.Y. 1916). For metaphors, see Samuel J. M. Donnelly, *After the Fall of the Citadel: Exploitation of the Victory or Consideration of All Interests?*, 19 SYRACUSE L. REV. 1, 1–2 (1967); Baz Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647, 647–49 (1977); William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099–100 (1960) [hereinafter Prosser, *Assault*]; William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791–93 (1966) [hereinafter Prosser, *Fall*]; Catherine M. Sharkey, *The Remains of the Citadel (Economic Loss Rule in Products Cases)*, 100 MINN. L. REV. 1845, 1845–47 (2016); William A. Worthington, *The “Citadel” Revisited: Strict Tort Liability and the Policy of Law*, 36 S. TEX. L. REV. 227, 227–29 (1995).

<sup>247</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1768 (1998); Prosser, *Assault*, *supra* note 246, at 1100–14.

<sup>248</sup> See *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440–44 (Cal. 1944); RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965). See generally *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (1963); *Henningens v. Bloomfield Motors, Inc.*, 161 A.2d 69 (1960); Kenneth S. Abraham, *Prosser’s The Fall of the Citadel*, 100 MINN. L. REV. 1823, 1828–30 (2016); Prosser, *Fall*, *supra* note 246, at 800–05.

<sup>249</sup> See RESTATEMENT (SECOND) OF TORTS § 402A cmt. B (AM. LAW INST. 1965).

But one of the significant effects of the doctrinal shift in American products liability law was the concomitant rise of a system of private administration to manage and resolve the claims that arose out of the new doctrines. The removal of doctrinal barriers turned national markets into a source of new tort claims—and products cases are fertile soil for private administrative economies. Product cases involve institutional repeat-play defendants who manage not individual cases but portfolios of cases over an entire product line. (It is no coincidence that product liability cases account for over ninety percent of the pending MDL caseload.<sup>250</sup>)

## F. Causation

For decades and more, jurists have formulated accounts of the causation requirement.<sup>251</sup> For corrective justice and civil recourse scholars, causation establishes a connection between wrongdoers and injury victims that, in turn, warrants a duty of repair or empowers injured parties to seek recourse for their grievances.<sup>252</sup> For economically-minded tort thinkers, the causation requirement is a convenient device for reducing the administrative costs of taxing risky behavior.<sup>253</sup>

Our project here, once again, is not to critique any one of these accounts, but rather to add a further observation about a further practical function of causation doctrine. The law of causation does not only reflect the moral connection between wrongdoers and their victims, or provide a mechanism for internalizing externalities, though it may sometimes do some of either or both of these things. The law of causation also structures and conditions the process by which tort claims are managed in the systems of private administration. For one thing, causation doctrine identifies the parties who find themselves working together in a private administrative system. Only parties with plausible causal connections to one another will find themselves managing claims. This fact is a deep background structuring feature of tort doctrine and the systems of private

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<sup>250</sup> See Resnik, *supra* note 121, at 1802.

<sup>251</sup> See RESTATEMENT (SECOND) OF TORTS § 433B (AM. LAW INST. 1965); PROSSER & KEETON, *supra* note 233, § 41, at 269; SANDY STEEL, PROOF OF CAUSATION IN TORT LAW 1 (2015).

<sup>252</sup> ARTHUR RIPSTEIN, PRIVATE WRONGS 116–119 (2016); WEINRIE, *supra* note 142, at 10 (The “master feature characterizing private law” is the “direct connection” between plaintiff and defendant, as established through such features as “the requirement that the defendant have caused the plaintiff’s injury.”).

<sup>253</sup> CALABRESI, *supra* note 188, at 6–7 n.8 (referring to causation as a “weasel word”); LANDES & POSNER, *supra* note 147, at 229 (“[T]he idea of causation can largely be dispensed with in an economic analysis of torts.”).

administration that have grown up around it. A number of causation doctrines add further pieces to the architecture of private administration.

1. *Binary Causation.* The but-for causation inquiry in tort adjudication adopts a binary rather than a probabilistic approach to causation. Consider the non-swimming plaintiff in *New York Central Railroad Company v. Grimstad*.<sup>254</sup> Judge Ward decided that Grimstad's death was not caused by his employer's negligent failure to have a buoy on board because Grimstad was more likely than not to have been unable to stay afloat long enough for such a buoy to get to him. And so, Grimstad's widow received nothing—not a discounted award, but no award at all. One effect of the binary character of causation, then, is to drive risk-averse parties, prototypically one-shot plaintiffs, into settlement at a discount. Private administration allows such plaintiffs to discharge the risk of a bad outcome on the all-or-nothing question of causation by obtaining a discounted settlement. Indeed, what it allows such plaintiffs to do is to opt into a private system that adopts precisely the probabilistic approach that the binary approach of tort law's causation doctrine rejects. For in the settlement system, the value of the plaintiff's claim will be a product of the probability of her being able to win at trial on the binary causation question.<sup>255</sup>

2. *Causal Link.* The doctrine of "causal link" holds that when a plaintiff accuses a tortfeasor of injuring her with a specific act—say, driving without his headlights on—she must show that "the recurrence of that act or activity will increase the chances that the injury will also occur."<sup>256</sup> Causal link forces a plaintiff to connect the defendant's conduct (driving without his lights) with the type of wrongful injury she sustained (getting hit by his car).<sup>257</sup> This doctrine has at least two

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<sup>254</sup> N.Y. Cent. R.R. Co. v. Grimstad, 264 F. 334, 334 (2d Cir. 1920).

<sup>255</sup> Formal tort doctrine has made limited inroads toward similar probabilistic approaches. Consider for example the famous (but confined) lost chance cases. See *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 832 (Mass. 2008); *Herskovits v. Grp. Health Coop.*, 664 P.2d 474, 474–75 (Wash. 1983); see also Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1396–97 (1981) (arguing that "the all-or-nothing approach to the loss of chance be abandoned for valuation . . . . In its place a set of rules should be adopted that recognizes the destruction of chance . . . that appropriately value such losses to reflect their true nature.").

<sup>256</sup> Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71 (1975).

<sup>257</sup> See *Zuchowitz v. United States*, 140 F.3d 381, 390–91 (2d Cir. 1998) (Calabresi, J.); *Martin v. Herzog*, 126 N.E. 814, 816 (N.Y. 1920).



significant effects on the world of private administration. For one thing, it allows plaintiffs to connect their injuries to large-scale actors whose conduct generates risk. Such large-scale defendants have motive and opportunity to establish systems for the management of the claims.

At the same time, the general causation test<sup>258</sup> posed by the causal link doctrine requires plaintiffs to make substantial upfront investments that are generic across all such cases. And where the law requires large upfront investments that can be inexpensively reused between cases by many different plaintiffs, it invites aggregation.<sup>259</sup> Consider, for example, the “trial in a box” strategy of aggregation by which plaintiffs’ bar trade associations share information about certain recurring injuries.<sup>260</sup> Early mechanisms of information sharing among plaintiffs’ lawyers organizations accomplished much the same end beginning in the middle of the twentieth century.<sup>261</sup> And before that, enterprising plaintiffs’ lawyers with portfolios of the same kinds of claims were able to amortize the cost of developing evidence on general causation across the run of claims.

