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BUREAUCRATIC LEGALISM, AMERICAN STYLE: PRIVATE BUREAUCRATIC LEGALISM AND THE GOVERNANCE OF THE TORT SYSTEM

*John Fabian Witt**

INTRODUCTION

The thesis of this Article is that while the modern plaintiffs' bar serves a crucial regulatory function in American public policy, the way we regulate the regulators warrants attention and perhaps even revision. The modern plaintiffs' bar began in what its progenitors described as a movement to defend the rule of law against the administrative and bureaucratic incursions of the twentieth-century state. The chief villain in the early years of the plaintiffs' bar was the bureaucratic state functionary. Vested with substantial discretionary authority and subject only loosely—if at all—to the traditions and constraints of law, the bureaucrat seemed to threaten the rule of law traditions of Anglo-American governance. Leading spokesmen of the plaintiffs' bar contended that the bureaucrat was akin to “a little dictator.”¹

And yet today, the American plaintiffs' tort bar has a rule of law problem of its own. In many areas of American personal injury practice, tort law has given rise to a far-flung, decentralized, and often virtually invisible private bureaucracy. In that vast administrative system, the plaintiff's representative has come to enjoy some of the same discretionary authority that plaintiffs' lawyers criticized in public bureaucrats of the welfare state. In some important respects, the plaintiffs' bar is remarkably unconstrained. Plaintiffs' personal injury lawyers typically work for relatively powerless clients, under ineffective ethical canons, and without meaningful monitoring by bar associations or other professional organizations. Moreover, trial lawyers operate in a market for legal services that is, at best, relatively

* Professor of Law and History, Columbia University. Many thanks to Sam Issacharoff, Bert Kritzer, Bob Rabin, and Cathy Sharkey for helpful comments on the manuscript, and to Alexander Michaels for excellent research assistance.

1. The historical elements of this paper draw heavily on my long chapter, “The King and the Dean: Melvin Belli, Roscoe Pound, and the Common-Law Nation.” JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 211–78 (forthcoming 2007).

disorganized and, at worst, perversely organized to serve the bar's interests rather than the interests of personal injury victims.

This is a significant problem for American public policy. As political scientists, historians, and tort lawyers are coming to understand better and better, the United States is distinctively reliant on lawyers and the courts to accomplish many of its social policy goals, particularly the delivery of deterrence and compensation in the personal injury area.² As much as \$250 billion flows through the tort system each year, a figure that is about the same as the yearly amount paid to the recipients of old-age pensions through the Social Security system.³ In many respects, this "American way of law" is deeply flawed. The tort system is expensive, erratic, unpredictable, nontransparent, and unaccountable. These are all serious criticisms. But for the moment, it is worth marveling at the genius of the private, market-driven regulatory system that is American tort law. It is a highly flexible, fast-moving, decentralized, and entrepreneurial engine for the provision of social policy goods such as deterrence and compensation. In an age in which so many New Deal-era regulatory systems have fallen on hard times, and other nation-states are starting to think twice about adopting American-style legal professions, the virtues of the market-driven American tort system are at least as apparent as its flaws.

The question this Article addresses is whether there are ways to capture the benefits of the private tort system while constraining the discretionary authority of the plaintiffs' bar and reducing some of the agency costs that result from that discretion. Are there ways to reduce the costs of tort and minimize the effects of relying on a private market for tort claims, while not undermining the benefits of flexibility, agility, and resistance to capture that tort seems to promise?

In this Article, I will sketch out some of what we know about the development and operation of the private bureaucratic administration of the modern plaintiffs' bar. If we begin to recognize the tort system as a sprawling private bureaucracy with a significant role in American public policy, at least two interesting points about the operation of the tort system follow. As a conceptual matter, we might begin to recon-

2. THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 7 (2002). See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the American Separation of Powers System* (2006) (unpublished Ph.D. dissertation, Columbia University) (on file with author); Robert C. Lieberman, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement* 6-7 (Apr. 2003) (unpublished manuscript), <http://mpsa.indiana.edu/conf2003papers/1032123040.pdf>.

3. TILLINGHAST-TOWERS PERRIN, *U.S. TORT COSTS: 2004 UPDATE 2* (2005), available at http://www.towersperrin.com/TILLINGHAST/publications/reports/Tort_2004/Tort.pdf.

ceptualize the characteristic structure of regulation-by-litigation in the United States. Perhaps what we have in large swaths of the American tort system is not Professor Robert Kagan's "adversarial legalism," but rather a variation on his European "bureaucratic legalism."⁴ Let's call this American variation "private bureaucratic legalism," a form of legalism with considerably fewer adversarial engagements than Kagan's account of American law suggests, and considerably more routinized private processing of claims by agents in ongoing relationships with one another. Private bureaucratic legalism is not Kagan's adversarial legalism because it is as cooperative as it is adversarial. And it is not Kagan's European-style bureaucratic legalism because its agents are private rather than public.

As an institutional and normative matter, it is vitally important that the administrative apparatus of private bureaucratic legalism be organized to deliver the social policy goods we require from it. And yet it is not so organized. In the American tort system, we govern the relationship between tort claimants and their agents with rules of law that are better suited to a mythical, bygone age of one-on-one lawyer-client representation than to the modern era of mass claims processing.⁵ The most prominent proposals for the reform of the lawyer-client relationship in the law of personal injury would only make things worse by putting awkward and counterproductive caps on market-rate contingency fees. If we seriously consider the promise of the market-driven private tort system as a way to achieve certain social policy goals, however, we ought to think harder about how to make the market in tort settlements, and in particular the market in claimants'-side legal services, work in concert with our goals—not against them.

II. THE PROBLEM EXPLAINED

A. *The Development of the Plaintiffs' Bar*

The modern American plaintiffs' bar began as an attempt to coordinate the efforts of a still relatively new cadre of administrative lawyers. Workers' compensation statutes enacted across the United States in the 1910s and 1920s ushered in the administrative state's public bureaucratic alternative to tort law. The lawyers for claimants in workers' compensation systems quickly found themselves enmeshed in the interstices of a new kind of statutory and administrative

4. KAGAN, *supra* note 2, at 3, 11.

5. On the myth of an individualized common law of tort and the inevitability of aggregation and settlement routinization in the private settlement market, see generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 *VAND. L. REV.* 1571 (2004).

regime. In particular, and in contradistinction to the tradition in the common law of torts, benefit rates and claims processing procedures in the workers' compensation system were set by legislatures, not by courts. Workers' compensation systems therefore seemed more susceptible than judge-made common law to the kinds of lobbying and interest group politics that employers' groups, chambers of commerce, and labor unions had long brought to bear on the political process.

By the mid-1940s, it became clear to leading claimants'-side practitioners that the decentralized and disorganized approach to lawyering that had been characteristic of the common-law plaintiffs' bar would no longer suffice under these new conditions. Employers'-side lobbies sought to reduce benefit levels, which in turn reduced the fees that claimants' lawyers received from their clients in compensation cases. Unions fought against such benefit-level decreases, but union interests in legislatures at the state and federal levels were diffuse and were not completely aligned with the interests of the claimants' representatives. And so, in 1946, a small group of claimants'-side workers' compensation lawyers formed an organization called the National Association of Claimants' Compensation Attorneys (NACCA). The NACCA did for claimants' lawyers what lobbies and defense-side organizations had been doing for employers for years in the workers' compensation system; it fought in the legislature and the state agencies for benefit rates and other changes in the workers' compensation system.⁶

Within just a few short years, however, NACCA leaders realized that the lobbying and networking they were learning to do in their workers' compensation practices could be adapted to tort, where it would be considerably more lucrative. Notwithstanding its common-law roots, legislatures had considerable influence over the law of torts. Moreover, courts were subject to the kinds of interest group politics in which the NACCA leadership was beginning to participate, especially at the state level. By 1949, trial lawyers were taking an increasingly large role in the claimants' compensation lawyers' organization. And by the early 1950s, the tort lawyers' influence led the organization to come out against the spread of the workers' compensation model to other common-law areas, and in favor of its reversal in those areas where it had replaced the common law. Within just a few short years, the organization changed its name to the National Association of Claimants' Counsel of America to deemphasize the worker's compen-

