COLLECTIVE JUSTICE IN TORT LAW

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INTRODUCTION

REPORTS about the "runaway" character of tort liability have become a staple of journalistic reporting on the law. The words "tort" and "crisis" now appear together so often in print that they have taken on the character of automatic association, like "bread and butter" or "death and taxes." Needless to say, no problem goes long perceived without generating proposed solutions. The solutions to the problems of tort law are as varied as the legal imagination. They range from replacement of the entire tort liability system with some form of regulatory and compensation mechanism for accidental injuries, to marginal corrections in the system such as limitations on damages and changes in liability standards. Broad, systemic reform proposals have generally foundered. The most noteworthy exception, workers' compensation, has not been emulated outside the confines of the workplace. The effort to develop a similar scheme to replace automobile accident liability in the 1960s and 1970s was both limited in its

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acceptance and partial in scope even where accepted.\textsuperscript{1} Since the automobile no-fault movement ground to a halt nearly two decades ago, the possibility of systemic overhaul has been entertained by a few academics,\textsuperscript{2} but it seems by almost no one else. All the practical reform efforts to address the assorted crises of contemporary tort law now focus on changes within the system.\textsuperscript{3}

The failure to alter the fundamental structure of tort law can be partly attributed to the political power of the trial bar, which has a large economic stake in maintaining the traditional system. However, we doubt that naked interest-group politics alone accounts for the resistance to basic reform. Interest-group politics in this case is powerfully reinforced by the widely shared public belief that, for all its flaws, the traditional common-law system of liability is better than the alternatives. Lawyers may be among the most unloved of professionals, the butt of endless popular jokes and the object of media derision, but everything is relative. Asked to choose between a lawyer and a claims office bureaucrat, most people instinctively prefer the former. Quite apart from a preference for lawyers over bureaucrats, there is a deep respect for the common-law system as a model of corrective justice. If lawyers are an unwanted nuisance, the system of law they administer is not. We despise ambulance chasers, but we prize our right to a “day in court.” It ranks right up there with the great liberties of the land.

To say that we love the common-law tort system, however, is to say mostly that we love an abstraction, an ideal of corrective justice whose contours and details are vague. We propose in this Article to examine critically this ideal by considering how far the tort system might depart from its traditional focus on the unique particulars of

\textsuperscript{1} For a survey of the plans and an evaluation of their effects see U.S. Dep't of Transp., Compensating Auto Accident Victims: A Follow-Up Report on No-Fault Auto Insurance Experiences (1985).


each tort claim and still produce acceptable results. Our initial focus is on proposals for collective—or, as we also call it, “aggregative”—valuation of tort claims, particularly in the context of mass tort cases. These proposals in turn are the occasion for exploring more broadly the proper form of corrective justice, in particular the degree to which principles of corrective justice require individualized adjudication of legal claims.

Phrasing the inquiry in terms of the form of corrective justice may suggest a higher level of philosophical abstraction than we intend. Our argument is really more specific and practical in its focus; it is about the form of a tort claim. We emphasize the word “claim” because our discussion is not primarily about the set of substantive legal duties and obligations underlying tort liability as such. Rather, we are concerned with the way a claim is presented in court—that is, with the way the story constituting every tort claim is told. All private litigation is a process of competitive storytelling. Every claim embodies a “story,” a combination of factual narrative and legal argument by both parties with respect to some claim of entitlement by the plaintiff. A person’s “day in court” provides the opportunity to tell that story, insofar as it is relevant to the legal relief claimed. The concept of relevance in this context is not, of course, free-standing. What is relevant is defined by the legal rules that govern the claim. Whatever the substance of those rules, however, in virtually every instance the story that the rules make relevant is unique.

We begin in Part I by examining the ways in which the common-law tort system implements and retains its individualized focus. In Part II we discuss departing from this individualized focus by means of collective valuation of tort claims. This method of valuation

4 Admittedly, it is not easy to abstract the notion of having a claim—the right to tell a story—from the body of legal doctrine associated with it. There is a reciprocal relationship between the two: just as the shape of legal doctrine determines what kinds of stories can be told, so too, the kinds of stories that are permitted determine the shape of legal doctrine. We are mindful, therefore, that any alteration in the way a legal claim is heard and evaluated functionally alters the substantive rights underlying the claim. Be that as it may, our present interest is in the process, not in the selection of substantive liability rules or standards. We leave for another day the exploration of how our scheme of collective adjudication of claims might alter substantive liability rules.

5 The distinction between the factual and legal components of the story here is, as a practical matter, a fine one. No one goes to court simply to report events. The factual narrative is selective and interpreted with a view to sustaining the legal claim.
includes not only a collective determination of damages but also a collective assessment of the substantive elements of the claim—that is, its "market value." Parts III and IV analyze various constitutional and corrective justice arguments bearing on the question of individual versus collective adjudication. We conclude that neither the Constitution nor credible conceptions of corrective justice forbid collective adjudication of tort claims and that, in appropriate cases, true corrective justice may require collective justice in some form and degree.

I. THE PARTICULARITY AND VARIOUSNESS OF TORT CLAIMS

We begin with the idea of allowing every person her day in court. In the popular mind, and in most professional minds as well, the phrase suggests a basic principle that each person has access to a court, or comparable legal forum, in which to tell her own particular story insofar as it is pertinent to the claim being made. Implicit in this idea is a notion that each story is, more or less, unique to that individual and thus one that only she can tell. The variousness of common-law claims adjudication is not limited to tort law, of course. The common law generally tends to break down fixed rights and obligations into highly variable ones. To borrow Carol Rose's apt metaphor, the tendency is to transform "crystals" into "mud." There is probably no field of law in which this tendency is more pronounced than the field of torts.

The individualism of tort law begins with the formulation of liability standards that are predicated on the idea that every claim is

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6 This conception underlies the rule that one cannot be bound by a judgment unless he or his agent, or someone through whom he claims, was a party to the litigation that produced it, even though the same issues and interests that he seeks to raise were adjudicated in the prior litigation. As the Supreme Court observed in Martin v. Wilks, 490 U.S. 755 (1989), "[t]his rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" Id. at 762 (emphasis added) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4449, at 417 (1981)). The value of a day in court does not necessarily assume that the person's story is unique. There is some value in being able to tell a story "my way" even if, objectively considered, the story has been heard before. Whether that value can claim constitutional protection is another matter. The right to be heard does presuppose that there be something worth hearing, something legally significant, not merely the plaintiffs' chant of their mantras.


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unique. From the time of its emergence as the dominant standard of liability for accidental harm, negligence has been defined as the failure to exercise reasonable care under the circumstances in which the actions take place.\(^9\) The emphasis placed on the circumstances surrounding each accident is an invitation to treat each case and each claim as sui generis. Over a century ago Holmes argued for a conception of common-law adjudication in which the accumulated findings of juries on commonly recurring issues would over time be crystallized by courts into more or less fixed rules.\(^{10}\) Through repeated adjudication, standards of conduct would evolve into specific rules. As the characteristics of what constituted a viable claim became increasingly concrete, there would be less room for individual storytelling and the variousness of individual claims would decrease. As every first-year law student learns, however, Holmes’ view of negligence law, which he had occasion to try to implement many years later from the bench,\(^{11}\) never took hold.\(^{12}\)

Indeed, one finds quite the opposite trend in negligence law. For instance, even the nineteenth century per se no-duty rules governing landowner liability have slowly eroded in favor of submitting negligence claims to juries for decision.\(^{13}\) Because of the breakdown of even these crystalline rules into muddy standards and the failure of other per se rules to develop, precedents can have preclusive effect only at the highest level of generalization—on abstract points of legal doctrine. Except for the most general doctrinal rules, each case turns on its particular facts.


\(^{10}\) Oliver W. Holmes, Jr., The Common Law 127-29 (Boston, Little, Brown & Co. 1881).

\(^{11}\) See Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927). It appears now to be de rigueur for every tort law casebook to include Goodman, followed by Pokora v. Wabash Ry., 292 U.S. 98 (1934), in which the Court expressed strong doubt about the feasibility of crystallizing variable standards of conduct into fixed rules. See id. at 102-06.

\(^{12}\) One instance of repeat adjudication evolving into a rule can be found in administrative law. The use of official notice, which creates a rebuttable presumption, has been sometimes grounded on prior adjudication of the noticed facts. See Manco Watch Strap Co., 60 F.T.C. 495, 513 (1962). This use of official notice to create presumptions of previously adjudicated facts is exceptional, however, even in administrative law. Most administrative agencies can create crystalline rules more efficiently by means of rulemaking processes.

\(^{13}\) See, e.g., James A. Henderson, Jr., Expanding the Negligence Concept: Retreat from the Rule of Law, 51 Ind. L.J. 467, 510-14 (1976); Johnston, supra note 8, at 379-82, 392-95.
This individualism in negligence adjudication has been partly modi-
ified by the emergence of strict liability rules that establish, in effect, a
kind of categorical "fault." Even here, however, ad hoc, particularis-
tic determinations tend to predominate. In ordinary products liability
cases most of the determinations are more or less special to each case
and each party. This is to be accepted in design defect cases, which
generally differ little, if at all, from negligence cases, but even when
courts use, or purport to use, a true strict liability standard, the appli-
cation of the standard tends to be particularistic. Issues of defectiv-
ness and causal responsibility can be litigated repeatedly
notwithstanding that the same issues have already been resolved in
other cases.