Consider, too, the effects of the general causation requirement in toxic tort cases. As Roger Cramton has observed, toxic tort plaintiffs have an incentive to wait for other plaintiffs to file first so that they can free ride off some other party’s expensive research.<sup>262</sup> By contrast, plaintiffs’-side lawyers who aggregate claims reap the rewards of expensive generic proofs by amortizing them across a portfolio of claims. General causation requirements thus create incentives for plaintiffs to band

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<sup>258</sup> In toxic tort cases, plaintiffs must show “general” and “specific” causation. To prove general causation, a plaintiff must show that the substance in question is capable of causing the type of injury in question. To show specific causation, a plaintiff must demonstrate that her particular injuries were caused by her exposure to the toxic substance. See *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007); *Raynor v. Merrell Pharm., Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997); Margaret Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2120–31 (1997).

<sup>259</sup> NAGAREDA, *supra* note 5, at 16 (stating that aggregation achieves efficiency benefits by “spread[ing] the fixed costs of generic assets over ever more units”); Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 CORNELL L. REV. 811, 818 (1995) (giving the example of discovery and expert testimony as generic assets for proving causation amenable to collective, pooled investment).

<sup>260</sup> See NAGAREDA, *supra* note 5, at 14 (footnote omitted); Scott Paetty, *Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts*, 41 LOY. L.A. L. REV. 845, 874–75 (2008) (“[A] trial in a box is a package that contains rulings and materials on” relevant parts of a trial.).

<sup>261</sup> See WITT, PATRIOTS AND COSMOPOLITANS, *supra* note 40, at 243–44.

<sup>262</sup> See Cramton, *supra* note 259, at 821.

together and aggregate their claims.<sup>263</sup> And this tendency towards aggregation has grown even stronger as courts have started to require more expensive scientific evidence. Since *Daubert*<sup>264</sup> and *Kumho*<sup>265</sup> asked courts to assess the scientific validity of different types of evidence directly,<sup>266</sup> judges have increasingly demanded epidemiological evidence to prove general causation.<sup>267</sup> Epidemiological studies are frequently more expensive than other forms of evidence for general causation.<sup>268</sup> To the extent that they raise the fixed costs of initiating litigation and encourage plaintiffs to pool their resources, expensive general causation requirements encourage aggregation.

3. *Specific Causation.* The flip side of general causation and causal link is the obligation to prove specific causation: namely, whether a particular plaintiff's injury was caused by the defendant's tortious act in the relevant sense.<sup>269</sup> Under what David Rosenberg calls the "strong version" of the preponderance rule, plaintiffs must provide some "particularistic" proof of causation, even if they have probabilistic evidence showing the defendant is more than fifty percent likely to have caused the harm.<sup>270</sup>

In many cases, including toxic tort cases, such proof is often difficult to provide.<sup>271</sup> And it is often exceedingly expensive, requiring investments that have little or no value for subsequent cases.<sup>272</sup>

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<sup>263</sup> See *id.* ("Collective action may solve the 'free rider' problem of individualized justice—some litigants benefitting from, but not contributing to, the expensive efforts of another litigant in discovering causation . . ."); Paetty, *supra* note 260, at 874 (noting "rulings and materials" on general causation as one of the items commonly in a "trial in a box" kit).

<sup>264</sup> *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 582–83 (1993).

<sup>265</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 137 (1999).

<sup>266</sup> See Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563, 1565 (2000).

<sup>267</sup> See Mark Geistfeld, *Scientific Uncertainty and Causation in Tort Law*, 54 VAND. L. REV. 1011, 1012–13 (2001); David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 61–69 (2008) (discussing how courts increasingly reject many alternative means of proving causation). For a survey of the alternatives to epidemiological studies, see Beecher-Monas, *supra* note 266, at 1604–24.

<sup>268</sup> Geistfeld, *supra* note 267, at 1016 (discussing how epidemiological studies tend to be more expensive than other types of studies).

<sup>269</sup> See STEEL, *supra* note 251, at 6.

<sup>270</sup> David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 857 (1984).

<sup>271</sup> See Alexandra D. Lahav, *Mass Tort Class Actions: Past, Present, and Future*, 92 N.Y.U. L. REV. 998, 1004 (2017).

<sup>272</sup> See Joseph Sanders, *Applying Daubert Inconsistently?: Proof of Individual Causation in Toxic Tort and Forensic Cases*, 75 BROOK. L. REV. 1367, 1375 (2010)

Such highly expensive specific causation requirements produce real savings opportunities for administrative alternatives to tort, whether public or private.<sup>273</sup> Such systems work not in specifics, but in averages. They omit the work of specifically connecting plaintiff and defendant. In the world of private settlement, repeat-play defendants and repeat-play plaintiffs' lawyers get the opportunity to economize on investigative costs and to share the gains all around.<sup>274</sup> This is essentially what workers' compensation achieves for the processing of work injuries; private administration means that the same process happens in tort, but in private not in public.

4. *Collective Causation.* Doctrinal theories of "collectivized"<sup>275</sup> causation such as market share liability,<sup>276</sup> alternative liability,<sup>277</sup> and industry-wide liability<sup>278</sup> absolve plaintiffs of the need to identify a specific defendant. Where adopted, these have been important doctrines in opening new categories of viable tort claims. And in this sense, collective causation doctrines—like most liability-extending doctrine—have created new classes of claims susceptible to private administration.

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( "[M]ost specific causation testimony [in toxic tort cases] is presented as 'differential diagnosis' testimony. "). See generally Joseph Sanders & Julie Machal-Fulks, *The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law*, 64 LAW & CONTEMP. PROBS. 107 (2001) (discussing differential diagnosis testimony).

<sup>273</sup> Nor are they alone in making toxic torts prime candidates for private administrative solutions. David Rosenberg explains that the "centralized corporate sources, statistical predictability, massive scale, and relative uniformity of disease risks" make such torts less costly to adjudicate on a per-case basis than an equal number of generic accident cases. Rosenberg, *supra* note 270, at 855.

<sup>274</sup> Consider the case of *Acuna v. Brown & Root Inc.*, where plaintiffs hired a single doctor to fill out one thousand standard form affidavits for as many plaintiffs, and the court rejected the affidavits as insufficiently detailed. 200 F.3d 335, 340 (5th Cir. 2000). The case highlights the push and pull between legal requirements that impose economic costs and private administrators who try to economize around them. See *id.* at 338; William A. Ruskin, *Prove It or Lose It: Defending Against Mass Tort Claims Using Lone Pine Orders*, 26 AM. J. TRIAL ADVOC. 599, 607 (2003).

<sup>275</sup> See generally Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 890–932 (2005) (explaining the processes through which plaintiffs have attempted to overcome the individual causation requirement in bringing lawsuits involving multiple and indeterminate defendants).

<sup>276</sup> See *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980) (adopting the market share liability rule); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989), *cert. denied sub. nom. Rexall Drug Co. v. Tigue*, 493 U.S. 944 (1989) (same).

<sup>277</sup> See *Summers v. Tice*, 199 P.2d 1, 5 (Cal. 1948).

<sup>278</sup> See *Hall v. E. I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 374 (E.D.N.Y. 1972).

The most interesting interaction between collective causation and private administration, however, recalls the binary causation point with which we started this subsection. Despite inroads by certain collective causation doctrines, the courts have been resistant to the statistical turn and have imposed the binary approach of traditional causation doctrine.<sup>279</sup> The rejections of the market share approach in lead paint cases<sup>280</sup> and in other areas, for example, are part of a more general reluctance by the courts to embrace statistical alternatives to the binary approach.

Private administration, by contrast, is inescapably statistical. It relies indispensably on aggregates and averages to accomplish its goals. And in this sense, it repeats in the private sector a version of what juries accomplished a century ago, when the contributory negligence rule dominated the law books. Observers of tort under the contributory negligence rule agreed that juries essentially created a de facto comparative negligence regime. They resisted entering verdicts against plaintiffs for contributory negligence.<sup>281</sup> Today, it is not the juries doing the work so much as the system of private administration. Settlement systems have displaced the binary law of causation with statistical aggregation in private administration, producing a de facto world of statistical causation in tort, much as juries once produced a de facto world of comparative negligence—doctrine be damned!

