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Tort Claims As Property Rights

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TORT CLAIMS AS PROPERTY RIGHTS

*D. Theodore Rave**

CONTENTS

Courts have long said that legal claims are a constitutionally protected form of property. But what does that mean? This essay explores the treatment of legal claims as property rights in the context of mass torts in doctrinal, theoretical, and economic terms. Corrective justice and civil recourse conceptions of tort law dictate that tort claims are owned by individual plaintiffs. Allocating these property rights at the individual scale can make it difficult to use public mechanisms, like class actions, to aggregate mass tort plaintiffs' claims to achieve tort law's instrumental goals like deterrence horizontal equity. At the same time property rights in tort claims facilitate aggregation and mass settlement through private ordering that often sweeps away individualized distinctions among plaintiffs. While the private aggregate settlements that emerge may sometimes further tort law's instrumental

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goals, they do so fortuitously, as a byproduct of intermediaries seeking private gain from bundling claims together for sale to the defendant en masse, and without the transparency or oversight of public alternatives.

INTRODUCTION

Legal claims are property rights. To say so is doctrinally uncontroversial. Indeed, the Supreme Court has so held numerous times.[1] A chose in action is a constitutionally protected form of property. This is true before the legal claim is liquidated into a judgment and, indeed, before the claim is even filed with a court.[2]

The idea that tort claims are a form of property rights is rooted in a corrective justice or civil recourse conception of tort law. When you are injured, *you* have a claim against the tortfeasor; it does not belong to someone else or to the state. In mass torts, however—the context with which I am primarily concerned in this Essay—the allocation of these property rights at the individual level creates a mismatch of scale. Mass tort defendants operate—and litigate—at a mass level. And the individual allocation of property rights in tort claims can frustrate efforts to achieve some of tort law's more instrumental goals through formal public mechanisms for treating claims in the aggregate. It is hard to use mechanisms like class actions and statistical adjudication to achieve goals like deterrence and horizontal equity when each claimant owns an individual claim that she may control as she sees fit.

At the same time, and perhaps ironically, treating individual tort claims as a form of property facilitates the aggregation and settlement of claims through *private* ordering. Lawyers and other intermediaries specialize in bundling these claims together and negotiating their sale to the defendant en masse. And the private aggregate settlements that emerge often result in the same kinds of averaging and approximation that corrective justice and civil recourse theories reject in public models.

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1. *See, e.g.*, Tulsa Prof'l Collection Serv. v. Pope, 485 U.S. 478, 485 (1988) ("Little doubt remains that [a cause of action] is property protected by the Fourteenth Amendment."); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950); Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933); Pritchard v. Norton, 106 U.S. 124, 132 (1882).

2. *See, e.g.*, *Pritchard*, 106 U.S. at 132; *see also* Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CON. L.Q. 373, 377–78 (2009); Thomas Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 913 (2000); Olivia A. Radin, Note, *Rights as Property*, 104 COLUM. L. REV. 1315, 1331 (2004); Ryan C. Williams, *Due Process, Class Action Opt Outs and the Right Not to Sue*, 115 COLUM. L. REV. 599, 619–21 (2015).

These private methods of aggregation and resolution—made possible precisely because tort claims are property—may have the fortuitous result of furthering some of tort law's instrumental goals. They may increase deterrence by enabling injured plaintiffs to more efficiently bring claims and increase horizontal equity by smoothing out some of tort law's individualistic features. But because these methods are designed by private claims brokers and operate in the dark shadows of the law, they lack the transparency of more public alternatives and may create opportunities for rent seeking by their repeat-player denizens.

I. TORT CLAIMS ARE PROPERTY

To call legal claims property rights is more than just semantics. Calling something property has legal consequences. It triggers constitutional protections under the Due Process and Takings Clauses.[3] And it has economic consequences. It implies that there are certain things that you can do with your rights (e.g., control them, use them, alienate them). It also implies that they are *your* rights, and thus there are limits on what other people can do with them.

But, as Thomas Grey told us four decades ago, our conception of property rights has disintegrated substantially from Blackstone's "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[4] So what is it that we mean when we say that tort claims are property?

The property right in a tort claim cannot be simply an entitlement to compensation from the defendant. If you possess a legal claim—even a meritorious one—you do not get compensation automatically; you have to litigate it to judgment, a process that may require you to spend a substantial amount of money and effort. And, of course, you might lose. But you still have a property interest in an unliquidated claim, even one that may turn out to be non-meritorious and result in no compensation. Preclusion law, class action law, and even bankruptcy law all protect rights in unliquidated legal claims.[5] The value of the property right may depend on the strength of the underlying claim, but its existence does not.

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3. U.S. CONST. amends. V, XIV.

4. Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS 69, 73 (1980) (quoting 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (11th ed. 1791)).