This particularity of claims adjudication is even more vividly illus-
trated by the conventional treatment of causation, under which the
variousness of individual events confounds attempts to fashion useful
general criteria for determining when this element of the plaintiff's
 case has been proved. This tendency is reinforced by the traditional
hostility of courts to statistical and probabilistic evidence, which is
aggregative in character, in favor of individual, "clinical"-type evi-
dence. As if this traditional approach to proving causal responsibil-

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15 Obviously, this is subject to the application of collateral estoppel, which precludes repeat litigation of issues previously adjudicated by the parties. Issue preclusion requires, however, that the party being precluded was a party in the prior adjudication, or in privity with someone who was a party. Martin v. Wilks, 490 U.S. 755, 761-62 (1989). The mere fact that the same issues were litigated, or the same arguments heard, is not sufficient by itself to preclude later relitigation. See Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 338-39 (5th Cir. 1982). Moreover, it is in all cases necessary that the issue to be precluded be identical to the issue earlier determined, that the earlier determination have been based on "actual" litigation, and that the determination have been necessary and essential to the decision. Id. at 341. Such a limited application of estoppel is not a significant qualification of the principle of particularistic adjudication.

16 The DES cases and the emergence of market-share liability represent a hesitant step in the direction of recognizing probabilistic measures of causal responsibility for harms known to be incurred by identified individuals. See Glen O. Robinson, Multiple Causation in Tort Law: Reflections on the DES Cases, 68 Va. L. Rev. 713 (1982). A few courts have indicated that probabilistic evidence of causation, or lack thereof, is not only acceptable but is required in
ity were not sufficiently particularistic to permit each "unique" story to be told in full, the doctrine of "proximate cause" is introduced to ensure maximum particularity.\(^1\)

Furthermore, the determination of damages in tort cases also tends to be highly individualized. Admittedly, some aggregative types of evidence such as actuarial tables or other statistical economic evidence may be used in determining damages. But all such evidence is received subject to the overriding consideration that the courts and juries do justice to the particular individual's injury. Individual storytelling remains the norm and departures from it are received with hostility.\(^8\)

To be sure, beneath the individualistic determinations about fault, causation, and damages there often lie judgments about classes of cases and types of conduct. Surely no judge, and probably few jurors, are wholly innocent of generalized knowledge concerning relevant aspects of a case. Indeed, we doubt that any assessment of culpability, of causation, or of damages could be rationally made without drawing on some knowledge of how such assessments have been made in other cases, however vagrant that knowledge may be. Nor does it seem possible that any judge or juror could reach a judgment in one case without considering how it fit within some larger class of cases.

cases where proof of causation depends on statistical methods. See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1203-05 (6th Cir. 1988). The acceptance of probabilistic proof is an important step away from individualistic determination insofar as it builds on aggregative statistics. However, aggregative methods of proof have been accepted only in rather special cases where individualistic evidence either does not exist or is not trustworthy. See Conley v. Boyle Drug Co., 570 So. 2d 275, 285 (Fla. 1990) ("Market share liability is generally looked upon as a theory of last resort.").

\(^{17}\) Those who recall their first-year torts course can supply their own illustrations. Of course, the effect of proximate cause analysis is to impose an additional layer of factfinding on top of that required to establish actual causation—in other words, a further inquiry into the particularity of the tortious event. Of all aspects of tort law proximate cause is probably the most dependent on artful storytelling—that is, on the way one describes the individual event. See Clarence Morris & C. Robert Morris, Jr., Morris on Torts 163-65 (2d ed. 1980). Since the purpose of proximate cause inquiry is to set limits on tort responsibility, this particularism advances defendants' objectives, not those of plaintiffs. Id. at 165-66. In other aspects of tort adjudication, however, particularism probably tends to be more favorable to plaintiffs, because it tends to focus the jury's attention on the injuries and needs of the plaintiff.

\(^{18}\) Although recent tort reforms such as changes in the rules governing pain and suffering damages, the collateral source rule, and proof of causation might be perceived as departures from the individual model, the extent to which they are precursors of further reform is unclear. See Kenneth S. Abraham, What is a Tort Claim? An Interpretation of Contemporary Tort Reform, 51 Md. L. Rev. 172 (1992).
Nevertheless, these are merely judgments that logically presuppose a generally applicable norm. The formal structure of adjudication remains committed to an individualistic model. Not only are prior adjudications of similar issues not generally binding—except in the limited circumstances permitted by collateral estoppel rules—but knowledge of such cases is generally withheld from the trier of fact.19 The judgment made in one case about a class of claims or type of conduct is permitted to conflict with a judgment made in another case about the same class of claims or type of conduct.

To say the least, treating every claim as unique imposes a large burden on the system. The recent emergence of mass tort cases involving thousands of claimants each20 has dramatized just how great the burden can be and has thereby energized battalions of practitioners and scholars to think of ways to cope.21 To date, coping has been largely confined to measures that, at best, have had only a marginal effect on the underlying problem. Consolidation of claims in class actions and consolidation of cases for pretrial management have introduced some managerial efficiencies, but have not significantly reduced the burdens of the present system.

19 Generally, evidence of other, similar cases is inadmissible on the same relevance ground that generally excludes evidence of prior unrelated occurrences. See McCormick on Evidence § 200 (Edward W. Cleary ed., 3d ed. 1984). Such evidence would also be, technically, hearsay. But the hearsay objection, which goes to the reliability of the evidence, is of secondary importance here. If prior adjudications or settlements are deemed relevant, it would not be sensible to exclude the records of such cases on the ground that they are (unreliable) hearsay since those records are the best evidence of the valuations made in those cases. Indeed, as a practical matter there is no other means of proving the valuations except by reference to the official records.

20 The single phrase “mass tort” obscures a huge difference between two classes of cases. In one class are cases in which the number of claimants is between a few hundred and several thousand. Illustrative are the MGM Grand Hotel fire litigation, In re MGM Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983); the DES suits, e.g., Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980), cert. denied, 449 U.S. 912 (1980); the toxic shock syndrome cases, e.g., Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983); the Bendectin litigation, In re Bendectin Litig., 857 F.2d 290 (6th Cir. 1988), cert. denied, 488 U.S. 1006 (1989); and the Hyatt Regency Hotel Skywalk litigation, In re Federal Skywalk litigation, 97 F.R.D. 380 (W.D. Mo. 1983). In the other class are “mega tort” cases—the Agent Orange, Dalkon Shield, and asbestos litigations, involving hundreds of thousands of claimants.

Traditionally there has been resistance to the use of class actions in mass accident cases on the premise that each claim involves distinctive questions of causation and damage that can only be fairly treated in individualized adjudication, but there now appears a greater willingness to certify classes for class-wide decisions on certain common issues such as due care, generic causation, and punitive damages. Still, as long as class action adjudication is confined to such “front-end” questions of liability and general causation, it cannot resolve the deeper problem of mass claims adjudication: how to handle the “back-end” determinations of individual causation and allocation of awards to individual claimants after common issues of liability and general causation have been resolved. The resolution of these individual issues continues to be accomplished by the tedious process of claim-by-claim adjudication or negotiated settlement.

There have been some efforts to streamline these individual determinations, in particular through the use of aggregative techniques for valuation of claims. Most proposals for reform have focused on the settlement process, however, not on methods of adjudication. Little thought has been given to attempting to transfer some of the techniques employed in the settlement process to the conduct of formal adjudication. In part, preoccupation with the settlement process reflects an assumption about its practical importance: because most claims are settled, it is logical to treat the settlement process as the part of the system that needs most attention. We do not quarrel with the assumption that the settlement process is a key to making the system work. If the overwhelming percentage of claims were not settled, the court system would break down very quickly. At the same time it must be recognized that settlements are influenced by the adjudication process, inasmuch as each party’s right to his day in court is a critical element in settlement bargaining. Each person’s “threat value” in bargaining is a product of the burdens associated with exercising the right to that day in court and forcing his opponent to bear some of that burden. Thus, any attempt to think about reforms of the settlement process — for instance, more efficient methods of process-

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23 See, e.g., Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986).
ing and valuing claims — must look beyond settlement to the ultimate adjudication process.

II. DEPARTING FROM THE INDIVIDUAL MODEL: AGGREGATIVE VALUATION

In a previous article we suggested the possibility of applying some of the innovations that have been developed to encourage settlement of mass tort claims to the process of formal adjudication. In *Cimino v. Raymark Industries*, Judge Parker, a federal district judge in Texas, has innovated along essentially similar lines in adjudicating asbestos claims. We think the basic scheme warrants further judicial experimentation. Our interest in the idea is driven less by the practical need to respond to the vexing problem of mass tort claims, however, than by the questions it raises about the common-law process—about the norms and forms of corrective justice that have traditionally governed the tort system.