#### G. Apportionment (Joint Liability)

Today, over half of tort suits arising out of accidental bodily injuries involve multiple defendants.<sup>282</sup> Some of these cases

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<sup>279</sup> See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1343–44 (1971).

<sup>280</sup> See *Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 550 (1st Cir. 1993); *Philadelphia v. Lead Industries Ass'n*, 994 F.2d 112, 125–26 (3d Cir. 1993); Donald G. Gifford & Paolo Pasicolan, *Market Share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?*, 58 S.C. L. REV. 115, 125 (2006) (“Initially, litigation against manufacturers of lead pigment was no exception.”). But see *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523, 255–56 (Wis. 2005) (extending Wisconsin’s “risk-contribution theory” of liability to lead paint manufacturers).

<sup>281</sup> See, e.g., *Martin v. Herzog*, 126 N.E. 814, 816 (N.Y. 1920) (explaining that the jury may improperly minimize the gravity of contributory negligence if not instructed properly); Daniel Kessler, *Fault, Settlement, and Negligence Law*, 26 RAND J. ECON. 296, 297 (1995) (“There is wide-spread agreement that juries allow plaintiffs to recover in contributory-negligence regimes . . .”).

<sup>282</sup> David Carvell et al., *Accidental Death and the Rule of Joint and Several Liability*, 43 RAND J. ECON. 51, 52 (2012).

can be sorted out using the doctrines governing causation<sup>283</sup>—if one tortfeasor breaks the plaintiff's shoulder and another breaks her shin, each tortfeasor pays for the damage they caused. In many cases, however, the injury is indivisible. In these cases, the tort doctrine governing liability apportionment structures the character of the settlement process.

Most obviously, joint and several liability,<sup>284</sup> where implemented, has helped bring about the private administration of the settlement process by increasing the exposure of large, deep-pocket, repeat-play entities and thus increasing the role of parties with motive and opportunity to rationalize the settlement process. Consider the theme park,<sup>285</sup> the product manufacturer,<sup>286</sup> or the hospital.<sup>287</sup> These are precisely the kind of repeat players likely to use and establish private administrative regimes. Joint liability increases the number of cases such deep-pocketed defendants must address, creating good reason to incur the up-front costs of investing in private administration.

Indeed, from a second-order perspective, joint and several liability is the allocation rule most favorable to systems of private administration. Joint liability without contribution makes settlement harder to routinize because the value of a given

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<sup>283</sup> See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 26 (AM. LAW INST. 2000).

<sup>284</sup> See *id.* § 10 (2000).

<sup>285</sup> See *Walt Disney World Co. v. Wood*, 515 So.2d 198, 202 (Fla. 1987), *superseceded by statute*, FLA. STAT. § 768.81(3) (2011), *as recognized in Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993). For an extended discussion of this case and its implications for how we should think about joint and several liability, see Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 MD. L. REV. 701, 754–55 (2014); Mark M. Hager, *What's (Not!) in a Restatement: ALI Issue-Dodging on Liability Apportionment*, 33 CONN. L. REV. 77, 104–07 (2000); Frank J. Vandall, *A Critique of The Restatement (Third), Apportionment as It Affects Joint and Several Liability*, 49 EMORY L.J. 565, 586 (2000).

<sup>286</sup> Injured employees can often use joint liability to hold a product manufacturer liable for a workplace accident where a workers' compensation statute might otherwise preclude them from having a tort claim. See, e.g., *Liriano v. Hobart Corp.*, 170 F.3d 264, 266 (2d Cir. 1999) (recounting how an employee brought a third-party claim against a product manufacturer); *Tragarz v. Keene Corp.*, 980 F.2d 411, 414 (7th Cir. 1992) (noting that joint and several liability applies to the manufacturers' discharging of asbestos into internal workplace environment).

<sup>287</sup> Victims of medical malpractice often sue a wide assortment of medical institutions in addition to their negligent physicians. See, e.g., *Schmidt v. Ramsey*, 860 F.3d 1038, 1043 (8th Cir. 2017) (suing hospital, midwife agency, and midwife); *Garcia Colon v. Garcia Rinaldi*, 340 F. Supp. 2d 113, 120 (D.P.R. 2004) (suing physicians and hospitals); *Velez v. Tuma*, 821 N.W.2d 432, 434 (Mich. 2012) (suing hospitals and physicians); *Maloney v. Valley Med. Facilities, Inc.*, 984 A.2d 478, 480 (Pa. 2009) (suing doctors as well as "institutional defendants associated with these physicians").

settlement under joint liability depends so radically on litigation strategy of other joint tortfeasors. Several liability, for its part, minimizes the role of the deep-pocketed repeat-player defendant. Joint and several liability, by contrast, functions to organize otherwise messy groups of defendants and foregrounds the role of those defendants most likely by virtue of their scale to be in a position to create economical administrative systems for resolving claims. The joint liability of repeat-play defendants is a machine for the promotion of private administration.

#### H. Apportionment (Settlement and Contribution)

More subtly, though just as importantly, the apportionment rules relating to settlements under joint and several liability are incomprehensible except by reference to the private settlement process. Indeed, no other area of tort doctrine has given more self-conscious attention to the promotion of private administration than the rules apportioning liability between settling and non-settling tortfeasors.

In cases of settlement with a subset of the relevant tortfeasors, the old rule of joint liability without contribution actions among joint tortfeasors had some virtues. It allowed a party desiring peace to settle and be done with a claim. Settlement was final, with no lurking risk of a residual contribution action by a joint tortfeasor.<sup>288</sup> The old rule of no contribution actions also created powerful incentives for each tortfeasor to settle. Settlement avoided the risk of a damages award for which a non-settling tortfeasor might be held fully liable. But such incentives were actually too strong. The joint liability rule with no contribution action produced too many opportunities for the plaintiff to collude with one or more tortfeasors at the expense of others. The old no-contribution rule thus interfered with the rational administration of claims by creating a race to collusive settlement.<sup>289</sup>

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<sup>288</sup> See *Merryweather v. Nixan* (1779) 101 Eng. Rep. 1337, 1337; 8 T.R. 186, 186 (articulating the rule of no contribution); Frank H. Easterbrook et al., *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 343-68 (1980) (arguing no contribution might be more efficient in many cases). The pervasiveness of this "old rule," however, has long been a matter of some contention. Easterbrook et al., *supra* note 288, at 332-37.

<sup>289</sup> Easterbrook et al., *supra* note 288, at 333 ("[A] plaintiff could settle for small amounts with all but one defendant and then 'go after' that defendant for the remaining joint liability."); Charles O. Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170, 1172 (1941).