6. RICHARD S. JACOBSON & JEFFREY R. WHITE, *DAVID V. GOLIATH: ATLA AND THE FIGHT FOR EVERYDAY JUSTICE* 1-22, 64 (2004); WITT, *supra* note 1, at 242; Samuel B. Horovitz, Editorial, *NACCA and Its Objectives*, 10 *NACCA L.J.* 17, 28 (1952); J. Harold Land, *NACCA Convention*, 5 *NACCA L.J.* 236, 237 (1950).

sation focus. In 1964, the organization stripped away all traces of its administrative beginnings and renamed itself the American Trial Lawyers Association, later amended to Association of Trial Lawyers of America (ATLA).⁷

As the plaintiffs' lawyers turned back toward the common law, they began to articulate a sustained criticism of the administrative state, especially of those dimensions of the administrative state that threatened to displace the common law of torts.⁸ In *Patriots and Cosmopolitans*, I tell the story of how the plaintiffs' bar developed a powerfully nationalist, often downright xenophobic, campaign on behalf of the common-law traditions of the Anglo-American legal system against ostensibly continental mechanisms of public administration. With help from opponents of the New Deal state, early members of the organized plaintiffs' bar described administrative alternatives to the common law as lawless zones of discretionary managerial authority vested in unaccountable bureaucrats.⁹

The switch of the claimants' bar from administration to the common law was an important, but now largely forgotten, moment in the history of American public policy. It came at the height of the New Deal state—the moment when public administration apparently triumphed in American public policy.¹⁰ And it marked the emergence of a new model for the administration of justice in the modern United States. Since at least the first decade of the twentieth century, when Roscoe Pound made famous what he called “sociological jurisprudence,”¹¹ American legal-intellectual elites had argued that the common-law method of dispute resolution and policymaking, on which the American state had relied heavily since its beginnings, was outmoded in modern mass society. Central features of the common-law system—its delegation of authority to private parties, its reliance on generalist judges, its use of lay jurors—made the common law seem vastly inferior to modern methods of public administration. Only public administration seemed capable of bringing to bear the kinds of expertise,

7. JACOBSON & WHITE, *supra* note 6, at 22, 163–64. As of November 2006, the ATLA has renamed itself yet again. It will now be known as the American Association for Justice.

8. I describe these critiques more fully in a long chapter of my forthcoming book, *Patriots and Cosmopolitans*. WITT, *supra* note 1, at 211–78.

9. MELVIN M. BELL, BLOOD MONEY: READY FOR THE PLAINTIFF 120–26 (1956); Rita Jameson, *ATLA*, TRIAL, July 1980, at 56; Roscoe Pound, *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 340, 346–51 (1938).

10. See generally THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980 (Steve Fraser & Gary Gerstle eds., 1989).

11. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911).

systemic rationality, and public accountability that progressives prized.¹²

The mid-century plaintiffs' bar crafted a new vision for the common law, a vision of the common law reengineered as a system of justice for the modern era. In its view, the entrepreneurial interests of the plaintiffs' bar supplied a motivating force that promised to overcome the defects in the common law that Pound and other sociologically inclined lawyers had identified earlier in the century. An entrepreneurial bar might make the common law into a system of justice that could work for the individual, even against the giant insurance companies of the world. To be sure, the lawyer might be "a gladiator for sale to the highest bidder." But according to the plaintiffs' bar, this was not so much a flaw in the adversary system as its genius. With the help of the contingent fee, the gladiator-for-hire might be converted to the service of the wronged individual. The adversary system thus need not produce the dysfunctions Pound had identified. It might instead redound to what the plaintiffs' lawyers, rearticulating the virtues of the common law in the sociologists' aggregate welfarist terms, now called "the greatest social benefit."¹³

This was the founding vision of the modern plaintiffs' bar, of the NACCA, and of the ATLA; it was a vision that was highly critical of public administration. Ironically, it was also a vision that was crafted by a much older and greatly changed Pound. Pound had pioneered the sociological critique of the common law, but by the 1940s and 1950s he had reinvented himself as a critic of the administrative state and of the New Deal. With Pound's help, the plaintiffs' bar brilliantly rehabilitated the common law for a modern age. If the plaintiff-sellers of personal injury claims could find sophisticated lawyers in repeat-play relationships with the defendant-purchasers of claims, plaintiff-sellers would have similar economies of scale and as much expertise as the defendant-purchasers. Thus, the inequality of plaintiffs and defendants in the personal injury field might be resolved by market solutions as well as by publicly administered ones. If lawyers could make personal injury cases pay, and if they could take advantage of the market opportunities provided by tort law, it seemed to follow that justice

12. Roscoe Pound, *The Limits of Effective Legal Action*, 3 A.B.A. J. 55, 57, 66-69 (1917); see also Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 308-09 (1913).

13. Cf. BELLI, *supra* note 9, at 6. See generally WITT, *supra* note 1, at 211-78.

could be delivered to the rich and the poor alike without the bureaucracies of the administrative state.¹⁴

In many respects, the early plaintiffs' bar managed brilliantly to rearticulate the rhetoric and goals of the New Deal state. They did so, however, in defense of the very institutions (courts, juries, and the common law) that the New Deal had sought to leave behind. The language of the early organized plaintiffs' bar often tracked quite closely the ideas of "economic freedom" that President Franklin Roosevelt had so powerfully advanced. Similarly, the plaintiffs' bar made powerful use of the social justice and equality ideals for which New Deal programs stood. But in the hands of organizations like the NACCA, these New Deal arguments were now being advanced on behalf of the courts and the common law—not their New Deal administrative replacements.

B. *Administering the Common Law*

Here's where things get tricky. The plaintiffs' bar introduced a new relationship of relatively unconstrained power that was potentially as susceptible to abuse as the claimant-bureaucrat relationship of which the plaintiffs' lawyers were so critical. As the gatekeepers to the tort settlement system, plaintiffs' lawyers were now repeat players in positions of substantial discretionary authority over their one-shot clients. In a number of respects, plaintiffs' lawyers in the tort settlement system now had the same kind of power that publicly administered compensation systems had conferred on claims bureaucrats.¹⁵

When I refer to the tort settlement system, I am, of course, hinting at the well-known predominance of settlement in American tort law, notwithstanding the occasional but remarkably infrequent tort jury trial. The classic study by Professors Richard Miller and Austin Sarat in the late 1970s found that as many as 97% of tort claimants settle their claims in return for some positive dollar amount.¹⁶ Other studies put the percentage of claims with positive dollar amounts at somewhat lower levels, but all agree that tort claims are exceedingly unlikely

14. MELVIN M. BELL WITH ROBERT BLAIR KAISER, *MY LIFE ON TRIAL: AN AUTOBIOGRAPHY* 88 (1976); ROBERT WALLACE, *LIFE AND LIMB: AN ACCOUNT OF THE CAREER OF MELVIN M. BELL, PERSONAL-INJURY TRIAL LAWYER* 125 (1955). See generally WITT, *supra* note 1, at 211–78.

15. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 97–101 (1974) [hereinafter Galanter, *Why the "Haves" Come out Ahead*]. See generally Issacharoff & Witt, *supra* note 5.

16. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC'Y REV.* 525, 544 (1980–1981).

ever to be tried to a verdict.¹⁷ Indeed, Miller and Sarat found that tort claims were among the least likely claims to be contested, largely because insurance company claims agents and their repeat-play plaintiffs' representative counterparts had routinized the tort claims settlement system so effectively.¹⁸ Today, in areas such as auto accidents, less than 1% of all claims in the insurance system are tried to a verdict.¹⁹

Within the world of settlement, a massive, far-flung system of private administration has arisen; the tort literature has long observed this phenomenon. Thirty years ago, Professor H. Laurence Ross's seminal book, *Settled out of Court*, described in wonderful detail the way in which the American tort system evolved into private bureaucratic administration.²⁰ In the automobile accident insurance claims practice that Ross studied, insurance adjusters working for liability insurance companies resolved tort claims by referring to rules of thumb and informal grids.

But the significance of Ross's observations has not been sufficiently appreciated, for they can be generalized a good deal further. As Professor Samuel Issacharoff and I argued in an article published more than three decades after Ross's initial observations, the rules and grids are but one example of the process by which areas of American tort law become routinized into bureaucratic administration.²¹ The work of Professors Howard Erichson, Herbert Kritzer, and Steve Yeazell, among others, has made similar points over the past several years.²² In what Issacharoff and I called "mature torts"—torts in which the law is relatively settled and in which injuries recur in clustered fact patterns—we claimed that tort practice converges with the practice of publicly administered systems such as workers' compensation.²³ Both are organized around bureaucratic administration. Both adopt rules

17. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1212–25 (1992).