The basic elements of our proposal are quite simple. Our scheme envisions the use of statistical claim profiles, or models, to set baseline appraisals of the value of individual claims. The profiles would provide an indication of the amounts paid in judgment or settlement to claimants falling into different categories. These categories would be defined as functions of certain variables that affect liability and of the severity and duration of a claimant's injury or illness. The claim valuation would be a function of both the probability and the magnitude of payout. In effect, the profiles would provide a kind of

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26 751 F. Supp. 649 (E.D. Tex. 1990) (collective adjudication scheme applied to a class of some 2300 asbestos victims, in which damages were to be based on a trial of selected claims representing different disease categories into which the class had been divided).
28 Inasmuch as our valuation would be based on the probability of recovery—more precisely, an array of probabilities associated with different payouts ranging from zero to the highest award imaginable—it differs from the scheme for aggregative valuation of damages proposed in James F. Blumstein, Randall R. Bovbjerg & Frank A. Sloan, Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury, 8 Yale J. on Reg. 171, 178-80 (1990) (proposing “presumptive” scheduling of damages based on prior case
market value of different categories of claims, with prior settlements and adjudications serving as a surrogate for an actual claims market.29

Ideally, claim profiles would be constructed from data derived from prior adjudications and settlements in the same or similar cases. The data would be assembled and modeled by statisticians and other technically qualified experts operating under the direction of special masters appointed by the court. The court would hold a hearing to evaluate the reliability and fairness of the profiles. Such a hearing would have a function similar to a trial of common issues of fact in a conventional class action. The profiles would be defined only by reference to what can best be described as "legally relevant" factors. Categories of claims would be defined by the characteristics of claims or claimants that could appropriately be considered by the finder of fact in any individual trial in order to make determinations of fault or culpability, causation, and damages.

For example, in cases where the basis of liability was the failure to warn of an unavoidably dangerous quality in a product and data showed that differences in information possessed by claimants were correlated with variations in earlier awards and settlements, profiles might take into account variations in different claimants' independent knowledge of the dangerous properties of the product in question. Similarly, in some cases data might show that awards and settlements varied with the type of disease that the plaintiff had contracted, and that such variation was correlated not only with the severity of the type of disease but also with differences in the probability that contracting different diseases was a result of exposure to a substance produced by the defendant. In such cases it would be permissible to define profiles by reference to both differences in the causal probabili-
ties of contracting these different diseases and variation in the severity of the diseases.

An alternative to the above is the Cimino court's technique of conducting special trials of representative claims to determine a set of model valuations for a class of claims. This approach is a less radical departure from the conventional class action trial in that the claim profiles are composites of the claims currently before the court. If one starts with the view that the present system of adjudication is the ideal, then this is a virtue. In our view, however, the goal should be to reduce the variability of claim valuations from case to case. In this respect the Cimino approach is flawed inasmuch as its claim valuations are derived from a single set of trials specifically designed to set such values. In contrast, our proposed scheme would draw on a wider database of prior adjudications and settlements by different juries, courts, or parties. Valuations derived from this wider, more diverse database would more nearly resemble the valuations that an objective claims market would produce. But whatever approach is chosen, the underlying conception of aggregative valuation is plainly a departure from the conventional common-law model.

Nonetheless, in certain respects our proposal would be less of a departure than a number of other recent proposals for across-the-board damage scheduling or scaling. It is highly likely that in traditional common-law cases the magnitude of a plaintiff's recovery is influenced by the strength or weakness of features of the claim that are unrelated to the magnitude of the plaintiff's loss—for example, such features as the probability that the defendant was negligent or that its negligence caused the plaintiff's loss. Under recent proposals for damage scheduling or scaling, however, the sums awardable for specified injuries would not change from case to case. A simple fracture of the tibia, for example, would entitle every successful claimant to a particular award or range of awards. In contrast, under our proposal, because new profiles based on judgments and settlements in

30 See supra note 28.
31 See, e.g., 2 American Law Institute, supra note 21, at 221-23.
32 Of course, the plaintiff's probability of success on the merits would influence the magnitude of settlements. But, since the jury would be unable to discount the sum awarded because of its doubts about liability or causation if the claim were successful, in reaching settlements the parties would have no reason to anticipate such discounting. Therefore, settlement would occur in the shadow of the new rules governing damage scheduling or scaling.
a mass tort case would be constructed for each such case, the aggregate value of particular claims could vary from mass tort action to mass tort action in a manner similar to the variation that occurs across traditional common-law claims.

Valuations of similar injuries or diseases might vary from case to case because of either or both of two factors. First, differences in the facts of different cases having nothing to do with the magnitude of any plaintiff's losses might cause variation in award levels for the same injury in different mass tort settings. For example, the degree of wrongdoing by the defendant, the probability that the defendant's conduct was causally connected with the plaintiffs' losses, or other factors might vary from case to case. Second, variations could be the result of changes over time in the legal rules governing such issues as liability and causation. Later mass tort cases subject to new legal rules would probably generate different aggregate valuations for particular kinds of injuries than earlier cases. Thus, our proposal would be much more capable than is damage scheduling of incorporating the effect of factual and legal variation and legal change on award levels.

Just how much a departure from the common-law approach it would be, however, would depend on how the claim profiles would be used. Our earlier exploration of claim profiles sketched three different uses of profiles, each giving different degrees of effect to the collective judgment represented by the profile valuation. The first and most modest use that we examined was to permit profiles to be introduced as statistical evidence that the trier of fact—a jury in virtually all cases—could consider in evaluating each claim. Considering the profiles as mere evidence of claim valuation, juries would be free to give a profile such force as they considered appropriate. In effect, the profiles would provide a kind of objective check on the individualistic evidence introduced by the parties. In any case, either party might rely on particularistic evidence and seek to challenge the accuracy of the profile. Allowing juries to consider claim profiles might make juries more skeptical about apparently idiosyncratic claims, but we do not have a great deal of confidence that this approach would substantially reduce variation in claim valuation.

A second alternative is to give some kind of special legal authority to the profiles while still preserving the parties' opportunities to intro-

33 Abraham & Robinson, supra note 25, at 141-52.
roduce particularistic evidence contrary to the profile determination. The basic idea is akin to giving the profiles presumptive weight that only a special showing could rebut. A jury would be instructed to determine which of the prespecified profiles most nearly represents the particular claim and then to make an award equal to or within some defined interval around the median claim value of the relevant profile, unless the plaintiff or the defendant showed that the particular claim cannot be fairly represented by any of the profiles. The third proposed use of the claim profiles takes a relatively short step from the second by removing individualized determinations altogether and making the profiles conclusive of all claims. The jury's only job would then be to determine the category into which a claim falls, that is, which profile best represents a particular claim.

Our earlier discussion of these three possible uses was essentially heuristic in purpose, intended to show a sequence of moves from particularized proof to aggregative determinations. On further reflection it now seems to us that there are only two practical moves, not three. Aggregative data could be used as mere evidence or to determine the value of the claim. The intermediate possibility of a presumption would be too cumbersome. Indeed, we are not sure a presumption could be meaningfully applied in this context.

34 Such an instruction would force the jury to disregard outliers in the profile. If the profile were merely used as evidence, presumably the jury should consider the entire distribution of valuations contained in the claim profile. Insofar as the purpose of the presumption here is to constrain jury discretion, however, that purpose could be undermined if juries were permitted to fix their awards at the extremes of the distribution contained in the profile. See Blumstein et al., supra note 28, at 178-79 (proposing similarly to give presumptive weight to the middle range of prior awards).

35 Abraham & Robinson, supra note 25, at 148. Blumstein et al., supra note 28, at 179, also propose to give presumptive weight to prior findings on damages. The effect of their presumption would be similar to that which we envisioned in our earlier article: it would require the jury to give special justification for departures from the presumed range of value. Id. As we noted in our earlier article, however, there is a difficulty in conceptualizing and explaining to a jury just how the profile is to be given special weight while still allowing the parties to introduce particularistic evidence which, by assumption, would more closely fit the individual case sub judice. Abraham & Robinson, supra note 25, at 148. As we argued in our earlier article:

Ordinarily, of course, the effect of such a presumption would be to impose on the party against whom it runs (in this case it would run against both parties) the burden of producing credible evidence to rebut the presumed fact. However, such an effect would not promote our aim of suppressing individualized determinations, whether on liability, causation, or damages. Given that the profile represents a class of claims, rebutting the presumption would require no more than the production of individualized evidence that
this matter here, however, for our present interest is to explore the broader implications of substituting aggregative for individualistic determinations, and for this purpose we shall assume that the claim profiles would be conclusive.

We do not doubt that making aggregative valuations conclusive for all claimants would work a radical change in the common-law system. The change is not so radical as to be beyond the contemplation of practically minded judges, as is evident from Cimino, but it is yet to be seen whether that court's bold innovation will be readily embraced by others. Even within the very special circumstances of asbestos claims—circumstances that have vexed every court that has been unfortunate enough to encounter them in the past two decades—this aggregative approach to adjudication is controversial. Any attempt to implement such a scheme more widely therefore would be certain to provoke attacks from defenders of the ancient ways of implementing corrective justice.