Ever since the advent of joint and several tort liability, jurists have actively debated which apportionment doctrines best facilitate the private settlement of claims. Judges, legislators, insurers, and tort lawyers have debated fine doctrinal questions about whether to permit contribution actions against settling defendants,<sup>290</sup> and about which set-off rules (if any) ought to exist for the benefit of non-settling defendants at trial.<sup>291</sup>

Consider the contribution rules governing whether one jointly liable defendant who has paid damages to a plaintiff may sue a fellow tortfeasor to collect the fellow tortfeasor's share of the damages.<sup>292</sup> A particularly thorny issue for this doctrine is whether a non-settling tortfeasor who litigates and loses can bring a contribution action against a settling tortfeasor. If no contribution action is permitted, the litigating defendant may end up paying some portion of the settling defendant's share of the damages. If a contribution action is permitted, the settling defendant will not be able to buy peace from the plaintiff.<sup>293</sup>

The law's earliest effort to solve this problem seemed to make things worse, not better. The first Uniform Contribution Among Tortfeasors Act (UCATA) permitted non-settling tortfeasors to bring contribution actions against settling tortfeasors.<sup>294</sup> The Act provided that a settlement would only relieve the settling defendant from future contribution actions if the settlement reduced the plaintiff's damages against remaining non-settling tortfeasors by the released tortfeasor's share of the damages.<sup>295</sup> Concerned parties soon reported that

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<sup>290</sup> Compare UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 5 (1939) with UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1955); see also Easterbrook et al., *supra* note 288, at 333–34 (discussing controversy regarding the no contribution rule.).

<sup>291</sup> Compare UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 5 (UNIF. LAW COMM'N 1939) with UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 (UNIF. LAW COMM'N 1955) (both specifying setoffs in the amount of the settling tortfeasor's payment to the plaintiff with the proportional liability rule (specifying set-off in the amount of the settling tortfeasor's share as determined at trial)). See *Am. Guarantee & Liab. Ins. v. U.S. Fid. & Guar. Co.*, 668 F.3d 991, 993–95 (8th Cir. 2012) (describing how settlement offset rules affected an insurer's decision about whether or not to litigate); Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427, 487 (1993); Alper Nakkas, *Settling with Multiple Litigants*, 6 REV. L. & ECON. 125, 126–27 (2010); Kathryn E. Spier, *Litigation*, in 1 HANDBOOK OF LAW AND ECONOMICS, 259, 322 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

<sup>292</sup> See PROSSER & KEETON, *supra* note 233 § 50, at 336.

<sup>293</sup> See Easterbrook et al., *supra* note 288, at 333.

<sup>294</sup> UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) CMT. (UNIF. LAW COMM'N 1955).

<sup>295</sup> *Id.*

defendants were reluctant to settle because settlement did not bring peace absent the plaintiff's agreement to relieve non-settling defendants of the risk of paying damages greater than their share.<sup>296</sup> Plaintiff's attorneys, in turn, were reluctant to accept such settlements because they had no idea how valuable these settlements were worth.<sup>297</sup> The result was widely thought to be a disaster for private settlement. Insurers' trade associations and the plaintiffs' bar both opposed the 1939 UCATA precisely because the regime interfered with the settlement process in which these ostensible adversaries had a mutual interest.<sup>298</sup> By contrast, Wisconsin was widely praised for its rule providing that non-settling tortfeasors had no contribution action against settling tortfeasors.<sup>299</sup> Under the Wisconsin practice, observers reported that "settlements flourish[ed]."<sup>300</sup> By the middle of the 1950s, the first UCATA was replaced by a new one that switched the contribution rule, eliminating contribution actions altogether.<sup>301</sup>

Today, a substantial literature in the field suggests that the bargaining effects of particular apportionment rules are highly contingent on things such as the number of parties involved, the solvency of the parties, and the correlation of expected trial

<sup>296</sup> UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 CMT. (UNIF. LAW COMM'N 1955) ("No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party.").

<sup>297</sup> *Id.* ("Plaintiff's attorneys are said to refuse to accept any release [containing the provision] . . . because they have no way of knowing what they are giving up.").

<sup>298</sup> *Id.* (noting this objection to have been a chief factor in the law's defeat in New York and crediting this objection as "one of the chief causes for complaint where the Act has been adopted, and one of the main objections to its adoption"); Fleming James, Jr. [*Contribution Among Joint Tortfeasors: A Defense*]; *Replication*, 54 HARV. L. REV. 1178, 1182 (1941) (citing a 1939 memorandum from the Association of Casualty and Surety Executives criticizing the Act on the grounds that it would "restrain, hinder, and delay the settlement of cases").

<sup>299</sup> See Charles O. Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365, 365 (1938) ("[T]he splendid tort contribution practice which has developed in Wisconsin . . ."); Fleming James, Jr., *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1162 (1941); Donald W. Fisher, *Uniform Contribution Among Tortfeasors Act*, 9 OHIO ST. L.J. 674, 675 (1948) ("[T]he joint tort procedure of Wisconsin . . . is frequently singled out for approval.").

<sup>300</sup> James, Jr., *supra* note 298, at 1162.

<sup>301</sup> UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 (UNIF. LAW COMM'N 1955). Subsequently, some states have adopted the Uniform Comparative Fault Act, which reduces a plaintiff's judgment against non-settling defendants by the settling defendants' share of the liability. UNIF. COMP. FAULT ACT § 6 CMT. (1977). See also UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 8 (UNIF. LAW COMM'N 2003) (adopting the 1977 approach); see William L. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 35-36 (1953) (observing that the 1939 UCATA would need to be withdrawn and redrafted and had only been adopted in nine jurisdictions).



outcomes between and among the parties.<sup>302</sup> Apportionment rules may prove fatal to settlement,<sup>303</sup> or they may facilitate settlement.<sup>304</sup> It all depends. The important point here is that virtually everyone agrees that the crucial criterion for evaluating this class of tort apportionment rules is the extent to which they facilitate or obstruct the private settlement process.<sup>305</sup>

### III

#### THE PRIVATE ADMINISTRATION OF FIRST ORDER GOALS

A second-order view of tort as private administration does not require the displacement of the principal first-order accounts of tort. Corrective justice and civil recourse interpretations will continue to do battle with functionalism.<sup>306</sup> But focusing on the world of private administration has important ramifications for the contenders in the struggle for first-order primacy. On one hand, the system of private administration places real limits on the domain of corrective justice. Private administration displaces inquiry into rights and wrongs and substitutes aggregate administrative management for individualized attention to fine questions of justice. On the other hand, systems of private administration challenge efficiency-oriented accounts of tort by creating settlement practices that routinely and by design advance the private interests of the parties over public well-being.

Private administration also revises an influential account of the role of law in American public policy. Since Alexis de Tocqueville nearly two centuries ago, observers have remarked

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<sup>302</sup> See Kornhauser & Revesz, *supra* note 291, at 453–56, 462–64; Spier, *supra* note 291, at 321–22.

<sup>303</sup> Consider the apportioned share setoff rule under a system of joint and several liability, whereby one joint defendant's settlement reduces the judgment against the non-settling defendant by the settling defendant's share of the liability. When the defendant's probabilities of winning are independent and litigation costs are low, the apportioned share rule should reduce the likelihood of settlement. See Kornhauser & Revesz, *supra* note 291, at 466–67.

<sup>304</sup> Consider the pro tanto setoff rule, whereby one joint defendant's settlement reduces the judgment against the other joint defendant by the amount of the settlement. Where the two defendants' probabilities of winning are positively correlated, the pro tanto rule should encourage settlement under a regime of joint and several liability, because any settlement below the settling defendant's share increases the amount the non-settling defendant would pay in judgment. See Nakkas, *supra* note 291, at 126–27.

<sup>305</sup> UNIF. COMPARATIVE FAULT ACT § 6 CMT. (UNIF. LAW COMM'N 1977) (weighing a rule's propensity to encourage settlement as one of the major determining factors in its adoption); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) CMT. (UNIF. LAW COMM'N 1955).