18. Miller & Sarat, *supra* note 16, at 542; see also Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 164 (1986).

19. INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS fig.6-16 at 74 (1999).

20. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1980).

21. Issacharoff & Witt, *supra* note 5, at 1605–08.

22. Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 383 (2000); Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 228–29 (2001) [hereinafter Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases*]; Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 199 (2001).

23. Issacharoff & Witt, *supra* note 5, at 1573.

rather than standards to facilitate the claims processing; both construct grids to measure the damages that arise out of routine injuries. Let's call this the convergence thesis. In tort areas characterized by the maturity of the underlying law and the regular clustering of fact patterns, private tort law and public compensation systems converge along each of these dimensions.

How do the private and public systems converge? One of the central strategies of the modern plaintiffs' bar was the development of aggregating strategies for the wholesale resolution of claims; this strategy first appeared before the rise of organizations such as the NACCA and the ATLA.²⁴ To achieve the kinds of economies of scale and efficiencies that would allow them to compete with defense representatives, the organized plaintiffs' bar worked to develop shortcuts, negotiation conventions, and other similar strategies.

Aggregating strategies are striking examples of convergence in the models adopted by public administrators in public compensation systems like workers' compensation. This convergence is especially clear in some of the pioneering early work of plaintiffs' lawyer Melvin Belli. The late and decadent phase of Belli's career has obscured his early creative moments in the late 1940s and 1950s, when Belli and Pound heralded their new vision for common law in the modern era. Yet even as Belli championed the trial lawyer as a bulwark against creeping bureaucracy, he was helping to create the institutions and information networks that would allow the plaintiffs' bar to function as a sprawling, decentralized, and private administrative apparatus.

The key here was providing plaintiffs' lawyers with the same kinds of information that their insurance adjuster colleagues had. The once-famous "Belli Seminars," for example, which were typically held in conjunction with NACCA conferences, created important early educational and information-sharing networks akin to those that are a mainstay of the ATLA today.²⁵ Perhaps most importantly, Belli's massive, multivolume treatise, *Modern Damages*, collected and disseminated information about claims values that had previously been available only to insurers and other repeat-play defendants.²⁶ *Modern Damages* compiled damages values from settlements and trials around the country. This information was absolutely critical if plaintiffs'-side claims administrators were to be on an equal basis with their insur-

24. See *id.* at 1573-74.

25. Ernst W. Bogusch, *NACCA Convention, Branches, and Meetings*, 11 NACCA L.J. 244, 244 (1953); *NACCA Convention and Meetings*, 10 NACCA L.J. 284, 284 (1952); Joseph W. Bishop, Jr., 69 YALE L.J. 925, 929 (1960) (book review).

26. MELVIN M. BELLI, *MODERN DAMAGES* (1959).

ance adjuster counterparts. It provided a quick and efficient new way to arrive at ballpark figures for injury compensation. And its structure—lists of body parts down the left-hand column with dollar values down the right—resembled nothing more than the kinds of damages grids used in public compensation schemes like workers' compensation. Even in the decentralized tort system, private claims administrators were compiling detailed lists of injury values for the processing of injury claims.²⁷

Equipped with information about the value of tort claims, plaintiffs' lawyers in the NACCA were able to turn large swaths of the tort system into decentralized administrative claims systems. As Judge Thurman Arnold long ago observed, there is a sharp divergence between the public rituals of the American tort system, on one hand, and its practice, on the other.²⁸ The public face of tort law is the individualized trial: the courtroom, the jury, the appellate opinion, and the common-law method. The reality of tort law, especially in areas of tort law that are susceptible to routinized claims handling, is the grinding fact of settlement in private bureaucracies. Thus, along a number of significant dimensions, the system of private administration in tort looks similar to the systems of public injury compensation administration with which tort law is typically contrasted. Again and again, studies conclude what Professor Marc Franklin and his colleagues found when they studied personal injury litigation in the 1950s. Tort law, they discovered, functioned not as an all-or-nothing lottery, but as a system of "part-recovery-most-of-the-time."²⁹

Consider automobile accidents once again. In recent years, lawyer participation in the settlement of third-party personal injury claims involving auto accidents has increased as much as 50%.³⁰ But the chance that any such claim will produce a lawsuit filed in court has actually decreased.³¹ This sounds counterintuitive; more lawyers might be expected to produce more lawsuits. But this is actually what we should expect to see when specialist lawyers (or other kinds of

27. See Joseph Bear, *NACCA Conventions*, 6 NACCA L.J. 212, 214 (1950); *NACCA Convention and Officers*, 7 NACCA L.J. 232, 236 (1951); *Verdicts or Awards Exceeding \$50,000*, 1 NACCA L.J. 99, 99-100 (1948). See generally MELVIN M. BELLI, SR., *THE MORE ADEQUATE AWARD: A COLLECTION OF THE MORE ADEQUATE AWARDS TO FEBRUARY 1952* (1952); MELVIN M. BELLI, *The Adequate Award*, 39 CAL. L. REV. 1 (1951).

28. Thurman W. Arnold, 40 YALE L.J. 833 (1931) (book review).

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

30. Mark J. Browne & Joan T. Schmit, *Patterns in Personal Automobile Third-Party Bodily Injury Litigation: 1977-1997*, at 16 (Sept. 2, 2004) (unpublished manuscript), <http://ssrn.com/abstract=588481>.

31. *Id.*

specialist claims agents) become increasingly significant. As repeat-play claims representatives become more involved in the claims settlement process, that process will become routinized and streamlined. Professors Jason Johnston and Joel Waldfogel, for example, found that as claims representatives develop repeat-play relationships with one another, the settlement rate and the speed with which claims are resolved increase significantly.³² Regular resort to the courts becomes less significant—not more. And so in the auto area, somewhere between 70%³³ and 81%³⁴ of third-party personal injury claims are now resolved in twelve months or less.

C. *Evaluating Private Administration*

There are two historical ironies here. The early organization of the claimants' bar was prompted by the collective action imperatives of administrative law. The resulting organization then shifted away from administration toward a new defense of the common law and an attack on the ostensibly unfettered, lawless authority of the bureaucrat in the administrative state. And yet, in subsequent years, the plaintiffs' bar helped forge a new administrative process, albeit a private one, in which the bureaucratic processes of the administrative state have been replicated in the private sphere of the tort claims settlement system. In this system, the claimants' representatives enjoy substantial discretionary authority, not unlike the public claims processors they once criticized. It is no surprise that studies of the legal profession have long found that plaintiffs' lawyers are among the members of the profession with the greatest freedom of action.³⁵ Indeed, members of the plaintiffs' bar will concede as much in anonymous surveys.³⁶

Ironies notwithstanding, there is a good deal to be said for this system of private administration. Plaintiffs' lawyers and defense representatives have achieved impressive efficiencies in claims handling.³⁷

32. Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39, 59–60 (2002); see also Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 513 (1994). The pattern is a long-standing one. See Maurice Rosenberg & Michael I. Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115, 1167 (1959).

33. Browne & Schmit, *supra* note 30, at 9.

34. INS. RESEARCH COUNCIL, *supra* note 19, fig.7-25 at 102.

35. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR tbl.4.3 at 103 (1982).

36. Cf. HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION tbl.1.5 at 26 (1991).

37. Johnston & Waldfogel, *supra* note 32, at 59–60.

The private tort system may be more flexible than public compensation programs. With its decentralized system of judges, juries, lawyers, and insurance adjusters, it may also be less susceptible to capture by well-organized interest groups. Public compensation values are set by a political process that has proven itself susceptible to dysfunctional interest group politics (witness the steady erosion of workers' compensation benefits from the 1910s until the early 1970s). The damages values in tort law's private administration system, by contrast, filter down the dispute pyramid to recalibrate the going rate for the private settlement system. They are continuously tested and retested in courtrooms, which serve as price coordinators for the private administration of claims.³⁸

In addition, while it is true that the aggregation strategy of the tort claims administration may be in tension with the rhetoric of the common law and its individualized methods, it is not at all clear, at least in the first instance, that the aggregating strategies of the plaintiffs' bar are a bad thing. To be sure, many aggregation strategies seem to be inconsistent with the traditional individualized canons of the profession's ethical codes because they take the plaintiff-clients as a class rather than as individual claimants.³⁹ Aggregate settlement strategies adopt rules of thumb to minimize the administrative costs of tort claim settlements. From an *ex post* perspective, some plaintiffs would undoubtedly do better under an individualized approach. Others would do worse. But *ex ante*, there is no telling on which side any one prospective claimant in the system will fall.⁴⁰ And so, from behind the veil of ignorance, prospective tort claimants should prefer to increase the size of the settlement pie that is achieved by adopting the efficiencies of aggregation, even if it means trading away individualized inquiry into the particular facts and circumstances of their injuries.