5. *See*, *e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (preclusion); *Shutts*, 472 U.S. at 808 (class actions); 11 U.S.C. § 541(a)(1) (2012); Parker v. Goodman, 499 F.3d 616, 624–25 (6th Cir. 2007) (bankruptcy).

A. Bundle of Procedural Rights

Using the familiar bundle of rights metaphor,[6] we might think of the property interest in a tort claim as a bundle of procedural rights. This focus on procedural rights is in line with a civil recourse theory of tort law, where tortious conduct by the defendant entitles the plaintiff to seek redress in the courts.[7] Within the bundle, the contours of some essential rights are shaped by the constitutional law of due process (e.g., the right to be heard and the right to a neutral decision maker). Other rights may be dictated by the rules of civil procedure, evidence, or legal ethics applicable in the particular court system invoked by the plaintiff. And some are, of course, defined by reference to the underlying substantive tort law applicable to the parties' dispute. It is possible that some of these procedural rights may not be at the core of a chose in action and could be limited or stripped away without infringing on the plaintiff's property interest, but let's leave that question for another day.[8]

The bundle of rights in a tort claim includes, at a minimum, the right to control how the claim is used, the right to exclude others from using the claim, and at least some right to alienate the claim.

The owner of a tort claim gets to decide how to use the claim. She may sue and invoke the judicial process to seek recourse for her injury. But she also has the right *not* to sue, for any reason or no reason.[9]

The bundle also includes the right to exclude. The doctrines of standing and claim preclusion exclude other people from using the owner's claim.[10] If strangers were to try to litigate on her behalf, the claim owner would not be bound.[11] Similarly, legal ethics rules ex-

6. *See*, *e.g.*, Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 363–66 (2001).

7. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

8. In the Trans Union Privacy Litigation class action settlement, for example, the parties settled only the right to litigate claims on a class action or aggregate basis, leaving intact the rights of each plaintiff to litigate his or her substantive Fair Credit Reporting Act claim on an individual basis. *In re* Trans Union Corp. Privacy Litig., 741 F.3d 811, 813 (7th Cir. 2014). If the right to aggregate is part of the core property interest in the claim, then a transaction like the Trans Union settlement might face a due process challenge. For a discussion of this form of unbundling of procedural rights in a legal claims, see D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 508 (2016).

9. Williams, *supra* note 2, at 622–23.

10. *See id.* at 624.

11. Subject only to narrowly drawn exceptions not relevant here. *See* Taylor v. Sturgell, 553 U.S. 880, 892 (2008).

clude even the lawyer for the claim owner from making certain fundamental decisions about how the claim is to be used.[12]

The owner also has at least some rights to alienate a tort claim. Although traditionally most tort claims have been considered personal to the plaintiff and thus not freely assignable like some other legal claims,[13] there are several ways in which tort claims are alienable. Most fundamentally, the plaintiff can sell the claim to the defendant in a settlement (either before or after initiating a lawsuit).[14] A plaintiff can also transfer the claim to an insurer through subrogation.[15] The plaintiff can assign at least a partial ownership stake in the claim to a lawyer through a contingency fee arrangement.[16] And newer models of litigation finance that involve assigning equity stakes in the claim to third parties are gaining traction.[17]

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12. A lawyer cannot settle a claim without the client's consent. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2018); *see also* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 283 (2011). Nor can a lawyer who represents multiple clients enter an aggregate settlement of their claims without the informed consent of each client. MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2018).

13. *See*, *e.g.*, 6 AM. JUR. 2D *Assignments* §§ 46, 48, 55 (2013). A robust secondary market for some legal claims, like debt claims, has emerged in many states. Other states limit the sale of many forms of legal claims (e.g., fraud, personal injury) to third parties. *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 75–82 (2011) [hereinafter Sebok, *Inauthentic*]. Sebok suggests that, traditionally and even under modern doctrine in some states, personal injury claims are not a form of property that can be "owned" because they are not assignable. Anthony J. Sebok, *Jeffrey O'Connell and the Market for Tort Claims*, 6 J. TORT L. 115, 133 (2013) ("Although it sounds odd to say, not even the original victim in a personal tort 'owns' her cause of action, which is not to say that she does not possess control over it. The cause of action in a personal tort simply cannot be owned by anyone; and that is why it cannot be assigned."). But, as Sebok acknowledges, this reluctance to allow assignment of personal injury claims is based on a formalistic anachronism that such claims are inchoate. *Id.* And just because some most states will not recognize the assignment of a personal injury claim does mean that such a claim is not a form of property that can be owned and afforded constitutional protections—or indeed that it cannot be alienated in other ways, as discussed in the text.

14. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 419 (2001).