There are two basic criticisms that need to be confronted by any proposal to depart from the traditional model of individualized claims would be routinely submitted anyway. In short, a simple rebuttable presumption in this context might have very little effect.

Id.  
36 See Cimino v. Raymark Indus., 751 F. Supp. 649 (E.D. Tex. 1990). Inasmuch as it derived the aggregative claim valuations from trials of representative claims selected from the class of cases sub judice, Cimino differs from our proposed reliance on a body of previously adjudicated and settled cases as the data source for claim profiles or models. Id. at 653. In terms of the fundamental issues explored here, however, the difference is fairly marginal. As we proposed in our earlier article, Abraham & Robinson, supra note 25, at 146, any use of aggregative data based on claim profiles or models should be subject to a full hearing, probably before a jury, in which the parameters of the profiles and the reliability of the data are subject to the kind of examination that was presumably conducted in the Cimino trials. But our method better fits with the Holmesian notion of a common law evolution. See supra note 10 and accompanying text. Also, because it draws on numerous decisions, made by different actors over time—different courts, juries, and private parties—our conception of aggregative valuation promises a greater degree of reliability than does the method used in the Cimino case. Nevertheless, the same basic issues of due process and fairness can be examined in the context of either scheme.

37 The fate of Cimino itself is uncertain. We were informed by Judge Parker that all but one of the defendants had entered into post-trial settlements, but it was expected that the one holdout would appeal. One other federal court recently adopted a similar plan of trials of selected claims to determine representative damage patterns for the class. In re Shell Oil Refinery, 136 F.R.D. 588, 593-96 (E.D. La. 1991). However, the purpose was solely to establish a basis for assessing punitive damages for the class, not to extrapolate compensatory damages.
adjudication. One criticism derives from the right to a jury trial under the Seventh Amendment and, because the Seventh Amendment is inapplicable to the states, under state constitutional provisions. The second criticism derives from a more vague conception of the intrinsic character of common-law adjudications, reinforced slightly perhaps by notions of due process, but not convincingly supported by any specific due process precedents. We address these criticisms in the following two Sections.

III. INDIVIDUALISM, THE JURY TRIAL, AND DUE PROCESS

A. The Right to a Trial by Jury

Any reform in private rights adjudication that contemplates significant constraints on the role of juries is bound to confront constitutional objections based on the right to trial by jury. We start with the assumption that a complete displacement of the entire tort claim in favor of an administrative scheme would be constitutional.38 However, retaining the basic common-law tort action while curtailing jury discretion with respect to factual issues pertinent to the individual claim would invite a more substantial constitutional challenge.39

The use of aggregative valuations as mere evidence or to support a presumption would be no different from any other evidentiary limitation or burden of proof allocations which, having the imprimatur of historical acceptance, are considered not to compromise the jury’s constitutional prerogatives. On the other hand, according conclusive effect to aggregative determinations clearly would limit the traditional prerogative of juries in making individualistic factual determinations. Whether such a limitation would be constitutionally acceptable depends on how flexibly one interprets the historical pattern of com-

38 The workers’ compensation cases are the most directly relevant precedent. See, e.g., Mountain Timber Co. v. Washington, 243 U.S. 219, 246 (1917) (upholding constitutionality of workers’ compensation plan). The key point here is that the wholesale replacement of the common-law scheme with a statutory scheme transforms the “private right” into a “public right.” Cf. Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n, 430 U.S. 442, 455 (1977) (upholding nonjury adjudication of “public right” claims).

39 The Supreme Court in Tull v. United States, 481 U.S. 412, 426 n.9 (1987), suggested that remedies in a civil case may not require jury determination. The fact that Tull involved a congressionally created cause of action, however, arguably distinguishes it from common-law cases. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51-55 (1989) (distinguishing between “public right” and “private right” claims for purposes of determining the applicability of the Seventh Amendment).
mon-law adjudication, or, more importantly, how flexibly one employs constitutional method.

The traditional response to Seventh Amendment challenges to procedural innovation has been to analyze the underlying right or the particular practice in historical terms to determine whether it preserves the essential elements of the jury trial as they existed in 1791, when the Bill of Rights was adopted. The initial inquiry is to ascertain whether the particular right or availability of the particular remedy in question would have been decided by a jury at that time. An affirmative answer is a given in all tort cases with which we are interested. What remains to be considered are what limitations can be placed on jury discretion, what issues must be considered by the jury, and under what directions or constraints. Although this inquiry is also framed in historic terms, the Supreme Court has shown considerable flexibility in upholding contemporary practices that do not find exact counterparts in historic jury trials. For instance, in upholding directed verdict practice and collateral estoppel, the Court has emphasized that the Seventh Amendment does not bind the federal courts to the exact incidents or details of a jury trial according to the common law in 1791 but “preserve[s] the basic institution of jury trial in only its most fundamental elements.”

This interpretation of the Seventh Amendment to accommodate changing patterns of common-law adjudication has been carried one step further by an important but controversial Third Circuit decision in Japanese Electronic Products, which held that the jury trial right does not extend to cases where issues, though formally within the province of juries, are so complex that juries could not reach a

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40 See, e.g., Tull, 481 U.S. at 417.
41 See Galloway v. United States, 319 U.S. 372, 388-96 (1943); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935). Such procedures for controlling jury findings have long been rationalized on the ground that the sufficiency of evidence to sustain a jury finding is a question of law, which is for the court to determine. Redman, 295 U.S. at 659. See also Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935) (dictum on constitutionality of remittitur drew on law-fact distinction).
42 See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333-37 (1979). As in Galloway, the Court in Parklane found no exact historic counterpart to the present practice of collateral estoppel without mutuality but upheld it on the ground that the Seventh Amendment did not limit courts to the exact procedural incidents of a jury trial as they existed in 1791. Id. at 336-37.
43 Galloway, 319 U.S. at 390, 392.
rational decision. The court held that insistence on a jury trial in such cases would conflict with the due process right to rational factfinding. Because the due process right is more fundamental than the right to a jury, the latter must give way to the former. The court’s decision is controversial and its status quite uncertain. In a contemporaneous case the Ninth Circuit rejected arguments that the Seventh Amendment itself contained a “complexity exception” and that due process required suspension of the jury trial for complex issues. No other court has since addressed the question.

As a matter of practical implementation we doubt that inquiries into the competence of juries could be easily confined. If complexity is understood simply in terms of the ability to understand particular factual aspects of a case, one can readily imagine a very large domain for application of this principle. It does not take much legal ingenuity to transform almost any case into a mare’s nest of complexity. At least on first appearance many of the issues involved in ordinary medical malpractice or products liability cases seem quite as difficult as the issues in Japanese Electronic Products, which consisted mostly of issues of economic costing and pricing standards relevant to charges of predatory pricing. The potentially vast reach of any “complexity exception” to the Seventh Amendment is reason to be cautious about embracing the decision. Still, we find it hard to resist the general principle that the right to a jury trial is subordinate to a due process-based right to rational factfinding.

We need not assume a clear conflict between the jury trial and due process, however, in order to conclude that the issue ultimately must be resolved in due process terms. Whatever the reach of the right to trial by jury, it extends only to matters that are properly before the court. A claim or an issue that has been previously adjudicated is not

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45 Id. at 1084.
46 Id.
47 In re U.S. Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980).
48 It is noteworthy that the complexity of the case in Japanese Electronic Products lay not merely in the fact that the issues were conceptually difficult, but also in the volume of evidence and the time required to sift through it. It is this aspect of the case that suggests the parallel to mass accident litigation, such as the asbestos cases, where the volume of claims threatens to overwhelm the capability of courts employing conventional, individualistic methods of adjudication.
properly before the court, and hence is not a subject for the jury to
determine.\textsuperscript{49} Where claim valuations have been previously deter-
mined by approval of claim profiles, or by special trials as in \textit{Cimino},
the conventional principles of issue or claim preclusion apply. Al-
though the method by which the claims have been adjudicated can
be challenged, that challenge properly turns on due process, not the
right to jury trial.\textsuperscript{50}

Shifting the issue in this way from one of jury trial right to due
process allows us a broader look at the fundamentals of fairness.
Unfortunately, such a turn toward fundamentals has all the problems
associated with "deep" questions in general: the deeper one digs the
darker it gets. With the jury trial right we have some illumination
from historic patterns of judicial practice and a substantial body of
contemporary precedent interpreting or embellishing on those pat-
terns. With due process we have little illumination from either
source.