<sup>306</sup> For a powerful new statement of the civil recourse view, see GOLDBERG & ZIPURSKY, *supra* note 234.

on the special authority of lawyers in American policymaking.<sup>307</sup> One influential strand of that literature holds that lawyer-dominated public policy entails adversarial and legalistic process. But the pervasiveness of private administration presents a new look at the mechanics of legalism in the actually existing world. The second-order world of private administration is quietly managed by repeat-play actors whose interests are best understood not only as adverse (though sometimes they are that), but also as codependent and even aligned. Private administration reveals that the accomplishment of public policy goals through lawyers and courts can be bureaucratic and administrative rather than adversarial and legalistic.

### A. The Private Administration of Justice

According to the corrective justice view, tort law is best understood “from within and not as the juridical manifestation of a set of extrinsic purposes.”<sup>308</sup> The corrective justice interpretation insists that tort’s animating principles are internal and relational.<sup>309</sup> For corrective justice theorists, the problem is that the defendant has wronged the plaintiff. Because she has violated her obligation to care for the plaintiff, the defendant must restore the equilibrium between them by repairing the wrongful loss.<sup>310</sup> Or—under an alternate formation—the wrong has created a harm which should be allocated on the basis of moral desert.<sup>311</sup> According to the closely-related theory of civil recourse, the plaintiff has been aggrieved by the

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<sup>307</sup> See discussion *supra* subpart I.A.

<sup>308</sup> See WEINRIB, *supra* note 142, at 5.

<sup>309</sup> See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 16 (2001) (“Tort law’s structural core is represented by case-by-case adjudication in which particular victims seek redress for certain losses from those whom they claim are responsible.”); WEINRIB, *supra* note 142, at 10 (the “master feature characterizing private law” is “the direct connection between the particular plaintiff and the particular defendant.”); RUSTAD, *supra* note 3, at 421 (“civil recourse’s focus is about one-on-one relationships between an injured plaintiff and . . . an individual defendant.”).

<sup>310</sup> See COLEMAN, *supra* note 309, at 15 (“[I]ndividuals who are responsible for the wrongful losses of others have a duty to repair the losses.”) (emphasis omitted); RUSTAD, *supra* note 3, at 436; Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 350–51 (2002); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 707 (2003) (“Corrective justice theory explains . . . that one who has wrongfully injured another has a duty of repair running to the victim.”).

<sup>311</sup> See Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 426–27 (1982) (arguing that torts give rise to wrongful gains which must be annulled). See generally Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 496–513 (1992) (positing that the costs of wrongs should be borne among those responsible according to their degree of fault).

defendant and is empowered by the law to achieve redress in the courts.<sup>312</sup> The courts then decide how the plaintiff may use the state to make demands on the defendant.<sup>313</sup> At the core of all these conceptions of tort is a concern about restoring the moral balance between two parties. Tortfeasors violate the rights of victims, and tort law exists to restore the balance that is upset by tortious wrongs.

The first-order literature in corrective justice and civil recourse has long been preoccupied with the challenge offered to the corrective justice account by the consequentialist alternatives. But the practical challenge of our time to such views of tort is not the economists' efficiency theories, though the literature could easily leave one with that impression. The practical problem for corrective justice accounts arises out of the pervasiveness of settlement.<sup>314</sup>

In some respects, corrective justice rises to the challenge. Corrective justice scholars have long contended that tort law's animating principles survive the pervasive fact of settlement.<sup>315</sup> Persons with claims sounding in corrective justice are free to discharge those claims if they so choose. Settlement, after all, is another way in which an empowered victim may achieve redress for a wrongful injury.<sup>316</sup> Indeed, the streamlined settlement systems made possible by private administration will often advance the projects of corrective justice and civil recourse. The aim of such systems is precisely to reduce

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<sup>312</sup> GOLDBERG & ZIPURSKY, *supra* note 234, at 6.

<sup>313</sup> See Rustad, *supra* note 3, at 434 ("In Goldberg's view, tort law is not a system of compensation but fundamentally about victim empowerment."); Zipursky, *supra* note 310, at 733–53. Pure corrective justice theorists see the duty of repair as central to tort; civil recourse theorists understand it as important because of it governs the more fundamental goal of tort, which is to articulate when and how plaintiffs may seek redress from defendants. *Id.* at 734–35. *But see* Scott Herschovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 107–08 (2011) (arguing civil recourse theory is a corrective justice account of tort).

<sup>314</sup> The historical literature in tort made this observation some time ago, when it moved from counting appellate opinions to studying docket sheets. See, e.g., BERGSTROM, *supra* note 65, at 1870–1910; Friedman, *supra* note 32, at 354–56. The next step was to see that even docket studies are likely misleading. The claims files of firms in dangerous industries are much better. See Issacharoff & Witt, *supra* note 5, at 1580–81, 1618–19; Kaczorowski, *supra* note 32, at 266, 269, 281.

<sup>315</sup> Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 370 (1992).

<sup>316</sup> See Scott Herschovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 32 (2018) ("The holder of a right ought to be able to decide how far—and in what forum—she will press it.").

the huge administrative costs of tort, and such costs are obstacles to the realization of corrective justice and civil redress.

In other respects, however, private administration is a threat to the normative project of repairing wrongful losses. Many tort claimants never encounter anything resembling the finely wrought doctrinal distinctions of the law of private wrongs. To the contrary, they encounter a privately administered settlement system structured and managed in the law's shadow. As we showed in Part II, that system reflects and arises out of the basic doctrinal principles of American tort law; those background principles shape and condition private administration.<sup>317</sup> But privately administered settlement practices reflect anticipated trial outcomes only wholesale and in the aggregate. In individual cases, the settlement awards available in systems of private administration will depart from what individualized corrective justice would demand. Settlement systems alter the substantive rights and duties that parties encounter in the actually existing world. And they do so because powerful actors and institutions in the tort claims system reshape the regime of actually existing rights and wrongs.

The settlement system is a marketplace. But it is no idealized free marketplace of autonomous choice. Tort plaintiffs do not consent in some free and unconstrained fashion to part with claims in return for redress designed for their claim. Instead, like so many other markets, the settlement system is characterized by powerful institutions, market-dominant actors, and sharply limited choices. Settlement practices in tort claims are best thought of not as a free market, but as privately managed administration that structures, shapes, and constrains the free choice of tort claimants. The key actors who function as administrators of private settlement systems—insurers, repeat-play defendants, and plaintiffs' representatives—are often more concerned with resolving liability claims quickly and efficiently than they are with resolving them justly. Particularized justice or redress is too costly for most cases, and so the private administrative state deals in aggregates. As we have seen, contextual fault standards give way to bright line rules;<sup>318</sup> detailed accounts of actually sustained harms are compensated according to heuristic grids of anticipated damages;<sup>319</sup> and complex issues of causation are reduced to a few

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<sup>317</sup> See *supra* section II.A.

<sup>318</sup> See notes 241–243 *supra* and accompanying text.

<sup>319</sup> See notes 211–213 *supra* and accompanying text.

boxes on a form.<sup>320</sup> Private administrators, in other words, reshape the doctrines of the tort system to accommodate the efficient resolution of claims. (Witness the well-documented fact that settlement tends to overcompensate small, poorly-substantiated claims and undercompensate large and meritorious claims.<sup>321</sup>) It is no wonder, then, that Christopher Robinette (building on the foundational work of H. Laurence Ross and others) has argued that the aggregative techniques of routinization pose a serious challenge to the corrective justice account of tort.<sup>322</sup>

Indeed, on closer examination, the idea of claimants freely choosing to settle their corrective justice claims is often more fantasy than reality. Nora Engstrom notes that settlement mills hustle their clients into quick settlements, often threatening to raise fees if plaintiffs insist on trial in order to “dissuade a client from insisting on her day in court.”<sup>323</sup> In one study of litigants in all personal injury cases up to \$50,000, eleven percent of litigants never met with their lawyers at all.<sup>324</sup> Only eighteen percent believed they exercised “a lot” of control over their case,<sup>325</sup> with forty-six percent blaming their lawyer for their lack of control.<sup>326</sup> One can only imagine what the statistics would look like for settlement mills specifically. While litigants’ perceptions may not necessarily be reliable indicators of how much control they actually exerted, such perceptions are a problem for those who argue that claimants are empowered by tort to seek redress as they see fit.