Furthermore, while the early leaders of the plaintiffs' bar identified the discretionary authority of the public claims bureaucrat as especially dangerous, there are market mechanisms in place that significantly constrain the discretion of the plaintiffs' representative. As we will see in a moment, these constraints are not effective along all dimensions, but they are not insignificant. In particular, even as Belli and the early leaders of the NACCA were creating the modern plain-

38. Issacharoff & Witt, *supra* note 5, at 1612.

39. Erichson, *supra* note 22, at 445-46.

40. Even viewed *ex post*, many of the factors that would be advantageous to certain claimants in an individualized system are likely to be morally irrelevant ones. The American tort system seems to return higher damages on bases such as sex, race, charisma, beauty, and numerous other morally irrelevant dimensions. To the extent that these factors are averaged out in aggregating settlement strategies, such averaging may be a virtue rather than a vice viewed *ex post*.

tiffs' bar, one governance feature of the attorney-client relationship was already in place that aligned many of the interests of the plaintiffs' personal injury lawyer with the client—the contingency fee.

In the personal injury area, the contingent fee is far and away the predominant fee arrangement. In a number of respects, the contingent fee functions nicely to align the interests of repeat-play lawyers and one-shot clients. Clients need not worry about their inability to monitor or evaluate the conduct of their counsel, nor about the information asymmetries that make them vulnerable, because the contingent fee provides their counsel with powerful incentives to advance their interests.

To be sure, the contingent fee does not align interests completely. In particular, as Professors Kritzer, Jack Coffee, Geoffrey Miller, and others have shown, the contingency fee does not completely close the gap between the interests of the lawyer and the interests of the client.⁴¹ The client's interests are in maximizing the total value of the claim. The lawyer's interests are in maximizing the implicit hourly wage. It follows that plaintiffs' representatives have powerful incentives to settle cases early in the process, before they have invested many hours in the claim, even if this means settling at a lower claim value.

Even so, the misaligned interests of the lawyer and the client under contingency fee arrangements have been mitigated by two developments in the market for plaintiffs' legal services. The first development consists of escalating sliding scale fees, in which the lawyer's share of the damages increases as the case proceeds from settlement discussions to trial to appeal.⁴² Upwardly sliding fee scales are relatively imprecise ways of aligning interests with respect to the duration of litigation, but they are better than straight contingencies.

A second development in the market for plaintiffs' legal services appears to have significantly mitigated the skewed incentives of plaintiffs' counsel in this area. Among the most striking features of the plaintiffs' bar to emerge from the remarkably interesting and still-developing sociological literature on plaintiffs' lawyering is its heavy reli-

41. HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 156–57 (1990) [hereinafter KRITZER, *THE JUSTICE BROKER*]; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 686–89 (1986); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 189 (1987).

42. Such upwardly graded fee arrangements have been around for some time. See *Proceedings*, 1929 PROCEEDINGS ST. B. ASS'N WIS. 200; see also F.B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES* app. at 218–19 (1964).

ance on thick systems of referral networks for a steady supply of cases. There are two different systems of referral networks at work in the personal injury bar. At the lower end of the plaintiffs' bar, the dominant source of clients is referrals by past clients.⁴³

The second, and increasingly important, referral network runs not from past clients to lawyers, but from lawyers to lawyers. The breadth of the lawyer-to-lawyer referral system is especially striking in the study of Sara Parikh on Chicago and the study of Stephen Daniels and Joanne Martin on Texas.⁴⁴ Lower-echelon lawyers refer big, complex, and expensive cases up the chain to high-end elite lawyers, who in turn refer simpler cases back down to the lower-echelon lawyers. Generalist lawyers refer cases to specialists; specialists in one area refer cases to specialists in other areas—and so on.

The results of referral networks are twofold. First, a robust lawyer-to-lawyer referral network means that claimants are much less likely to have their claim values reduced because they chose a bad lawyer. As Yeazell has observed, the modern referral system means that “a plausible claim is quite likely to get into the hands of a competent lawyer who can invest the amount necessary to reach a good result for the client.”⁴⁵ Second, both the lawyer-to-lawyer referral networks and the networks of past clients present superb market solutions to the skewed incentives of plaintiffs' counsel to settle low rather than go to trial. In both of these systems, a lawyer's reputation matters immensely. Lawyers who hope for future referrals from their past clients have a powerful reputational interest in ensuring client satisfaction, even among one-shot clients such as those in personal injury cases.⁴⁶

Lawyers who hope for future referrals from other lawyers have perhaps an even stronger reputational interest in ensuring the satisfaction

43. CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 53 (1996); see also Stephen Daniels & Joanne Martin, “It's Darwinism—Survival of the Fittest”: How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients, 21 *LAW & POL'Y* 377, 385 (1999). But see Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases*, *supra* note 22, at 225; Jerry Van Hoy, *Markets and Contingency: How Client Markets Influence the Work of Plaintiffs' Personal Injury Lawyers*, 6 *INT'L J. LEGAL PROF.* 345, 358–59 (1999).

44. Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiffs' Personal Injury Bar* 119–20 (2001) (unpublished Ph.D. dissertation, University of Illinois at Chicago); Daniels & Martin, *supra* note 43, at 381; see also Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases*, *supra* note 22, at 225; Yeazell, *supra* note 22, at 199–203.

45. Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 *VAND. L. REV.* 1975, 1996 (2004).

46. Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 *EMORY L.J.* 1065, 1077 (2003).

of the referring lawyer. Referring lawyers retain a cut of the contingent fee in return for the referral, typically one-third of the fee. This referral fee neatly solves the contingency fee misalignment problem in the asymmetric relationship between the repeat-play lawyer and the one-shot personal injury client. Now another repeat player, the referring lawyer, has an interest in maximizing the value of the claim, and the referring lawyer has no implicit hourly wage calculation because the work is typically finished after the referral itself. Among repeat-play referring and receiving lawyers, the reputational interests of receiving lawyers in maintaining the relationships that supply them with cases substantially mitigates the misalignment of interests that would otherwise systematically lower claim values.⁴⁷

Together, then, contingency fees and referral networks effectively work to maximize claim value. Here, at least, the discretionary authority of the plaintiffs' bar cannot be said to be unconstrained.

And yet from a public design perspective, the informal rules of the private tort settlement system are highly unsatisfactory. Plaintiffs may rest easy that their claims representatives are well incentivized to maximize the value of their claim within the rules of the administrative matrix, but the rules of that matrix are almost completely opaque. They are virtually invisible, rarely articulated, and usually unreviewable. They do not produce information about their operation. They have nothing approaching a notice-and-comment period of the sort we require for public administrative rulemaking.⁴⁸ And their creators are unaccountable to any democratically authorized body.⁴⁹

To be sure, the rules of the administrative system are roughly tied to the likely outcomes at trial by their very nature. But like the expected jury outcomes on which they are based, the informal settlement system rules may be replete with illicit mechanisms that would be unacceptable in a publicly accountable and transparent system. Examples might include differential claims values on the basis of race⁵⁰ or sex,⁵¹ or higher claims values as a share of total damages for claimants with

47. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 58–61 (2004); *see also* Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 *LAW & SOC. INQUIRY* 795, 799 (1998) [hereinafter Kritzer, *Contingent-Fee Lawyers and Their Clients*].

48. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2000).

49. *See generally* REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002).

50. Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 *How. L.J.* 99 (2005).

51. Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 *LOY. L.A. L. REV.* 1435 (2005).

slight injuries than for claimants with serious ones.⁵² Another well-documented dysfunction in the private settlement system is the problem that arises in areas such as asbestos injuries, when the interests of present and future claimants in the system conflict. The future claimants, of course, have found themselves unrepresented in a system that relies on representation and the market interests of the representatives. Future claimants' interests have suffered accordingly.⁵³

We have reason to believe that each of these features is characteristic of the way the private tort settlement system functions. Given the paucity of information available, it is virtually impossible to be sure, but that is the point: the private administrative system, unlike its public compensation alternatives, systematically shields itself from review by making information collection extremely cumbersome.⁵⁴

The substantial and often virtually unconstrained discretionary authority of claimants' representatives in the claims system is perhaps most visible in package or aggregate settlements. In that kind of settlement, a defendant settles two or more cases with a single claimants' representative for a lump sum, leaving it to the claimants' representative to allocate settlement dollars among the group of claimants.⁵⁵ It may well be that the economies of scale offered by representing multiple claimants create savings that could be passed along to the group members. If so, it stands to reason that from the *ex ante* position, behind the veil of ignorance, prospective group members might choose to allow some kinds of aggregate settlements, just as they might choose to authorize any number of aggregating, surplus-creating strategies in the settlement system.⁵⁶ And yet what is striking about the aggregate or package settlement in the tort claims system is how unfettered the discretionary authority of the claimants' representative is. Vesting broad discretion to allocate settlement funds in the hands of the claimants' lawyer creates a significant risk of arbitrary

52. Saks, *supra* note 17, at 1217-18.

53. Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1436 (2004).

54. *Cf.* Saks, *supra* note 17, at 1154-68.

55. Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998) [hereinafter Silver & Baker, *Plaintiffs' Counsel*].

56. Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227, 241-42 (1999); Silver & Baker, *Plaintiffs' Counsel*, *supra* note 55, at 1496-97; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744-45 (1997).

allocations, or more likely, allocations that maximize the claimants' lawyer's fee rather than the interests of the claimants.⁵⁷

D. Private Administration and the Legal Fees Market

It is worth asking whether the savings from the economies that plaintiffs' lawyers achieve in the administrative settlement system are shared with the claimants. This brings us to one of the most important distinctions to be drawn between public and private compensation systems: public compensation systems often seem considerably less expensive to operate than their private tort alternatives. As leading figures in the torts literature have reminded us for the better part of a century, the virtues of tort law are enormously expensive.⁵⁸ The going rate for plaintiffs'-side legal services is typically one-third of the damages or settlement value, and sometimes it is closer to one-half of the claim value. When one adds in the defense costs and the public administrative burdens, the costs of administering the tort system are typically said to amount to somewhere between fifty and sixty cents for every dollar delivered to injury victims.⁵⁹ It is a shockingly high cost, one that has soured many on the private alternative to public administration that the plaintiffs' bar crafted a half century ago.

There is good reason to think that the savings from these aggregating strategies are not passed on to the claimants themselves, and in my view this is probably the most acute instance in which the plaintiffs' bar has proven all too resistant to constraint by either market or law. Does the cost of the tort system, and in particular the costs of plaintiffs'-side legal services, have to be so great? Are there ways to design the tort settlement market so as to capture the benefits that markets deliver without the costs that this particular market seems to have brought with it? To answer these questions, we should identify the characteristics of the plaintiffs' side of the tort settlement system.

57. Cf. Erichson, *supra* note 22, at 388 n.7. The settling lawyer may have different interests in the claims of a group of clients if, for example, the lawyer owes a referral fee for some clients but not others.

58. ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 69-71, 228-29 (1965); Alfred F. Conard, *The Impact of Expense on Injury Claims*, 287 ANNALS AM. ACAD. POL. & SOC. SCI. 110, 119 (1953); see also Fleming James, Jr., *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315, 328-33 (1959); cf. John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1536-37 (1966); Fleming James, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537 (1952).

59. JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 70 (1986).

1. *Contingency Fees*

As I noted above, the predominant fee arrangement in personal injury litigation is the contingency fee, which functions to partially align the interests of the claimant and the claimant's representative. Though the contingency fee rates have changed somewhat over time, mostly decreasing, they have been the standard claimants'-side personal injury fee arrangement for as long as 150 years in American tort law.⁶⁰

2. *Repeat-Players Versus One-Shotters*

Further, the demand side of the equation—the consumers of plaintiffs'-side services—is made up of one-shot players. The supply side, by contrast, consists of repeat-play personal injury lawyers.⁶¹ There are, of course, numerous important transactions in the course of people's lives in which the commercial relationships take this form. Think of real estate transactions, for example, or automobile sales, or life insurance policies. But the problem is especially acute in the market for legal services because consumers are highly unlikely to ever have entered the market before, and will rarely know more than one or two people who have.

3. *Information Asymmetries*

Because of the one-shot, repeat-play structure of the client-lawyer relationship in the personal injury context, information asymmetries are pervasive.⁶² Consumer-clients cannot be expected to know much about the proper course of litigation. They are thus poorly positioned to monitor a lawyer's performance or evaluate a settlement offer. More importantly, consumer-clients are also poorly positioned to have information that would allow them to differentiate among plaintiffs' lawyers on the front end of the legal services market when choosing a lawyer. Indeed, in many respects, claimants' legal services in the personal injury area are what economists call "credence goods": goods or

60. Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 457, 469–70 (1998) [hereinafter Galanter, *Anyone Can Fall Down a Manhole*].

61. See Galanter, *Why the "Haves" Come out Ahead*, *supra* note 15, at 97.

62. As Professor Michael Abramowicz and others have noted, there are information asymmetries that run the other way as well. Because personal injury claimants have private information about the character of their injuries and the circumstances out of which those injuries arose, we should see limits on the alienation of tort claims by victim-sellers to third-party buyers, even where those third-party buyers would be better positioned to finance the claims and achieve economies of scale in the litigation process. Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 737 (2005).

services provided by a seller or provider of services “who also determines the buyer’s needs.”⁶³

Surprisingly, in the personal injury context on the claimants’ side, none of this may matter very much for the quality of the legal services likely to be provided. For reasons we have seen, the contingent fee combined with referral networks should take care of that. But lack of market information turns out to matter a whole lot for the price the consumer-client pays in the marketplace.

4. Price Stickiness

As critics of the contingency fee like to point out, the price of the plaintiffs’-side legal services in personal injury cases is relatively constant at about one-third of the total damages or settlement value. Most plaintiffs’ lawyers charge a flat contingency fee of about one-third of the total damages or settlement value and, while some plaintiffs’ lawyers offer a sliding scale fee arrangement, such arrangements often yield fees close to this same one-third portion.⁶⁴ The contingency fee was once higher. Until investigations and hearings on plaintiffs’-side legal fees in the middle of the twentieth century, early plaintiffs’ lawyers’ contingency fees were typically closer to one-half of the total damages or settlement value.⁶⁵ But since then, and despite some limited evidence of price competition in the plaintiffs’ market, the price term in plaintiffs’-side personal injury retainers is remarkably sticky at around the one-third point.⁶⁶

There are many possible explanations for the standardization of contingency fees. Critics, for example, describe the bar as an anticompetitive cartel extracting monopoly rents.⁶⁷ Others chalk up the standard contingency fee to path-dependence and tradition. But one of the relevant factors inhibiting price competition is almost certainly the

63. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 968 (2000).

64. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 286–87 (1998); see also Kritzer, *Contingent-Fee Lawyers and Their Clients*, *supra* note 47, at 809 (noting that some lawyers may employ sliding scale arrangements not because they are engaging in price competition, but because they want to be able to use the threat of rising fees to convince clients to accept settlement offers).

65. MACKINNON, *supra* note 42, at 139 n.16 (citing Wasservogel, *Report, Findings and Recommendations in the Matter of the Hearing Ordered by the Appellate Division of the Supreme Court in and for the First and Second Judicial Departments Regarding a Proposed Rule to Limit Compensation of Plaintiffs’ Attorneys in Personal Injury and Wrongful Death Actions*, N.Y.L.J., Sept. 9, 1955, at 38–39).