\textbf{B. The Scope of the Procedural Due Process Right to a Hearing}

Three elements of a common-law trial have implications for proce-
dural due process: notice,\textsuperscript{51} jurisdiction,\textsuperscript{52} and an opportunity for a
hearing.\textsuperscript{53} The first two elements are irrelevant to our inquiry because
the use of collective adjudication techniques does not require any
change in the requisites of either. The sole question, then, is whether
the elimination of individualistic factual determinations violates the
right to a hearing. The scope of the procedural due process hearing
right in judicial trials has not received the kind of attention that has
been lavished on this question in the context of administrative pro-
ceedings,\textsuperscript{54} no doubt because administrative agencies have produced

\begin{itemize}
\item \textsuperscript{49} See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 325 (1979).
\item \textsuperscript{50} In \textit{Cimino} each of the special trials was conducted before a jury. \textit{Cimino} v. Raymark
Indus., 751 F. Supp. 649, 652-53 (E.D. Tex. 1990). In our proposed scheme, the hearing on
the claim profiles could be a regular jury trial, though we are skeptical of the usefulness of a
jury in such a hearing inasmuch as the hearing would focus on highly technical questions of
statistical methodology.
\item \textsuperscript{52} See Pennoyer v. Neff, 95 U.S. 714, 733 (1878).
\item \textsuperscript{53} See Hansberry v. Lee, 311 U.S. 32, 40 (1940).
\item \textsuperscript{54} To say that administrative due process precedent is "abundant" perhaps understates the
reality. Since the legal maturation of the modern welfare state (circa 1970, the date of
Goldberg v. Kelly, 397 U.S. 254 (1970)), there has been a veritable flood of due process cases

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more deviations from the historic (circa 1791) model of adjudication than have the courts. Because we propose the application of aggregative techniques in common-law trials, we examine the due process issue in that context.

In common-law trials the principal occasion for addressing the question arises in applying res judicata or collateral estoppel. In this context the general principle is clear: a person may not be precluded from litigating a claim or an issue that has been previously litigated unless she participated in the prior adjudication or is in privity with a participant. "Participation," of course, is a term of art: a member of a class may be precluded from relitigating claims or issues that have been previously adjudicated for the class even if she was not an actual participant, provided that she was adequately represented by an actual participant. The key here is defining the requirements of representation.

The use of collective adjudication is envisioned primarily for class actions involving relatively homogeneous claims. Although our proposal is not necessarily limited to large class actions like the asbestos cases, we nevertheless assume that class action cases would be the principal vehicle for employing aggregative methods. In this con-
text, claimants would be represented in the hearing to determine the claim profiles in the same way that they are represented in any class action determination of common issues of law and fact. To be sure, there is a difference between adjudication of issues that are truly common, in the sense of being identical for all parties, and adjudication of issues that are merely similar. But we think that difference does not have constitutional significance.

Collective valuations have passed constitutional muster in several contexts. In *Eisen v. Carlisle and Jacquelin* \(^{59}\) the legality of aggregative valuations was before the Second Circuit in the form of an attempt to establish a so-called fluid class recovery scheme. Such a scheme was central to the district court's finding that the class action was manageable, hence certifiable. \(^{60}\) Plaintiff, an odd-lot investor, had brought an antitrust class action on behalf of himself and other odd-lot investors, a class the court estimated to comprise some six million traders. Because the losses alleged to have been suffered by individual traders were trivial in amount, administration of the damage portions of the trial was not practicable if it required separately calculating and distributing the awards to each member of the class. In lieu of such a conventional procedure, the district court constructed a scheme in which aggregate damages would be determined for the class as a whole, to be paid into the court and then distributed by summary procedures to the odd-lot traders who had traded during the period of the violation or were trading at the time of distribution, regardless of whether the trader had been injured by the antitrust violation. Any residue left after these distributions would be used to lower fees paid by future odd-lot traders. \(^{61}\)

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See, e.g., United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). Of course, parties whose rights will be affected by the rule have a formal opportunity to participate in the rulemaking proceeding, typically by written submissions to the agency, and this opportunity might be said to satisfy their due process rights. As with legislation, however, the binding effect of the rule does not depend on whether the person affected participated in or could have been a party to the rulemaking proceeding. A person who was not even alive at the time of the rulemaking would be bound by it no less than a person who was alive and a participant. In any event, inasmuch as the right to participate in rulemaking is the right to participate as a member of the interested public, one can hardly hold up such participation as a meaningful example of the right to individualized treatment.

\(^{59}\) 479 F.2d 1005 (2d Cir. 1973), vacated on other grounds, 417 U.S. 156, 173-76 (1974).


\(^{61}\) Id. at 264-65.
The court of appeals reversed the lower court’s certification of the class on two grounds: the absence of provision for individual notice to each member of the class—the point on which the Supreme Court affirmed—and the unmanageability of the class. In holding the class to be unmanageable the court rejected the fluid recovery scheme as unauthorized by Rule 23.\textsuperscript{62} Describing this inventive scheme as “fantastic,” the court went on to state that if such a scheme were authorized by Rule 23, it would violate due process.\textsuperscript{63} The status of the fluid recovery scheme under Rule 23 since \textit{Eisen} is uncertain: some courts have flatly rejected it,\textsuperscript{64} others have approved it for limited situations,\textsuperscript{65} still others have approved it as part of a settlement.\textsuperscript{66}

Few of the decisions have even mentioned due process as an issue. After \textit{Eisen}, one district court considered and explicitly rejected any due process challenge to aggregative damage assessments.\textsuperscript{67} Other decisions that have approved fluid class recoveries in special circumstances have found, by necessary implication, no due process objection. Furthermore, when certification of the class has not been an issue, courts have upheld aggregative damage awards if individualized awards are impracticable. For instance, in employment discrimination cases under Title VII a number of courts have approved back-pay

\textsuperscript{62} \textit{Eisen}, 479 F.2d at 1015-18.

\textsuperscript{63} Id. at 1018. The court did not elaborate on its assertion that the fluid recovery scheme would violate due process. The only discussion of pertinent cases appears in the context of distinguishing three cases relied on by the lower court in support of fluid class recovery. \textit{Bebchick} v. Public Utils. Comm’n, 318 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963); \textit{West Virginia} v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff’d, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971); \textit{Daar} v. Yellow Cab Co., 433 P.2d 732 (Cal. 1967). \textit{Pfizer} was correctly distinguished on the ground that it involved a consensual settlement. \textit{Eisen}, 479 F.2d at 1012. The court distinguished \textit{Bebchick} on the ground that it was not a class action case and \textit{Daar} on the ground that it was not a Rule 23 case. Id. But these distinctions go only to the question whether fluid class recovery is authorized by Rule 23 and are irrelevant to the due process question.


\textsuperscript{65} See Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990) (approving fluid recovery for limited purpose of distributing unclaimed damages); \textit{Nelson} v. Greater Gadsden Hous. Auth., 802 F.2d 405, 409 (11th Cir. 1986) (same); \textit{Simer} v. Rios, 661 F.2d 655, 676 (7th Cir. 1981) (validity of fluid recovery must be considered on case-by-case basis), cert. denied, 456 U.S. 917 (1982).


awards based on average damages for the class of claimants. In all important respects, the averaging of such awards involves the same problems of collective assessment and approximation of actual damages as the fluid recovery device, yet due process has not even been raised as an objection.

Precedent aside, the nature of the due process objection is unclear. It is not even apparent from the court’s dictum in Eisen whose right to due process would be violated. It is hard to see how the plaintiffs in that case could complain, since the court conceded that without a class action no plaintiff would bring an action and that this scheme was necessary to make any class action manageable. In a different context, such as that of the mass tort action, some plaintiffs will be able to have their individual claims adjudicated at some time. In such a case their argument would have to be that their individual right to due process cannot be sacrificed for the sake of others whose claims would be squeezed out by the demands placed on the judicial system. But such an argument has a very hollow ring, because it implies that some individuals’ claims to due process have priority over others. If there is no constitutionally-required means of selecting which claims will and which will not be tried, it cannot be that a plaintiff’s right to due process is denied by collective adjudication. If there is a due process right to individualized adjudication, it must be in recognition of an equal right enjoyed by other, similarly situated claimants. A system designed so that all claimants cannot enjoy the same due process “right”—because one claimant’s demand for individualized treatment forecloses another claimant’s ability to be heard—arguably denies the latter the equal protection of the laws.

Even if it were practicable to try every claim, it does not follow that due process forbids aggregation and averaging of valuations. Averaging does imply that there will be some error in measuring the value of individual claims, with some claims being overvalued, some underval-


69 Judge Parker suggests this point in Cimino, 751 F. Supp. at 666, albeit in a rather off-handed fashion that is more rhetorical than substantive.
ued. Although reasonable accuracy is a due process value,\textsuperscript{70} that value does not require error-free precision in adjudication. If it did, the entire legal system would be subject to constitutional challenge at every turn. If error were a basis for a due process challenge to averaging claim values, it would be equally a basis for challenging the traditional, case-by-case system of adjudication which is notoriously tolerant of error: no one with a modicum of trial experience will imagine that the traditional common-law trial, the jury trial especially, is an instrument of fact-finding precision.\textsuperscript{71}

If plaintiff’s due process objections are unpersuasive, then those of the defendant are even more so. Again, we must take some liberty in speculating about the nature of the argument because it has not been fully articulated.\textsuperscript{72} We assume that the defendant’s argument would be essentially the flip side of the plaintiff’s. Where plaintiffs would object to the possibility of undercompensating some victims, defendants would object to overcompensating others. Our response to defendant’s objection is partly the same as to the plaintiff’s, but this response has an additional bite for the defendant: the error inherent in averaging is a function of the accurate distribution of damages, not of any error in assessing the total amount awarded. From a plaintiff’s perspective any distributional error is obviously important, but from the defendant’s perspective distribution should be a matter of indifference as long as the total amount of damages is accurately assessed.