Consider too that private administrative bodies not only alter the substantive rights and obligations of tort, they sometimes do so in patently unfair fashion.<sup>327</sup> Resource imbalances between litigants can force parties into unfair settlements.<sup>328</sup> And many private administrative bodies are in fact designed to confuse, hector, and demoralize plaintiffs into acquiescing to

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320 See, e.g., note 274 *supra* and accompanying text.

321 See *supra* note 43 and accompanying text.

322 See Robinette, *Two Roads Diverge*, *supra* note 5, at 550–54.

323 Engstrom, *Run-of-the-Mill Justice*, *supra* note 5, at 1526.

324 Hensler, *Resolving Mass Toxic Torts*, *supra* note 37, at 95.

325 *Id.*

326 *Id.* at 96. For more extensive examination of the attorney-client relationship, see *id.* at 92–97.

327 Efforts to save money may lead claims resolution facilities to violate their own procedural rules—the Manville Personal Injury Trust, for instance, violated its “first-in, first out” rule by attempting to settle any case scheduled for trial, regardless of when it was filed. See Deborah R. Hensler, *Assessing Claims Resolution Facilities: What We Need to Know*, 53 LAW & CONTEMP. PROBS. 175, 175 (1990); See also Hensler, *Alternative Courts*, *supra* note 27, at 1435.

328 See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076–78 (1984).

speedy—and small—settlements. Henry Farber and Michelle White, for instance, surveyed one hospital's informal claims resolution process for patients' tort claims. They found it mainly existed for the hospitals to secure information about how litigious the patient was.<sup>329</sup> The claims resolution process rarely settled cases and when it did, it did so at a considerable discount over the settlement patients received if they initiated a lawsuit.<sup>330</sup> Goldberg recognizes the problem these types of institutions pose to the corrective justice view of tort. He concedes that it would significantly undermine the enterprise of tort if lawyers recommend settlement to maximize the returns to their portfolio of claims.<sup>331</sup> And there seems little doubt that in many domains of tort practice this is precisely what happens.<sup>332</sup>

A system of private administration may, to be sure, offer real advantages in ensuring that people get their just deserts. For instance, private administration holds out the promise of smoothing the problem of unevenly distributed moral luck. Under a fault-based system of tort law, careful drivers injured by solvent careless drivers receive compensation. Equally careful injured drivers (in precisely the same moral position) receive no such compensation if the other driver who causes them injury exercised due care or is otherwise judgment-proof. Thus, a blameless driver's compensation in tort depends on whether they were "lucky" enough to be hit by a solvent careless driver.<sup>333</sup> By the same token, the sanctions on careless drivers also depend on luck; whether or not a careless driver pays for her carelessness in tort depends in substantial part on her good or bad luck as to whether a pedestrian happens to be in the wrong spot as she careens down the street.<sup>334</sup> Settlement systems do not do away with such moral luck altogether. But by aggregating away from the particulars of particular

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<sup>329</sup> Henry S. Farber & Michelle J. White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 J. LEGAL STUD. 777, 795 (1994).

<sup>330</sup> *Id.* at 802–03.

<sup>331</sup> See John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1266–67 (2008).

<sup>332</sup> Engstrom, *Run-of-the-Mill Justice*, *supra* note 5, at 1501; Erichson, *All-or-Nothing*, *supra* note 34, at 1020–22; Issacharoff & Witt, *supra* note 5, at 1576; Remus & Zimmerman, *supra* note 5, at 160–63; Witt, *Bureaucratic Legalism*, *supra* note 5, at 273.

<sup>333</sup> See Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 THEORETICAL INQUIRIES L. 165, 165–66 (2007). On moral luck generally, see THOMAS NAGEL, *MORTAL QUESTIONS* 24–38 (1979); BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980* (1981).

<sup>334</sup> See Baker, *supra* note 333, at 168–70.

claims, key features of the private administrative system—insurance and settlement in particular—smooth out some of the morally arbitrary features of tort adjudications.<sup>335</sup>

On the other hand, the same capacity to predict and allocate risk that allows private administrators to solve some problems of moral luck also entrenches and recreates unjust patterns of discrimination and domination. It is no secret that the structure of tort law reproduces discrimination on the basis of gender and race.<sup>336</sup> To the extent private administration reflects tort law, it reflects these biases. Indeed, it may make the discrimination worse. Where the tort system uses race-based and gender-based economic data to set compensation, it risks allowing injustice in one area to create injustice in another. Martha Chamallas gives the example of tort law's use of demographic data to calculate a victim's lost earning capacity; using such data allows racist and sexist employment decisions to create racist and sexist tort compensation.<sup>337</sup> But the tort system often uses discriminatory actuarial categories when individualized data is not available.<sup>338</sup> Substituting predictive categories for individualized treatment is one of the bedrock tenets of private administration. It should come as no surprise, then, that private administration often recreates some of the problematic dynamics Chamallas and others identify in tort damages.

As early as the turn of the twentieth century, railroad executives encoded their prejudices into their settlement practices by dividing claimants into demographic categories.<sup>339</sup> Executives believed juries were more sympathetic to women than men,<sup>340</sup> and less sympathetic to black plaintiffs than white plaintiffs.<sup>341</sup> When one railroad compiled detailed records of its

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<sup>335</sup> For a more comprehensive treatment of how insurance ameliorates some of the problems of moral luck in tort, see Kenneth S. Abraham, *Tort Luck and Liability Insurance*, 70 RUTGERS U.L. REV. 1, 11–34 (2017). To the extent private administration substitutes the vicissitudes of judicial discretion for a more streamlined and consistent set of recovery values, it might reduce yet another aspect of moral luck.

<sup>336</sup> See Avraham & Yuracko, *supra* note 195, at 717 (discussing how tort law offers lower penalties for torts committed against women and minority racial groups); Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999). See also *supra* notes 11–12.

<sup>337</sup> See Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994).

<sup>338</sup> See *id.* at 79–84.

<sup>339</sup> WELKE, *supra* note 56, at 105–112.

<sup>340</sup> *Id.* at 108.

<sup>341</sup> See WELKE, *supra* note 56, at 110–11; Wriggins, *supra* note 11, at 108–110.

settlements, it found that it gave black plaintiffs disproportionately small settlements, while it offered women disproportionately generous compensation.<sup>342</sup> This problem still pervades in many different types of private administrative institutions today. For instance, insurers are often accused of engaging in racial and gender discrimination in setting premiums and offering coverage. When confronted, defenders respond that they are merely offering coverage tailored to the risk profile of the individual in question.<sup>343</sup>

In submitting to private administration, plaintiffs may lose more than autonomy. The experience of adjudication in private administration is qualitatively different and may well deny plaintiffs more than merely their just deserts. Scott Hershovitz, for instance, has pointed out that the structure of tort law delivers “collateral benefits” for victims that exceed the mere value of their monetary compensation.<sup>344</sup> Through tort litigation, victims are empowered to seek answers for why the tortfeasor harmed them; participate in a public conversation about the duties we owe to one another; and receive other indirect benefits of the organization of the tort system.<sup>345</sup> These collateral benefits often sound in corrective justice—the tort system assigns responsibility for harms as well as compensation, and the assignment of responsibility is often central to making a plaintiff whole.<sup>346</sup> Civil recourse theorists may also add the tort system empowers a plaintiff to demand an explanation from any defendant, regardless of whether the plaintiff has *actually* suffered a wrong.<sup>347</sup> Because private administrative bodies are not homogenous, some may capture some of the collateral benefits that Hershovitz outlines.<sup>348</sup> For instance,

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342 WELKE, *supra* note 56, at 111–12.