66. Galanter, *Anyone Can Fall Down a Manhole*, *supra* note 60, at 468–73.

67. See, e.g., Jeffrey O’Connell et al., *Yellow Page Ads as Evidence of Widespread Overcharging by the Plaintiffs’ Personal Injury Bar—And a Proposed Solution*, 6 CONN. INS. L.J. 423 (1999–2000).

information deficits that potential customer-clients face when they enter the market for claims administration. Precisely because the private settlement system is virtually invisible (sometimes invisibility is even built into the settlement through gag order clauses), credible information about the past performance of the lawyer or lawyers with whom the potential client-customer is contemplating a relationship is very difficult to come by. In such a setting, we should expect to see more price stickiness than elsewhere. Suppliers of legal services will shy away from cutting their rates so as not to send signals that might suggest that the quality of their services is below average, and consumers of legal services will be reluctant to pay premiums for high-quality legal services when the information required to comparison shop is unavailable.⁶⁸

5. *Competition and the Queuing Effect*

Notwithstanding the price stickiness in plaintiffs'-side personal injury legal services markets, close observers have noted that there is significant and often cutthroat competition in the plaintiffs' bar. Rather than reduce their rates, plaintiffs' lawyers compete for clients—specifically, they compete with one another for clients with easy cases or valuable claims.⁶⁹

In turn, claimants often compete with one another to retain the services of well-known lawyers. This is the queuing effect that Professor Robert Mnookin has observed in the market for plaintiffs'-side claims administration.⁷⁰ As Mnookin points out, high-quality claims assistance providers do not raise their rates, they simply cherry pick their cases. Would-be clients line up outside the doors of the very best lawyers, who are then able to select the highest-yield cases from the mix. Among other things, this phenomenon has the perverse effect of encouraging the best service providers to take the cases that will most easily yield the highest value. As a consequence, the harder cases may often fall to the middle or lower ranks of lawyers, precisely because their difficulty reduces their likely yield. As Mnookin explains, the result is that the best lawyers do not select the cases to which they might be able to add the most value.⁷¹

68. See Rudy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J.L. & ECON. 549 (2001).

69. On competition in the plaintiffs' bar, see Parikh, *supra* note 44, at 60 and Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2086–93 (2002).

70. Robert H. Mnookin, *Negotiation, Settlement and the Contingent Fee*, 47 DEPAUL L. REV. 363, 368 (1998).

71. *Id.* at 369.

6. *Thick Referral Networks*

As we have already seen, the system of referral networks among repeat-play plaintiffs' lawyers functions nicely to minimize the remaining gaps between the interests of the claimant and the claimant's representative that the contingency fee does not close.⁷²

Interestingly, a relatively small number of disputes appear to occur among lawyers over referral fees. There is some such infighting, to be sure, but the lawyers who specialize in personal injury cases are not known to be a cooperative bunch.⁷³ Their capacity to get along in referral networks is a clue to one further feature of the market for plaintiffs'-side claims administration that I have not yet mentioned. Sticky contingency fee pricing may also be relatively uncompetitive pricing that generates supramarginal fees. The rents from uncompetitive markets may be just enough to grease the wheels of the referral system and minimize the referral fee conflict. This shows the extent to which the private settlement market has failed to pass along the efficiencies of aggregation to the claimants themselves.

III. TOWARD A SOLUTION: IMPROVING THE MARKET FOR PRIVATE ADMINISTRATION

A. *The Perversity of Contingency Fee Price Controls*

The public debate over contingency fees immediately suggests a solution to the problem of uncompetitive rates. We could simply cap contingency fees, and in some areas of American tort law, such as medical malpractice, a number of jurisdictions already have. Under the California Medical Injury Compensation Reform Act (MICRA) enacted in 1975, attorney's fees are capped at 40% of the first \$50,000 recovered, 33 1/3% of the next \$50,000, 25% of the next \$500,000, and 15% of anything over \$600,000.⁷⁴ Such limits mean the loss of big money. A recent RAND Corporation study found that this fee limitation has cost plaintiffs' lawyers in California some \$17 million each year. This figure does not even include the cases that were not brought because of MICRA, or cases that were settled in its shadow for a fraction of what they would have received in a world without caps on damages.⁷⁵

72. Kritzer, *Contingent-Fee Lawyers and Their Clients*, *supra* note 47, at 799.

73. Cf. Galanter, *Anyone Can Fall Down a Manhole*, *supra* note 60, at 471-72.

74. CAL. BUS. & PROF. CODE § 6146 (West 2003).

75. See generally NICHOLAS M. PACE ET AL., *CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA* (2004).

But as even some of the most vociferous critics of plaintiffs' bar fee arrangements have observed, caps on contingency fees are a perverse and cumbersome mechanism for regulating prices in the personal injury legal services market.⁷⁶ Like price controls in most markets, fee caps are likely to generate all kinds of dysfunctions. They are likely to leave the hardest cases, the ones in which the pre-cap contingency fees were more or less what the competitive market would have generated, unserved by the bar. Moreover, fee caps such as the one in MICRA that decline as the settlement or damages values increase are especially perverse. Remember my discussion of the agency problem that arises in contingency fee settings between lawyers seeking to maximize implicit hourly wages and clients seeking to maximize claims values. The MICRA diminishing scale cap exacerbates the problem by further minimizing the claimants' representative's incentive to maximize claim value. Increased claims values produce ever smaller returns under MICRA, and the result is diminished incentives to put time into a claim, even where that time would increase the total claim value.

B. The Limits of Legal Rules

The limitations of fee cap rules are symptomatic of the broader limits facing rules of law in this area. The ethics canons and codes of the organized bar, its disciplinary mechanisms, and the supervisory role of the courts are likely to be too unwieldy to provide meaningful constraints on the pricing of plaintiffs'-market legal services. We have gained fifty years of experience since the last significant efforts by the bar to reduce the contingent fees of the plaintiffs' bar. The lesson of time is that these long-standing mechanisms of governance are unlikely to deliver the kind of oversight needed. This should hardly be surprising, given the market into which the traditional professional apparatus seeks to intervene. The almost entirely private system of settlements, in which repeat-play lawyers represent one-shot claimants, is one that is extremely poorly suited for a rule-of-law command approach to governing the lawyer-client relationship.

C. The Rule-of-the-Market Alternative

I am relatively unpersuaded that a new focus on using rules of law to constrain the plaintiffs' agents in the settlement process will do much to improve the functioning of the legal services market or lower the agency costs personal injury law currently entails. The institu-

76. Hadfield, *supra* note 63, at 1003.

tional context of legal rules governing the professional conduct of the plaintiffs' representatives is simply not well suited to the regular and reliable use of new ethical injunctions or command-and-control rules for contingency fee rates.

Although rule of law constraints are unlikely to be effective here, redesigning the market for plaintiffs'-side legal services seems quite promising. As Professor David Wilkins has reminded us, canons of legal ethics and professional norms are only some of the tools that govern lawyers.⁷⁷ To quote Professor Charlie Silver's characteristically blunt way of making this point, "A good incentive structure . . . is worth a pick-up load of . . . disciplinary rules."⁷⁸ Where I come from, we are more likely to talk about taxicab trunks than pick-up truck beds, but the point seems to hold true across jurisdictions. Market mechanisms can function effectively in the same decentralized contexts that defeat command-and-control rules of professional conduct.

The difficulty in the market for plaintiffs'-side legal services, however, is that the information asymmetries are drastic. There is virtually no way for a potential claimant to choose sensibly among lawyers competing for a claim. To be sure, there is relatively little price competition outside of niche markets such as aviation disaster claims. And in this regard, the potential claimant has little to go on. But even if there were price competition, a potential claimant would have little way of making sense of the choices because of the extreme difficulty of evaluating the quality of the legal services being offered. In a world in which the quality of the services is opaque to the consumer, price cutting merely sends signals that the quality of services will be low.⁷⁹

In some respects, as we saw earlier, the inability of potential claimants to distinguish high-quality legal services providers from low-quality ones no longer matters as much as it once did. The dense network of lawyer referrals means that cases are likely to be channeled to lawyers in a good position to maximize their claim value, even where the case began in the office of a lawyer not in such a position. But the referral network does not constrain the price term of the lawyer-client relationship. Indeed, there is some reason to think that the uncompetitive market in contingency fee arrangements has helped to grease the wheels of the referral market. So what can be done? In other areas that rely on private mechanisms to deliver important social policy goods, the legal regime has focused on flushing out the information

77. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

78. Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 FORDHAM L. REV. 233, 242 (1996).

79. Santore & Viard, *supra* note 68, at 550.

that allows markets to work. Securities markets are the classic example.