There is no reason to think that total damages could not be measured with reasonable accuracy. Indeed, it is likely that aggregative methods will provide a truer measure of the total injury inflicted than simply taking the sum of individual awards in separate proceedings.\textsuperscript{73}

\begin{itemize}
\item\textsuperscript{70} See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (reasoning that risk of error is one of three factors to be balanced in a due process analysis).
\item\textsuperscript{71} See Michael J. Saks & Peter D. Blanck, Justice Improved: The Unrecognized Benefits of Sampling and Aggregation in the Trial of Mass Torts, 44 Stan. L. Rev. 815, 833-36 (1992) (arguing that any individual jury decision is analogous to an unrepresentative sample of potential jury verdicts on the facts of a particular case, and that the aggregation procedures employed in cases such as Cimino are more accurate than individual jury verdicts because of the effect of the statistical sampling on which aggregation is based).
\item\textsuperscript{72} As we noted, the Eisen opinion contained no specification on this point.
\item\textsuperscript{73} We should note here one difference between the tort cases and the fluid class recovery cases. In the latter cases the determination of the aggregate damages could be determined by reference to the total volume of transactions and the amount of the illegal overcharge applicable to each type of transaction. There is no need to examine each individual victim’s transactions for this purpose. In the tort case, no such simple measurement of aggregate
\end{itemize}
No doubt, because the burden of such an effort will discourage small claimants from coming forward and defendants may save a considerable amount in damage payments, defendants will often prefer a system in which each victim must separately prove individual injury. Even if no claimant were discouraged, repeated adjudication of individual damage claims by the defendant offers the possibility that vigorous litigation will reduce aggregate recovery. But it strains belief that such strategic preferences would be sanctified as requirements of due process.

Aggregation and averaging of damages is simply one form of collective adjudication that has been accepted in a variety of judicial and administrative contexts. Every class action involves an adjudication of certain general facts pertinent to the class that will foreclose hearing any individual claims that are inconsistent with the general findings. For instance, in a class action on behalf of persons claiming that the defendant's product caused them to contract cancer, a finding that the product is not a carcinogen precludes no adjudication of individual claims. In the case of voluntary class actions—for instance, those under Rule 23(b)(3)—the ability of members to opt out of the class and pursue their individual claims may be important in supporting the constitutionality of such binding determinations. Dicta in the Supreme Court's decision in Phillips Petroleum Company v. Shutts74

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74 In Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), the Court cast some doubt on the constitutionality of mandatory class actions with its flat statement that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class." Id. at 812. The immediate concern of the Court in Shutts, however, was jurisdiction of a court over claimants in the absence of minimal contacts between claimants and forum. On this ground, the Court's statement about the necessity of allowing opt out may be limited to the jurisdictional problem of distant forum abuse. See Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 52 (1986).
so suggests. Lower courts nevertheless have continued to certify non-opt-out class actions in limited fund cases.\footnote{See In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 824-34 (Bankr. E. & S.D.N.Y. 1991).}

Admittedly, the limited-fund action presents an unusually compelling case for binding all members of the class in a single adjudication. Permitting individuals to pursue separate claims runs the risk of an inequitable distribution of compensation if early claimants draw down the fund disproportionately, or perhaps exhaust it altogether. If, as we argued earlier, due process does not entitle one plaintiff's claim to preempt another's, there can be no due process right to opt out in this situation. The vice of opt-outs in the case of limited fund class actions, however, is not simply that they create the risk of inequitable distribution of the fund, but that they entail unreasonable transaction costs to ensure equity among claimants. Consoliated treatment of all claimants reduces the costs of comparing and, as necessary, compromising the claims. Coordinating and reconciling such claims in separate cases, on separate schedules, might not be impossible, but it would be costly. Any assessment of due process rights should take account of such costs, balancing them against the gains to the plaintiff of pursuing a separate claim.\footnote{See Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that due process requires balancing three distinct factors: private interests at stake, risk of error and probable value of additional procedures, and Government's interest in minimizing fiscal and administrative burdens).} Just as some plaintiffs have no due process right to subordinate the equally legitimate claims of others, so also they should not have the right to impose unreasonable costs on the system simply to allow them to tell their own "unique" stories.

The foregoing arguments are compelling for limited fund cases, but they are not limited to such cases. The transactional efficiency argument for consolidation is persuasive whether the fund is limited or not. Although the exact benefits and costs may be somewhat different in the two cases, we believe that a conscientious balance will still favor collective adjudication in cases involving large numbers of claims. The implicit premise of allowing binding class action determinations is adequate representation of the class by the named parties—which realistically means representation by lead counsel.\footnote{See Greenfield v. Villager Indus., 483 F.2d 824, 832 n.9 (3d Cir. 1973) ("Experience teaches that it is counsel for the class representatives and not the named parties, who direct and manage these actions.")}. But the practical
reality of representation in class actions provides a very infirm basis for resting anything important on it. In large class actions, representation of individual members is more formal than substantive. The most one can claim is that the class action representatives are Burkean agents who are required to act in the best interests of their constituents but who are not bound to represent their actual preferences. We see no difficulty in assuring that claimants bound by collective adjudication under our proposed scheme, or any others like it, such as the Cimino scheme, receive adequate representation under the loose standards that are now accepted in ordinary class actions.

C. Substantive Due Process

To this point we have assumed that the due process objections to aggregative techniques are procedural in character and are addressed to the form of adjudication. That seems to be the sense of what little discussion of the subject one finds in the cases. Reflecting on the weakness of the purely procedural argument against aggregative valuation, however, causes us to think that the argument might be one of substantive rather than procedural due process. The essence of this argument is that a plaintiff with a cause of action in tort has a constitutional right to be compensated for the amount of her loss, and that a


For Burke's concept of political representation see Edmund Burke, Speech at Bristol Previous to the Election, in I The Works of Edmund Burke 309-10 (New York, Harper & Bros. 1837); see also Hanna F. Pitkin, The Concept of Representation in Representation 1, 10 (Hanna F. Pitkin ed., 1969) (distinguishing between acting for and standing for another).

For instance, representatives are not bound by the registered preferences of even a majority of the class members in proposing settlement. Indeed, courts have approved class settlements proposed by class representatives over the objection of a majority of members of the class, see TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462-63 (2d Cir. 1982), or of the named plaintiffs, see Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir.), cert. denied, 459 U.S. 828 (1982).

Indeed, given the reality that class action attorneys act as virtually autonomous enforcement agents, we are tempted to suggest that the whole idea of representation in class actions is artificial and probably could be abandoned without frustrating any of the values served by class actions or by the limitations on their use. See Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1 (1991). It is not necessary for us to argue that point, however. It is enough simply to argue that our proposal for collective adjudication comports quite comfortably with the standards for ensuring representation.
defendant in a tort action has a constitutional right not to pay a plaintiff any more than the amount of her loss. Aggregative valuation would violate both rights, because the compensation awarded would not always perfectly reflect the amount of the plaintiff’s loss. Stated in this way, the argument runs counter to most of the constitutional law of the last half-century. If, as Justice Holmes famously declared, “the Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,”81 neither does it enact Aristotle’s Nichomachean Ethics, the font of corrective justice ideals.82 On this view, government has broad authority to modify the goals of tort law by departing from, or dispensing entirely with, the features of tort law that promote corrective justice, just as it would have authority to strengthen those features.

A different kind of substantive due process attack on our proposal might be that, because aggregative valuation is at odds with the compensatory purpose of tort law, it lacks a rational basis. Under our proposal some plaintiffs would receive payments in excess of their “actual” losses, while some would receive less. Correspondingly, a defendant would pay some plaintiffs more than their “actual” losses and some plaintiffs less. The question is whether there is a rational basis for this result. Our answer is that the issue is not whether there is a rational connection between collective adjudication and the compensatory aims of tort law; the issue is precisely what the compensatory aims of tort law should be. Tort law should sacrifice a measure of corrective justice—conceived as full individualization—in order to achieve more efficient forms of adjudication and more even-handed distribution of compensation. Even if our proposal were viewed as a departure from the existing aims of tort law rather than as an improvement over current methods of achieving those aims, the due process clause places almost no substantive limit on government’s authority to modify those aims.

Moreover, an additional response that can be made to a defendant’s substantive due process attack on aggregative valuation—a response similar to that which we made to the procedural due process attack—

is that any "overpayment" made to some plaintiffs will necessarily be offset by "underpayment" to others. The defendant will not be made to pay any more than the aggregate loss suffered by all plaintiffs. In fact, because aggregative valuation would reduce the variance of expected damage payments defendants would face, risk-averse defendants would benefit from the approach rather than merely break even under it. Since the aggregate effect of such valuation on defendants is that they suffer no disadvantage, at least from the point of view of defendants a substantive due process attack on aggregative valuation must be based entirely on abstract principle.

At bottom, the substantive due process argument against collective adjudication simply repeats the argument against workers' compensation rejected long ago. The present argument is somewhat different in being directed not to the basis of defendant's liability but to the manner in which the amount of its liability is determined. This difference is immaterial, however, and the basic response to the due process challenge is the same in both cases: neither substantive due process nor procedural due process require preserving the traditional goals of tort law. If collective adjudication is constitutionally vulnerable because it does not take adequate account of individual circumstances, so too is a very large domain of substantive legal rules.