343 Willy E. Rice, *Race, Gender, “Redlining,” and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950–1995*, 33 SAN DIEGO L. REV. 583, 593–95 (1996).

344 Hershovitz, *Harry Potter*, *supra* note 4, at 71.

345 *Id.* at 71–74. Hershovitz also explains how the procedure of bringing a tort suit has “collateral costs,” including incentives to make evidence of errors more difficult to obtain, litigation-related aggravation, and other harms brought on by the specific operation of the tort system. *Id.* at 74–75.

346 *Id.* at 95–100. For theorists who argue apology and assignment of responsibility are part of a corrective justice remedy, see Prue Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?*, 27 SYDNEY L. REV. 483, 503–04 (2005). For those who disagree, see COLEMAN, *supra* note 189, at 329 (“[T]he duty to apologize . . . [is] not derived from corrective justice.”).

347 See Hershovitz, *Harry Potter*, *supra* note 4, at 100–01.

348 See, e.g., Hensler, *Alternative Courts*, *supra* note 27, at 1435 (discussing how claims administrative facilities can run the spectrum from “administrative” to “adjudicative”); Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflec-*



where profitable, some repeat litigants have incorporated apologies into their mass settlement practices.<sup>349</sup> And some dedicated private administrators attempt to make claimants feel heard, respected, and given individual treatment.<sup>350</sup>

But the structure of private administration more typically omits the collateral benefits of traditional tort law. Private settlements are just that: private. Private actors do not generally make public announcement of the resolutions they reach, and often the terms of the settlements they reach include nondisclosure agreements prohibiting such announcements.<sup>351</sup> Such failure to disclose disrupts the expressive collateral benefit of tort: confidential settlements do not force the tort system to express the duties we owe to one another publicly and do not allow litigants to argue for modifications to the prevailing standard of care.<sup>352</sup> In moving away from individualized consideration to aggregate treatment, private administration also denies litigants the ability to tell their story.<sup>353</sup>

## B. The Private Administration of Efficiency

In the efficiency view, tort law is predominantly functional. Tort judgments are best, on this view, when they minimize social costs by encouraging the allocation of risks to their least

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*tions of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513, 519 (1998) (describing how participants in the Dalkon Shield Claimant's Trust had several choices of claims resolution procedures).

<sup>349</sup> See Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 358–60 (2008) (surveying large institutions that offered apologies as part of their settlement process and noting that apologies facilitated settlement).

<sup>350</sup> See, e.g., Menkel-Meadow, *supra* note 348, at 519, 522–23 (noting how the Dalkon Shield Claimant's Trust provided an option for fast-track arbitration, which provided an individualized way for claimants to be heard).

<sup>351</sup> The rate of secret settlement is contested. For a more extensive discussion see Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1460–64 (2006); Rhonda Wasserman, *Secret Class Action Settlements*, 31 REV. LITIG. 889, 906–10 (2012). See generally, Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869–70 (2007) (discussing the enforceability of confidentiality agreements in settlements).

<sup>352</sup> See Herschovitz, *supra* note 313, at 31–33; Fiss, *supra* note 328, at 1085–87.

<sup>353</sup> See Hensler, *Resolving Mass Toxic Torts*, *supra* note 37, at 99; E. Allan Lind et al., *In The Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 981–82 (1990) (finding personal injury litigants were more satisfied with arbitration than with bilateral settlement because they felt their cases received more respectful treatment); Menkel-Meadow, *supra* note 348, at 528–35 (discussing how some forms of alternative dispute resolution may allow plaintiffs to feel heard).

cost avoiders.<sup>354</sup> The efficiency view adopts the ex ante perspective: it inquires into the incentive effects of tort liability for future behavior.<sup>355</sup> And because it adopts ex ante posture, the efficiency account of tort law necessarily contemplates a certain kind of private administration, namely the private behavioral response to the risk of future tort liability. In this respect, private administration of the ex ante variety is not a challenge to functionalism but its fulfillment. A century ago, for example, Taylorism and scientific management of the workplace arose hand-in-glove with the new liability regime of workmen's compensation.<sup>356</sup>

This article has focused on a different kind of Taylorism, namely the scientific management of the claims process after the fact of injury, where the private administration of claims proceeds in the service of a kind of ex post efficiency. Speedy settlements reduce the transaction costs by which accident costs are allocated and reallocated. And there is reason to think that private administration has achieved significant savings. Over the past half-century, the aggregate administrative costs of tort claims relative to the total amount of tort transfers has decreased.<sup>357</sup>

In important ways, however, ex post private administrative practices in the claims administration process depart from the project of advancing efficient allocations, and indeed depart from the project of promoting the public welfare under any plausible definition. Private administrative practices are created by private actors for self-regarding reasons. They arise out of public view and with little public accountability. Where efficiency-minded theorists ignore the ways private administration changes their models, they entrust social planning to the very actors they seek to regulate.<sup>358</sup> Divergence between the

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<sup>354</sup> CALABRESI, *supra* note 188, at 26–27 (“[T]he principle function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”); LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* xvii (2002) (“[S]ocial decisions should be based *exclusively* on their effects on the welfare of individuals—and, accordingly, should not depend on notions of fairness, justice, or cognate concepts.”).

<sup>355</sup> Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123, 126, 152–53 (2003).

<sup>356</sup> See John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 40 (2003).

<sup>357</sup> See *supra* note 94.

<sup>358</sup> Here, we especially build on the insight of Keith Hylton, who argues that economically-inclined tort theorists must include the costs of litigation in their models of how tort law allocates the cost of accidents. Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111, 147–48 (1991).

private interests of the parties in tort law's far-flung and private systems of settlement are thus virtually inevitable.

Consider the widespread existence of nondisclosure agreements in tort settlements. Nearly ninety percent of medical malpractice settlements in the University of Texas system include nondisclosure agreements.<sup>359</sup> Defense lawyers routinely report that they include confidentiality clauses in their settlement agreements as a matter of course.<sup>360</sup> But nondisclosure agreements open up a gap between private and public interests. They allow private parties to buy and sell information that is of value to the rest of us.<sup>361</sup> They deprive the public of valuable information that would allow parties to manage their risks more effectively moving into the future, and they do so because the law of settlement contract enforcement allows the sale and purchase of the right to communicate information about tort claims.<sup>362</sup>

Confidentiality agreements in private settlements are a specific example of a more general problem. The participants in a system of private administration may be able to arrange collusive settlements that reduce the private cost of behavior below its social cost, leaving some of those social costs on third parties. The threat is salient, for example, in tort claims between repeat-play defendants, on the one hand, and repeat-play plaintiffs' representatives, on the other. Such plaintiffs' representatives have an incentive to settle claims in such a way

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<sup>359</sup> William M. Sage et al., *Use of Nondisclosure Agreements in Medical Malpractice Settlements by a Large Academic Health Care System*, 175 J. AM. MED. ASS'N INTERNAL MED. 1130, 1132 (2015) (finding 88.7% of medical malpractice settlements made by the University of Texas System contained nondisclosure agreements).