15. *See* Nathaniel Donahue & John Fabian Witt, *Tort as Private Administration*, 105 CORNELL L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3349858; *see also* Sebok, *Inauthentic*, *supra* note 13, at 83–84.

16. *See*, *e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 (2000).

17. *See*, *e.g.*, Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1301 (2012); Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561 (2014); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1277–78 (2011). Even with the emergence of third-party investors, however, the market for tort claims is necessarily thin, as there is only one ultimate buyer—the defendant. The defendant is a monopsonist. Contingency fee lawyers, subrogees, and third-party financiers are simply middlemen. Though that is not to say that the middlemen cannot add value by brokering the transaction and aggregating and packaging plaintiffs' claims in ways that can extract more value from the defendant. For more elaboration, see Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the*

B. Put Options

Another way in which we might think about tort claims as property is in economic terms. Guido Calabresi and Douglas Melamed famously drew a distinction between entitlements protected by property rules and those protected by liability rules.[18] A property rule makes the entitlement holder the sole decider on how the entitlement will be allocated—she can veto any involuntary transfer of the entitlement.[19] A liability rule, by contrast, allows another party to take the entitlement and then pay the original owner a court-determined amount of damages.[20] Under this framework, tort law is the quintessential liability rule. A product manufacturer, for example, may take a consumer's entitlement to be free from injury, so long as the manufacturer pays for the damage it causes.

Ian Ayres extended this analysis by explaining that a liability rule gives at least one party an "option" to force the transfer of an entitlement at a court-determined exercise price.[21] This option could take the form of either a "call" or a "put." A call option is a right to buy an asset at a set exercise price within a set period of time. Conversely, a put option is the right to sell (that is, to force someone else to buy) an asset at a set price within a set period of time. Ayres' great insight was that we can decouple who owns the initial entitlement from who gets to decide whether it is transferred.[22] Thus our product manufacturer has a call option to take the consumer's entitlement to remain injury-free for the exercise price of damages determined by the court.

Of course, when the product manufacturer exercises that option, the victim does not just magically get damages. Calabresi, Melamed, and Ayres were all analyzing the *ex ante* world of incentives. In the *ex post* world, instead of damages, the victim gets a new kind of entitlement: a tort claim—that bundle of procedural rights that allow the new plaintiff to use the court system to attempt to extract damages from the defendant, and which the Supreme Court has recognized as a constitutionally protected form of property.[23]

In economic terms, then, we might think of a tort claim as a put option. The plaintiff has the option to force the defendant to buy the

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"Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation, 108 GEO. L.J. 73, 89–92 (2019) [hereinafter Bradt & Rave, *It's Good to Have the "Haves" on Your Side*].

18. Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

19. *Id.*

20. *Id.*

21. IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 5 (2005).

22. *Id.* at 7.

23. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985).

claim for a price determined by the court within the statute of limitations period. Of course, exercising that option is not costless. It may cost the plaintiff a substantial amount of money to litigate all the way to the point where the court sets the exercise price (i.e., determines damages) and forces the defendant to make the purchase. These litigation costs are part of the "premium" that the plaintiff pays for the put option.[24] Exercising the option also imposes litigation costs on the defendant. For this reason, and because of the inherent uncertainty of predicting litigation outcomes, the plaintiff's option has economic value independent of the strength of the underlying claim.[25] Accordingly, it will very often be in both parties' interest for the defendant to purchase the plaintiff's claim at an agreed upon price (i.e., to settle) before the plaintiff exercises her put option.

These litigation options do not, of course, work exactly like options in the financial markets (for example, much of the "premium" to acquire and use the option is paid to third parties like lawyers, not to the option-writing counterparty).[26] But the important point is not how tight the analogy is. The important point is that the plaintiff is the decider. The plaintiff decides whether to file a lawsuit before the statute of limitations runs and the option thus expires. Having done so, the plaintiff decides whether to press on to trial, to accept a settlement offer, or to drop the claim altogether. Ultimately, with enough perseverance (and financial outlay) the plaintiff can force the defendant to purchase her claim at the court-determined price (though that price may, at the end of the day, turn out to be less than the plaintiff's costs, or even $0). The defendant, by contrast, cannot typically force an un-

24. *Cf.* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1288–89 (2006) ("Legal fees and other costs constitute premiums that a plaintiff must pay to third parties, such as lawyers and experts, and not to the defendant, in order to optimize the lawsuit's value.").