Indeed, if the mere failure to take individuality into account raised due process objections, then no current legal rule would be safe from challenge. Virtually all legal rules generalize in some degree, thereby suppressing individual circumstances that compromise the ideal of fairness as individualism. Even tort law, with its penchant for case-by-case, individualized adjudication, nevertheless employs some generalized rules and standards that suppress individualism to some degree. Yet we think no one would take seriously a challenge to, say, strict products liability, merely because it sets categorical standards applicable to product manufacturers. In short, the demands of due process, considered either in procedural or in substantive terms, are very undemanding.

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84 See, e.g., Goss v. Lopez, 419 U.S. 565, 579, 581 (1975) (reasoning that procedural due process requires a "some kind of hearing" and "rudimentary precautions against unfair or
The fact that the Constitution does not embrace the classic conception of corrective justice, however, does not fully resolve the fairness issue. Whatever the formal requirements of due process, we do not doubt that individualistic adjudication continues to have a powerful hold on the American mind. At least in the judicial arena we continue to cling to individualistic storytelling and ad hoc decision-making, subject only to the loosest of constraints imposed by precedent and the minimal demands of relevance. Those who seek standardization look mostly outside the common law altogether, to social security disability or workers' compensation, the apparent belief being that the tort system should not be contaminated by standardized approaches to compensation. Yet this argument is rather odd: if the issue is fairness, how is it we tolerate unfairness in administrative programs that suppress individualization? Surely such a fundamental value as fairness ought not to turn on the arbitrary labeling of the process as administrative or judicial. Even setting aside this apparent contradiction, the question is whether and why it might be thought that fairness requires individualization in either judicial or administrative settings. We turn next to that question.

IV. INDIVIDUALISM AND FAIRNESS

The argument for individualization is composed of a number of different assertions. Perhaps the most fundamental assertion is based on mistaken findings); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (applying minimal rationality review to a substantive due process claim).


Putting it in constitutional terms, there is only one specification of due process and it applies to administrative as well judicial process. There is no textual basis for construing the Due Process Clause differently for courts and agencies, but it is possible that the requirements of due process may be somewhat more flexible in accommodating the special needs of administrative programs. Cf. Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 455 (1977) (Seventh Amendment does not forbid allocating certain factfinding functions to agency as part of a general administrative program, even though the same function would require a jury if it were performed in federal courts). If some particular procedure fails the test of due process, it presumably fails it whether the forum is judicial or administrative.
the notion that rigid rules cannot do justice to individuals without taking the unique particulars of each case into account in reaching a decision. The argument is correct, as far as it goes. All collective determinations, which includes all fixed rules, ignore factors that on some liberal conception of justice could be considered to be intrinsic to a just disposition of the controversy in question. From this perspective, any compromise of individualized adjudication is, pro tanto, a compromise of justice. This simple syllogism is appealing, however, only at an unreflective level of understanding. Taken at face value, such a conception of justice would entail nothing less than an abandonment of all rules and standards in favor of some form of unrestrained inquiry into the unique circumstances of the individual claimant. Even the most ardent admirer of ancient equity, meting out justice by the measure of the chancellor's foot, would find it difficult to argue for a system of adjudication wholly ungoverned by some collective standards that limit the individualistic inquiry into those special stories that each individual wants to tell in the name of "justice." On full reflection, the idea of defining justice in terms of unconstrained individualism is both quixotic and ethically dubious.

First, to say that fairness requires attention to the distinctive details of each individual accident or each individual actor is hopelessly overbroad. In truth, attention to the details of individual cases is, and must be, selective. Indeed, this selectivity is required by conventional conceptions of corrective justice. Thus, the right of a victim to recover damages for tortious injury is not affected by the victim's general economic need, or by his general moral character. A rich sinner has the same right to recover from a poor tortfeasor as a poor saint does from a rich tortfeasor. In such cases, information about the parties' anterior economic status or moral character is suppressed in the interest of focusing on the claim arising from a particular event. This suppression of information is said to follow from the need to keep separate the domains of distributive and corrective justice.\(^\text{87}\) We agree that correcting wrongful harms is not an appropriate occasion for a general inquiry into the respective needs and/or moral characters of the parties. The consequence of this feature of corrective justice, however, is the suppression of much detailed information about individuals that might be thought relevant to some independent the-

ory of justice. To this extent otherwise relevant information is not taken into account.

Second, the rules governing recovery in tort have never gone so far as to require complete individualization. Rather, corrective justice has always been subject to compromise in the service of other goals. Wrongful death recoveries were unavailable at common law and have been limited by statute. In some jurisdictions, comatose plaintiffs are not permitted to recover for their loss of the capacity to enjoy life. Furthermore, in awarding lump-sum recoveries for future loss rather than periodically assessing the magnitude of a claimant's losses, the tort system falls short of doing perfect corrective justice.

Third, there is inherent in any general rule the risk that it overgeneralizes. The pertinent question is what the optimum level of generality should be, in light of this risk. Given the administrative and uncertainty costs associated with individualized adjudication in modern tort litigation, the traditional level of individualization is almost surely far from optimal. And the modest moves away from individualization made by the reforms of the last two decades probably still fall short of striking an optimal balance between doing "perfect" justice in the individual case and reducing the administrative and uncertainty costs entailed in doing so. For example, we can easily imagine employing devices resembling the profiles we have proposed for mass tort cases in ordinary tort cases as well. On their own initiative the courts might develop damage profiles for commonly recurring forms of injury, or legislatures might mandate the preparation and use of such profiles in tort litigation. Profiles might be merely evidentiary,

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88 For that matter, virtually all inquiries into the "justice" of a particular action, whether considered from a corrective or distributive justice point of view, abstract from human and cultural conditions that some philosophers regard as essential to a more complete ethical inquiry. See, e.g., Charles Taylor, Sources of the Self: The Making of the Modern Identity 53-90 (1989); Bernard Williams, Ethics and the Limits of Philosophy 174-96 (1985).


or they might be binding in any case in which the jury found that the plaintiff fell within a particular profile.

One argument against adopting the latter approach in this context is that giving the profiles a binding effect would hinder the gradual evolution of the law, an important aspect of common-law adjudication. The more the adjudication of cases becomes collectivized, the more it takes on the characteristics of legislation, and the more the process becomes legislative the more it undermines what has been said to be the "boast and excellence of the common law,"91 its capacity to adapt as circumstance and maturity of experience show to be desirable.92 From this perspective individualized adjudication is part of the "deep" structure of the common-law system.

Although we believe this objection has considerable force, it also has an ironic edge to it. The substance of the objection is that individualization is necessary to make the common-law system function effectively, which implies that the justification for individualized adjudication is not simply that the parties deserve it, but that it is desirable because other, future parties will benefit from the incremental legal change that individualization facilitates. Under the traditional view, the parties to a tort claim have a strong right to individualized treatment. But under our analysis, this right is weak if it is a right at all, because individualization is employed as a means to an end—the facilitation of legal change—having little do with the parties holding a "right" to this form of justice.

Fourth, there is a conflict between the ideal of doing justice in the individual case and the equally fundamental ideal of fairness as equality of treatment. The more judges and juries are permitted to pursue the varying details of each claim and claimant, the more they will generate uneven outcomes across cases and parties. This conflict between individualization and equality is more frequently finessed by artful categorization than confronted. Equality means like treatment of persons in the same category. Everything turns on how the relevant categories to be compared are defined. The common law has defined the relevant categories in such a way as to minimize the basis for interpersonal comparison. Race is a relevant category, therefore

91 Hurtado v. California, 110 U.S. 516, 530 (1884).
people must be treated alike with respect to racial characteristics. Economic circumstance is not a relevant category, hence persons having identical economic injury need not be treated alike.

For most purposes pertinent to his claim, each person is in effect a separate category. For example, Homer, a fifty-year-old Louisiana dock worker with five dependents, a mortgage and a 1988 Chevrolet, dies from asbestos-induced mesothelioma. Harry, a fifty-year-old Texas factory worker with a family of five, a mortgage and a 1980 Volvo, dies from asbestos-induced mesothelioma. Legally each is a category by himself. Such is our commitment to the uniqueness of each individual and his circumstances that we cannot contemplate the notion that both might together form a single category. Suppose, however, that Harry is African-American, or that her full name is Harriet. If each individual is a category by himself or herself, then a system of corrective justice through individualization in effect permits discrimination against or in favor of these individuals, on the basis of race or gender. Even if the jury awards Harry or Harriet one-half the damages it would have awarded Homer, there is no existing legal mechanism available to reverse such discrimination. In contrast, aggregative valuation and other collective procedures would mitigate or completely neutralize this effect of individualization.