The problem is that attorney-client privilege rules make it exceedingly difficult for any would-be claimant to obtain such information. We could try to collect systematic information on claims values through lawyer self-reporting. In limited local studies, such self-reporting has yielded valuable information about the functioning of the tort system.⁸⁰ But to my knowledge, it has never been used to evaluate the performance of the lawyers who did the reporting, and if it were so used, the quality of the reporting would be highly suspect. Developing a mechanism for auditing self-reporting would be prohibitively costly and virtually impossible given lawyer-client confidentiality rules.

D. Claims Brokers and the False Start of Brotherhood of Railroad Trainmen v. Virginia

If information is the critical missing ingredient in the market for legal services, and if self-reporting is unreliable and difficult to police, are there other ways to create a richer information environment?

The history of personal injury practice suggests just such a mechanism. Wherever routine, repetitive tort claims have appeared, lay claims brokers have arisen to connect the claimant with the legal system. The well-known Frank McCloskey ran a railroad claims brokerage business in Texas in the 1910s and 1920s.⁸¹ Polish translators served as the go-betweens for work-related injuries in the Massachusetts textile mills of the 1890s,⁸² and Russian claims agents brokered personal injury claims in Wisconsin in the 1920s for another immigrant population.⁸³ Both sets of middlemen-brokers, interestingly enough, seem to have been paid by their claimant clients and also by the industrial defendants for whom they provided peace and claim resolution.⁸⁴ More formally, labor unions,⁸⁵ automobile owner associations,⁸⁶ and other voluntary organizations had sought to develop legal services plans that streamline and reduce the cost of legal services for their

80. See, e.g., Rosenberg & Sovern, *supra* note 32.

81. Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 342-43 (1987).

82. Issacharoff & Witt, *supra* note 5, at 1592.

83. *Proceedings*, *supra* note 42.

84. Issacharoff & Witt, *supra* note 5, at 1593; *Proceedings*, *supra* note 42, at 343-44.

85. See generally George E. Bodle, *Group Legal Services: The Case for BRT*, 12 UCLA L. REV. 306 (1965).

86. Quintin Johnstone, *The Unauthorized Practice Controversy, A Struggle Among Power Groups*, 4 U. KAN. L. REV. 1, 14 (1955).

members. In the 1920s, so-called independent claims adjusters sprung up in California to provide auto accident victims with the same kinds of claims representation that insurance companies received from their defense-side claims adjusters.⁸⁷ In short, lay claims brokers have appeared wherever tort law has created repetitive and routinized claims to fill the market niche created by claimants' lack of information about legal services and the law.⁸⁸

These lay intermediaries, of course, have been the object of heated attacks and criticisms by the legal profession from the very beginnings of American tort law to the present.⁸⁹ But the resistance of the legal profession seems motivated, in large part, by the threat that lay middlemen and brokers pose to lawyers' monopoly over the provision of legal services. What the middlemen promised their claimant clients was a way to collect and utilize information about the lawyers in the marketplace. Claims brokers offered the services of a knowledgeable intermediary who had good information about the quality of lawyers in the area and whose goodwill the lawyers were anxious to retain.

A closer look at two examples of claims brokerage in the personal injury area may illustrate what claims brokers can do. The first example is drawn from the early history of the claims system, and its lost promise may hold the seeds of a solution to the failures of the personal injury legal services market. The second example, drawn from our own time, is a sign of the dysfunction of the legal services market today.

The functional example is the Brotherhood of Railroad Trainmen's legal counsel plan, which was at its height around the middle of the twentieth century. The Brotherhood of Railroad Trainmen (BRT) first developed its legal counsel plan in 1930, when it established a Legal Aid Department in response to decades of complaints by members about the difficulty of identifying high-quality legal services at reasonable rates.⁹⁰ The Department served as a union-wide clearinghouse for information about accidents and accident claims. It conducted its own preliminary investigations of accidents involving injury to one or more of its members; it then connected its injured members

87. Corinne Lathrop Gilb, *Self-Regulating Professions and the Public Welfare: A Case Study of the California State Bar 233 (1956)* (unpublished Ph.D. dissertation, Radcliffe College).

88. *Proceedings*, *supra* note 42, at 343–44.

89. *See, e.g.*, Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159; Gilb, *supra* note 87, at 234.

90. Bodle, *supra* note 85, at 309–10.

to participating lawyers who represented members in injury claims against the railroads.⁹¹

The goals of the Department were twofold. First, it sought to alleviate what one observer has called “the hatpin-method” of selecting an attorney at random from the phonebook.⁹² In the era before modern referral networks made it increasingly likely that claims would make their way to a value-maximizing lawyer, the BRT’s lawyer identification service was exceedingly important. By collecting and organizing information about lawyer performance, the Department would allow its members to make sensible decisions in the legal services market. Second, the Department reduced the contingency fee rates that participating lawyers charged BRT members, from between 33% and 50%, to between 20% and 25%.⁹³ To this day, the descendent organization of the BRT coordinates the identification of legal services for injured railroad worker members.⁹⁴

The second, and dysfunctional, example of claims brokerage is the kind of brokering that is more often the paradigmatic form of claims brokering in our own time: the lawyer-organized claims mill. Many lawyers who advertise as personal injury specialists are little more than referral mills. They serve as intake offices for claims that they then farm out to specialized lawyers in return for a contingent referral fee.⁹⁵ In the process, lawyer claims mills effectively get cases into the hands of specialized, high-value-added lawyers. But they put no pressure at all on fees. Quite the contrary, they seem to thrive in an uncompetitive legal fees market that sometimes functions a little like a gold rush—locating and signing up clients is the key. Such client prospectors function as a tax on actual legal services providers, whose fees are discounted by the claims mill referral fee.⁹⁶

Perhaps the most striking thing about these two different systems of claims brokerages—one union-organized, one lawyer-operated—is that the limits of one and the defects of the other seem to arise out of the same regulatory problem: the legal profession’s rules against referral fees for nonlawyers. The lawyer-run claims mills operate in an

91. *Id.*

92. *Id.* at 323.

93. *Id.* at 311.

94. See Brotherhood of Locomotive Engineers and Trainmen, The Federal Employees Liability Act, <http://www.ble.org/fela/> (last visited Feb. 7, 2007).

95. Daniels & Martin, *supra* note 43, at 390; Van Hoy, *supra* note 43, at 347.

96. Andrew Blum, *Big Bucks, but . . .*, NAT’L L.J., Apr. 3, 1989, at 1 (noting that a prominent personal injury firm pays 28% of its fee revenue to referring lawyers); *State Tax Tribunal Rules Against Law Firm on Withholding for Referrals by Associates*, N.Y.L.J., Oct. 3, 2003, at 21 (noting that a prominent plaintiffs’-side firm regularly pays 50% referral fees).

environment of starkly restricted competition. Under the American Bar Association's professional ethics provisions, lawyers may not pay referral fees to nonlawyers.⁹⁷ Nonlawyers, in turn, risk prosecution for the unauthorized practice of law for claims brokerage. It is little wonder, then, that the lawyer claims mills have put so little pressure on fees.

As for the BRT's legal services plan, its chief shortcoming was that these same limits on nonlawyer claims brokering prevented it from collecting and organizing information in a way that would allow members to make effective decisions in the legal services marketplace. We can infer this in part from the standardized 25% contingency fee arrangement that emerged in the BRT program's heyday.⁹⁸ The price variation that one would expect to see in a market in which there was considerably more information about the quality of the services being offered did not develop.