<sup>360</sup> Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 676 (2001) (quoting an insurance defense attorney who had not put a settlement together in the past "five to six years" without "a confidentiality clause in it" (internal quotation marks omitted)).

<sup>361</sup> Spier, *supra* note 291, at 324 ("There are important externalities at play."). The ability to limit public information about a tort claim has substantial value, because when defendants possess better information about the value of the claim than plaintiffs, they can get away with disproportionately small settlements. See Kathryn E. Spier, *A Note on the Divergence Between the Private and the Social Motive to Settle Under a Negligence Rule*, 26 J. LEGAL STUD. 613, 614 (1997). But see Moss, *supra* note 351, at 910–12 (discussing how confidential settlements might benefit the public).

<sup>362</sup> Owen M. Fiss, *supra* note 328, at 1085 ("[W]hen the parties settle, society gets less than what appears, and for a price it does not know it is paying."); Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 316 (2018) (arguing that confidentiality is "socially undesirable" in the case where it hides useful information from would-be plaintiffs).

as to maximize their imputed hourly returns instead of maximizing the value of each claim.<sup>363</sup>

The common thread for nondisclosure agreements and collusive settlements more generally is that they reach results favoring the moving forces behind the agreements over the public. Such risks are built into the very DNA of private administration. By allocating the administration of public questions to the private sphere, the system of tort settlement in the United States trades off advantages of speed and flexibility, on the one hand, for the vices of rent-seeking and opportunism, on the other.

#### CONCLUSION: LEGAL ARCHITECTURE FOR A PRIVATELY ADMINISTERED WORLD

This article has only just begun to sketch the significance of placing private administration at the center of accounts of American tort law. Forms of private administration are pervasive in our law because the legal system in the United States plays a famously significant role in public policy making, and because this distinctively important legal system allocates equally distinctive power in the litigation process to private parties.

The idea that American litigation processes are distinctively party-driven is of course no novel insight; such a claim has long been central to the comparative law literature.<sup>364</sup> The problem is that scholars have drawn incomplete lessons from the fact of party-driven process.

Since at least Robert Kagan's groundbreaking work, lawyers and political scientists have contended that litigation lends a dimension of adversarial legalism to American public policy.<sup>365</sup> In one especially prominent version of this view, articulated by Kagan among others, American policymaking is hindered by a pervasive adversarialism supposedly built into

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<sup>363</sup> See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 624–25 (5th ed. 1998); Kritzer, *supra* note 87 at, 286–88.

<sup>364</sup> See Richard Marcus, 'American Exceptionalism' in *Goals for Civil Litigation, in GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS* 123, 135 (Alan Uzelac ed., 2014) ("American exceptionalism depends largely on its embrace of the private enforcement goal."); Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 *AM. J. COMP. L.* 277, 292–99 (2002).

<sup>365</sup> BURKE, *supra* note 19, at 17; FARHANG, *supra* note 19, at 57–58; KAGAN, *supra* note 16, at 9, 11–14; J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 *WM. & MARY L. REV.* 1137, 1155–56 ("Private litigation also gives individuals a 'personal role and stake in the administration of justice . . . .").

the very structure of litigation.<sup>366</sup> In this literature, tort claiming serves as a paradigmatic site of adversarial legalism.<sup>367</sup> Among other things, tort appears in the literature as a key source for a culture of claiming and rights assertions.<sup>368</sup>

The literature, however, has missed the ways in which litigation in the age of settlement is ultimately not adversarial (or not only adversarial) but cooperative. Settlement alters the adversarial process by adding substantial—though often hidden—cooperative and managerial dimensions. Private administration as it has developed is a bilateral and cooperative endeavor between the contending sides in tort disputes to take advantage of available economies. Sometimes, as the literature on mass tort litigation has shown, it verges on the collusive, for ultimately, litigation is not about crushing the other side, or at least not only about that.<sup>369</sup> Litigation is also about the pursuit of peace—for both sides.<sup>370</sup> And that puts litigation as a dimension of public policy in important new light.

Put differently, markets take many structures, sometimes horizontal and other times hierarchical, sometimes decentralized and sometimes centralized. In the same way, adversarial legalism produces many different formations, some of which are collusive, cooperative, and managerial rather than adversarial and legalistic. In the literature on adversarial legalism,

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<sup>366</sup> KAGAN, *supra* note 16, at 29–32; *see also* W. Kip Viscusi, *Overview*, in *REGULATION THROUGH LITIGATION* 1, 1 (W. Kip Viscusi ed., 2002) (“The policies that result from litigation almost invariably involve less public input and accountability than government regulation.”).

<sup>367</sup> BURKE, *supra* note 19, at 127–28, 151–55.

<sup>368</sup> For the sophisticated version of the hypothesis about tort claiming and a broader culture of claiming, *see* LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1994); Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 *LAW & SOC. INQUIRY* 187, 208–09 (2009). Casual and less sophisticated examples abound, too. *See* Steve Spellman, *Tort Reform is a Sad Symptom of a Litigious Society*, *COLUMBIA MISSOURIAN* (Mar. 1, 2017), [https://www.columbiamissourian.com/opinion/local-columnists/steve-spellman-tort-reform-is-a-sad-symptom-of-a/article\\_39160026-fdf4-11e6-a152-235290b858a2.html](https://www.columbiamissourian.com/opinion/local-columnists/steve-spellman-tort-reform-is-a-sad-symptom-of-a/article_39160026-fdf4-11e6-a152-235290b858a2.html) [<https://perma.cc/Z9Y7-DEQ2>].

<sup>369</sup> *See supra* note 29.

<sup>370</sup> NAGAREDA, *supra* note 5, at ix (“[T]he most ambitious settlements seek to make and enforce a grand, all-encompassing peace.”); Baker, *supra* note 34, at 1944; Erichson & Zipursky, *supra* note 123, at 267 (2011) (noting that “achieving closure” is often a primary objective in tort litigation); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 *FORDHAM L. REV.* 1177, 1201–02 (2009) (defending the “public value” of “mass resolution”); Rhonda Wasserman, *Future Claimants and the Quest for Global Peace*, 64 *EMORY L.J.* 531, 533, 536–39 (2014) (“The defendant’s interest in global peace . . . is both intense and understandable.”).

giant environmental projects like the retrofitting of Oakland Harbor serve as paradigm cases.<sup>371</sup> In domains where settlement is the norm, by contrast, the story is very different. Settlements by their nature are cooperative: parties agree to settle because, as best they can determine, it is in their mutual interest to bring closure to their dispute. Sometimes this takes the form of bespoke settlement arrangements tailored to the individual circumstances in question. And sometimes, in domains such as automobile accidents and other repeat-play areas in tort, legalism combines with private discretion to produce private settlement systems with administrative bureaucracies, settlement grids, and stereotyped rules of thumb for the aggregate resolution of disputes.

When private administration is the order of the day, as it so often is in the law of tort claims, the law and the literature ought to take into account the pervasiveness of second-order administration in advancing its first-order goals. Private administration is the architecture within which the law alternately vindicates and obstructs the basic goals of deterrence and corrective justice.

All this is hard to see in the shadows of the law, to be sure. The systems of tort settlement are unusually hidden in the gloom. But a law that is blind to the distinctive characteristics and the pervasiveness of private administration is simply stumbling in the dark.

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<sup>371</sup> See, e.g., KAGAN, *supra* note 16, at 25–29 (discussing the Oakland Harbor story and describing how it represents adversarial legalism's harms); see also Busch et al., *Taming Adversarial Legalism: The Port of Oakland's Dredging Saga Revisited*, N.Y.U. J. LEGIS. & PUB. POL'Y 179, 180 n.3 (1999) (collecting sources).