Of course, part of the reason for treating individuals as entirely separate is institutional. Except in the exceptional class action or consolidated case, we have no means for comparing individuals and their legal treatment. The claims by Harry and Harriet will not often be brought in the same jurisdiction, let alone in the same court. But this cannot be the whole of the explanation, for even when they are joined as members of a single class action the law still insists on giving the maximum play to their individual circumstances. Indeed, it is just this insistence that traditionally was thought to make class actions unsuitable for mass tort cases—the notion that the separateness of the individual claims overwhelms common questions such as liability, generic causation, or punitive damages.93 If, as we earlier observed, the pressure of mass tort actions has induced courts to rethink this notion, the extent of this rethinking is still limited. Recognition of the usefulness of certifying a class for common issues or of consolidating cases for pretrial or trial of common issues has not yet altered the

basic model of individualized adjudication, the "‘deep-rooted historic tradition that everyone should have his own day in court.’"^{94}

This tradition is reinforced by another, equally deep-rooted sense that tort cases are inquiries into the moral quality of the defendant’s behavior. Despite the modern development of legal and economic theory that has supported a substantial expansion in the scope of tort liability on non-moral grounds, in any given case there is still particularized inquiry into the moral character of the defendant’s behavior and the plaintiff’s relation to it. The general rationale for the imposition of liability has evolved away from moral evaluation, but each case remains a morality play. Given the moral character of the inquiry, individualization is inevitable because a modern appreciation for the complexity of moral relations dictates that there be individualized inquiry into those relations—in this instance the relations between the plaintiff and the defendant. A sense of fair play mandates that a party who is for all intents and purposes accused of immorality be entitled to offer an individualized justification for his, her, or its conduct.

All this means that the categorical and statistical treatment of claims that is so characteristic of insurance systems is largely absent from the adjudication of tort claims. Because it is a mechanism for the pooling of risk, insurance employs an ex ante perspective. Through its use of the laws of probability, insurance recognizes the inevitability of personal injury, charging categories of potential victims or injurers in accordance with the likelihood that they will suffer loss or cause harm. Whatever moral calculations there are, and there are few, occur in fashioning these categories and setting the premiums charged. Aside from exclusions of coverage for bodily injury or property damage resulting from the most blatant forms of moral hazard,^{95} there is no effort to conduct an ex post inquiry into the moral quality of the policyholder’s conduct.

In contrast, the essence of a tort claim is precisely to conduct an ex post inquiry into the particular way in which the plaintiff suffered the harm alleged in the claim. Notwithstanding the very high probability

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^{95} For example, some forms of insurance exclude coverage of harm caused intentionally. See Robert E. Keeton & Alan I. Widiss, Insurance Law 493-94 (student ed. 1988).
that the defendant is protected in whole or in part by liability insur-
ance, the defendant’s conduct often is microscopically examined. And notwithstanding that the modern rules governing tort liability are structured in recognition of the statistical inevitability—indeed, in some cases the economic unavoidability—of at least some bodily injury and property damage, the tort law inquiry proceeds by looking backward, as though the system were writing on a tabula rasa in each new case. To do otherwise would require greater acknowledgment of the inevitability of accidental injury, and a concomitant de-emphasis on the moral quality of the conduct that produces such injury. These hallmarks of any insurance system are antithetical to the morality play at work in tort law.

Still another reason we seem to be so wedded to traditional forms of corrective justice is our belief that otherwise the high variance among claims will be suppressed. Determinations that would be made dozens, hundreds, or thousands of times under a heavily individualized system may be made only once when decisions are collective. Asbestos manufacturers may be found to have known or not to have known of the dangers of that product, Bendectin may be found to cause or not to cause birth defects, and so forth. Because they apply to large groups of claims, such findings will either treat all the claims correctly or all the claims incorrectly.

Thus, one of the great advantages of an adjudicatory system heavily focused on individualized inquiry is that its errors also are individualized. Decisions on key issues are made repeatedly, and any errors committed because of flaws in the process have a chance of averaging out over time. We think that this would be a perfectly good rationale if there were justification for thinking that collective adjudication of tort claims would often result in error. But given the resources that can be invested in ensuring that errors are not committed, the price paid to honor the tort system’s aversion to the risk of error is very high. Similar or identical issues are litigated repeatedly, with attendant repeated cost, and like cases may not be treated alike precisely because they are individually adjudicated.

A final notion that has helped to preserve the ideal of individualized adjudication is the formalist idea that individualization is what adjudication is supposed to be about. What we have in mind in describing this notion as formalist is an unwillingness on the part of its adherents to weigh the functional costs and benefits of reforms that
would depart from the model against the model's own costs and benefits. We have difficulty explaining this kind of attachment to individualized adjudication, since by definition an attachment to the formal properties of an institution is not grounded in substance or principle. It is a bit like opposing the development of vehicles with four-wheel drive on the ground that cars are not jeeps. If, on balance, importing some of the features of insurance or administrative compensation schemes into the tort system would improve that system, then we favor importing them, even if the effect would be to remove some of the differences between different systems of compensation.

We acknowledge that the attachment to individualized adjudication is not simply a belief in the value of form, but a matter of symbolism as well. In a world in which the ordinary individual receives little particularized attention from large institutions, the idea that such attention is available when one has his or her day in court may have considerable importance. For adherents to the model of individualized adjudication, this idea may outweigh the fact that the other costs of employing this model not only are high, but that these costs are ultimately paid by the supposed beneficiaries of the system themselves. We do not profess to know how these competing values of aggregation or individualization ought to be weighed. For just that reason we have not attempted to design a specific program of reform for tort claims generally or for specific classes of claims. The pressing practical problems presented by mass tort claims, such as asbestos cases, suggest that they are the logical place to begin thinking practically about aggregative adjudication of claims. However, the inquiry cannot be confined to mass accident cases. Once begun, the inquiry leads inexorably to reexamining some of the foundational ideas that underlie the common law in general.

V. CONCLUSION

The ethic of individualism runs deep in American law, as it does in American culture generally. For all of the compromises in individualism that the circumstances of modern society have forced upon us, the compromises have not altered our resilient belief in individualism. Our legal, political, and social institutions continue to reflect this tenet of the American liberal culture. No American institution shows greater respect for this ethic than our common-law system of adjudication. We remarked in the beginning that the exceptional value
Americans place on their right to a day in court reflects this value. The right is not simply a right to be represented before the law, but the right to tell one's own story. This conception of what it means to have a legal claim is not an isolated eccentricity of the legal system, it is part of the structure of our culture. This is for better and for worse. It has not been part of our undertaking to decide that larger question of the proper scope and limits of individualism in our social, political, or legal environment generally. Our ambition has been merely to raise questions about the principle of individualized adjudication in one small corner of the law, the adjudication of tort claims.

We are hardly the first to raise such questions. Since the appearance of the so-called “mass accident,” a large number of academics, practitioners, and judges have raised the same questions. As one would expect, most of the attention has been devoted to marginal modifications designed to achieve immediate results. The huge overhang of asbestos cases is chiefly responsible for the focus on expedient and practical measures at least in those venues where such claims have concentrated.96 In those venues asbestos cases have become, to borrow a crude but apt metaphor, “the fat boy in the canoe”: as the fat boy goes, so goes the canoe. If necessity is the mother of invention, the asbestos burden may yield some valuable system-wide benefits. The more likely scenario, however, is that the asbestos cases, by virtue of the sheer magnitude of the problem they create, will be treated specially—perhaps by removing them to some form of administrative compensation system. Although this may be the sensible, expedient solution for asbestos, it will produce no important reforms for the common-law system. The opportunity to use the asbestos problem as an opportunity for changes in the existing structure of claims adjudication will have been lost.

Whatever the future of asbestos litigation, we think there is a clear and pressing need to reexamine the character of the common-law system of adjudication, specifically its bias towards individualistic, case-

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96 The asbestos cases are becoming less concentrated, and as their effects have spread the search for solutions has become national in scope at least within the federal court system. See In re Asbestos Prods. Liab. Litig., 771 F. Supp. 415 (J.P.M.L. 1991) (transferring to the Federal District Court for the Eastern District of Pennsylvania for pretrial proceedings 26,639 pending federal actions involving allegations of personal injury and wrongful death allegedly caused by asbestos). It remains to be seen whether the courts themselves will be able or willing to develop effective solutions without congressional action.
by-case adjudication. Collective methods of adjudication are not new; some form of collective adjudication has been around since medieval times.\textsuperscript{97} Despite this ancient lineage, and despite its present widespread acceptance, the use of the class action in modern tort actions has been limited by the traditional conception that tort law claims are unique and require individualistic determinations. The model of the individualistic claim has trumped the efficiency of collective adjudication. The fairness of relying on particularistic evidence, with its sensitivity to variable circumstance, has trumped the fairness of more uniform disposition of claims.

No doubt this individualistic method serves a symbolic function that responds to political and social values that transcend the immediate objectives of claims adjudication. To a point, we do not quarrel with these symbolic functions. It is proper that legal institutions reflect cultural norms. Indeed, it is inevitable that they do so in some degree. But this is not to say that every part of the system is equally a part of some cultural norm too deeply embedded in the social fabric to be disturbed. And the disturbance we have proposed is quite modest. On the Richter scale of social changes, our proposal might wobble some of the household furnishings and break a vase or two, but not much more than that.

\textsuperscript{97} See Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987).