The reason for the limits of the BRT program seems quite simple. As a labor union, the BRT was forbidden from committing the kind of resources to the program that the collection and organization of the relevant information would have required. At first, it appears, the BRT tried to do precisely this. In the early 1930s, the BRT itself took 5% or 6% of each claim's ultimate value as a contingent fee.⁹⁹ This cut of the proceeds might have become the mechanism by which the BRT financed a systematic body of information on lawyer performance for its members. But within just a few short years, railroad employer organizations and bar associations led a successful attack on the BRT plan's early business model. In states around the country, participating lawyers were charged with disciplinary violations of the rules of professional ethics for accepting paid referrals.¹⁰⁰ By 1960, it was relatively well settled that although professional norms permitted a labor organization such as the BRT to identify lawyers for its injured members, the practice of referral fees paid to the labor organization constituted a violation of lawyers' professional ethics, as well as illegal

97. MODEL RULES OF PROF'L CONDUCT R. 7.2 (2006).

98. Bodle, *supra* note 85, at 311.

99. *Id.*

100. *Id.* at 313–17 (noting that lawyers were charged with violating Canons 28 and 35 of the ABA Canons of Professional Ethics); *see, e.g., In re O'Neill*, 5 F. Supp. 465 (E.D.N.Y. 1933) (*per curiam*); *Hildebrand v. State Bar of Cal.*, 225 P.2d 508 (Cal. 1950) (*per curiam*); *Hulse v. Bhd. of R.R. Trainmen*, 340 S.W.2d 404 (Mo. 1960) (*en banc*); *State ex rel. Beck v. Lush*, 103 N.W.2d 136 (Neb. 1960).

solicitation of lawsuits by the labor organization and the unauthorized practice of law.¹⁰¹

This compromise was the arrangement that the Supreme Court upheld in its well-known 1964 decision, *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*.¹⁰² The *Railroad Trainmen* case began in the civil rights battles of the 1950s. In an attempt to foil the NAACP's civil rights litigation campaign in the South, the Virginia legislature in 1956 expanded the state's definition of the illegal solicitation of legal business. In 1963, in *NAACP v. Button*, the Supreme Court struck down an injunction against the NAACP litigators on the grounds that the First Amendment protected the organization's right to organize its campaign in the courts.¹⁰³ A year later, the Court did the same for a similar Virginia injunction against the BRT, extending the First Amendment principle from the civil rights cases to the labor union and personal injury context.¹⁰⁴

The decision in *Railroad Trainmen* is typically hailed as a robust defense of the BRT's legal services plan.¹⁰⁵ In retrospect, however, the limitations of the *Railroad Trainmen* decision are just as salient as its virtues. The *Railroad Trainmen* decision suggested strongly that if the BRT had sought to take referral fees or retain a stake in the claim—the kinds of steps that might have allowed it to recoup its costs—the case would have been very different. The Court's First Amendment rationale thus emphasized the cooperative and associational aspects of the BRT's legal services plan. The Court concluded that the plan was “not a commercialization of the legal profession.”¹⁰⁶ Seven years later, in another railway union legal services case, the Court quietly made it clear that it would uphold ethics rules barring referral fees and fee sharing with nonlawyers.¹⁰⁷

The Court's disdain for commercialization was evident. It indicates that the Court decided the union legal services cases on the basis of a rights framework that it drew from the related civil rights battles of the *Button* case. Or perhaps the Court was misled by the individual rights rhetoric of the plaintiffs' bar in its founding years.¹⁰⁸ But in

101. Bodle, *supra* note 85, at 316–17; *see also In re Bhd. of R.R. Trainmen*, 150 N.E.2d 163 (Ill. 1958); *Ryan v. Pa. R.R.*, 268 Ill. App. 364 (App. Ct. 1932).

102. 377 U.S. 1 (1964).

103. 371 U.S. 415 (1963).

104. *Bhd. of R.R. Trainmen*, 377 U.S. at 7–8.

105. *See* Bodle, *supra* note 85, at 322; *see also* Yeazell, *supra* note 45, at 1976, 1988 (describing the significance of *Button* and *Railroad Trainmen* for the transformation of civil litigation).

106. *Bhd. of R.R. Trainmen*, 377 U.S. at 6.

107. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 582–84 (1971).

108. *See* WIRT, *supra* note 1, at 211–78.

retrospect, the First Amendment framework adopted by the Court sent the law of lay claims brokers down a blind alley. For what the *Railroad Trainmen* case ought to have been about was not associational rights so much as the effective delivery of legal advice in the legal services market. Even as the Court recognized new rights in the legal services area, the plaintiffs' bar was quickly turning the provision of legal services in the personal injury area into a powerful but deeply flawed market, one that the First Amendment regime of the *Railroad Trainmen* case had little hope of successfully organizing.

To be sure, after the *Railroad Trainmen* case, lay organizations such as labor unions have a formal First Amendment right to associate their members with participating lawyers. But legal ethics rules bar them from taking the steps that would allow them to do so effectively. Indeed, were large organizations such as labor unions allowed to develop a financial stake in litigation, there is good reason to think that the price of legal services in the personal injury market might become considerably more competitive. Organizations sufficiently large to collect and organize information about the legal services performed would be in a good position to turn their members into effective agents in the legal services marketplace.¹⁰⁹

An effective system of lay brokers would probably not even require preexisting organizations such as labor unions. Private market brokers might simply spring up, offering to match claimants with participating lawyers; the brokers would collect and update information on lawyers in return for a cut of the action. Such a system of lay brokers might effectively introduce the power of the market into the lawyer-client relationship in the personal injury area, accomplishing what the BRT accomplished for its members and more. Like the BRT's legal services plan, lay brokers might push contingent fee rates down. More significantly still, lay brokers might be able to collect sufficient information about lawyers which would not only push standard fees down, but also introduce new price competition in the personal injury legal services market. Price competition, in turn, could mean lower tort administrative costs and even the mitigation of the queuing problem. With information on the claimants' side, high-quality lawyers might be able to maintain or even increase their current contingent fee structures, though the cases they would get would be the complex or otherwise challenging ones to which their skills would add considerable value. Claimants with simpler claims would be able to select a lower

109. The analogy would be to the role that institutional investors play in selecting class counsel in securities litigation, or—out of the litigation context—to the role that mutual funds play for individual investors in the selection of securities.

fee arrangement without the anxiety that they were unwittingly opting for a low-quality lawyer.

We cannot know for certain that for-profit lay claims brokers would move the personal injury legal services market in this direction. But little harm would likely come from the experiment. For-profit broker intermediaries would be simple to put into place. Repealing the legal ethics rules that currently bar fee sharing and referral fees between lawyers and nonlawyers would authorize a market in claims brokers. If claims brokers do not emerge, or if existing organizations such as labor unions do not develop their own, then perhaps the existing contingent fee structure in the personal injury area is not higher than that which a competitive market would produce. Abolishing the offending legal ethics rules would hardly do much harm if the theory advanced here is incorrect. If the contingent fee rates are in fact what a more robust market would produce, we will not see successful brokerages develop.¹¹⁰

IV. CONCLUSION

The creative vision of the private tort bar in rehabilitating the common law for the age of statutes is a truly remarkable moment in the intellectual history of American law, one that too often goes unnoticed in histories of American legal thought, which spend more time in the hallways of the law schools than in the law offices in which ideas about the law have been crafted and implemented. Moreover, the public policy system that modern American tort law has put into place often performs brilliantly, even if it seems deeply flawed.

Nonetheless, the efforts of the plaintiffs' bar and its resistance to administrative compensation systems have given rise to a new claimant-administrator relationship, one that reproduces some of the unconstrained authority about which the early leaders of the plaintiffs' bar worried when they criticized public administration. Pound and the early leaders of the plaintiffs' bar saw public administration as akin to a dictatorship, but they and their successors have created a massive private administrative system with many of the same attributes. When Ross described the bureaucratization of torts practice three decades ago, his book might well have been heralding the decline of the rule of law in the torts area.¹¹¹ After all, what Ross was describing was the rise of administrative systems staffed by bureaucrats with significant

110. For similar theories, see generally KRITZER, *THE JUSTICE BROKER*, *supra* note 41 and Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 *CARDOZO L. REV.* 65 (2003).

111. Ross, *supra* note 20.

amounts of discretionary managerial authority. The plaintiffs' lawyer, in other words, has much of the discretionary power that characterizes the managerial alternative to the rule of law in the jurisprudential literature. Yet the regulatory regime for the market in plaintiffs'-side legal services, a regime that is summed up by the promise and the limits of the *Railroad Trainmen* case, has failed to grapple with the private market-driven bureaucracies of the settlement system.

For those of us who are tempted to see something of genius in what Kagan has called "the American way of law,"¹¹² taking the tort system seriously requires applying its market principles not just to the primary regulatory problems of deterrence and compensation, but to the secondary regulatory problems of the lawyer-client relationship that arise out of our distinctively private approach to the law of personal injury.

In particular, the efforts of the plaintiffs' bar have created a system in which claimants' representatives are almost certainly unduly unconstrained with respect to the costs of the system that they help administer. We should view the project of reining in those costs, of exerting these constraints, and of unleashing the power of the market in this context as the full realization of the startlingly fresh and little-studied regulatory vision of the twentieth-century American plaintiffs' bar.

112. KAGAN, *supra* note 2.