25. Options theory predicts that the value of an option goes up as variability and uncertainty about valuation of the underlying asset increases. *See* Grundfest & Huang, *supra* note 24, at 1287–88; *see also* Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173 (1990). Grundfest and Huang analyze plaintiffs' claims as call options, not put options. In their model, the plaintiff holds a call option to either abandon the suit or invest a set amount of money in the litigation to purchase new information (through discovery or obtaining a ruling on a motion or the like) about how much damages the court is likely to award while simultaneously imposing costs on the defendant. Grundfest and Huang suggest that plaintiffs will pursue even negative expected value suits for their option value if the range of potential expected values is high enough and the price of obtaining new information low enough. *But see* Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 212–22 (2007) (critiquing Grundfest and Huang's options model). Although I am adopting a different framework here, this analysis of claims as call options reinforces my point that it is the plaintiff who decides what to do with the claim—to press on or abandon it.

26. *See* Grundfest & Huang, *supra* note 24, at 1288–89.

willing plaintiff to sell her claim.[27] The plaintiff retains the right to reject even a generous settlement offer as well as the right not to sue at all.[28] The plaintiff holds the option. The plaintiff gets to decide.

It did not have to be this way. Our system could have made someone else the decider. We could have given the defendant a call option to buy claims from unwilling plaintiffs. That is essentially what happens in bankruptcy and interpleader. But outside of the contexts of insolvency or competing claims on a limited fund, we generally do not give the defendant a call option. Indeed, even when a defendant makes an offer of judgment for *more* than the plaintiff is seeking in damages, courts have shied away from treating the plaintiff's claim as moot if the offer is unaccepted.[29] We could have made the government the decider, as in qui tam suits where the government can intervene, seize control from the relator, and decide whether to press, settle, or dismiss the claim. But aside from a handful of statutes like the False Claims Act, the qui tam model is rare.[30] Or we could have a more overtly regulatory system where injured parties complain to the state, and a state agency decides whether to commence (or cease) a public enforcement action, which, if successful might be accompanied with some form of restitution for the complainant. But we have opted to leave large swaths of public policy—including tort law—to private enforcement.

By allocating tort claims to private plaintiffs, we have made individual plaintiffs the deciders. Each plaintiff gets to decide how to use the bundle of procedural rights that make up the claim. The plaintiff has the option to sue or not sue, to settle or not to settle. And because those legal claims are property rights, due process and other doctrines protect the individual plaintiff's role as the decider on what happens to those claims.[31]

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27. There are exceptions to this general rule. One other insight from option theory is that where there are puts there can also be calls. *See* AYRES, *supra* note 21, at 6. And so it is with legal claims. Under certain circumstances, a defendant may have a mirroring call option to force the plaintiff to sell the claim at a court-determined price through either interpleader or bankruptcy.

28. *See* Williams, *supra* note 2, at 622–23.

29. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 674 (2016); *see also* Diane Myers, Comment, *Mooting the Fair Labor Standards Act: How Offers of Judgment Are Eliminating the FLSA Collective Action*, 53 HOUSTON L. REV. 303, 331–32 (2015).

30. 31 U.S.C. § 3730(b) (2012). *See generally* David Y. Kwok, *Evidence From the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 PUB. CONT. L.J. 225, 228–30 (2013).

31. *See* Williams, *supra* note 2.

II. Property Rights are Allocated at the Wrong Scale in Mass Torts

Allocating property rights in tort claims to individual plaintiffs makes sense under a corrective justice view of tort law. After all, if the defendant has harmed a plaintiff, it is *that plaintiff* whom the defendant must make whole, not some hypothetical construct of an average plaintiff or the public more generally.[32] The logic is even more compelling under a civil recourse theory. When a plaintiff is wronged, civil recourse theory says *that plaintiff* is empowered to use the court system to seek redress from the defendant.[33] The property nature of tort claims is practically baked into civil recourse theory.

But, at least when we are talking about mass torts, those property rights may be allocated at the wrong scale to achieve some of the more instrumental goals of tort law, like deterrence and horizontal equity. And the individual allocation of property rights in tort claims may also frustrate individual plaintiffs' attempts to maximize the value of those claims.[34]

A. Frustrating Tort Law's Instrumental Goals

In mass torts, defendants operate at a mass scale. Property rights in tort claims, however, are allocated at an individual scale. This mismatch in scale can create problems of under-deterrence and a lack of horizontal equity.[35]

For tort law to achieve optimal deterrence, the defendant must internalize the costs of the harms that it causes. But internalization depends on enforcement, and enforcement is not costless. Much of this is familiar ground.[36] The cost of litigation may make it practically impossible for some plaintiffs to pursue their claims on an individual basis.[37] And even when they can, the defendant has built-in advantages in terms of scale economies and repeat-play.[38] The repeat-player defen-

32. *See*, *e.g.*, Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 Geo. L.J. 695, 701 (2003).

33. *Id.* at 699.

34. *See* D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 Vand. L. Rev. 1183, 1185 (2013) [hereinafter Rave, *Anticommons*].

35. *See* Sergio Campos, *Mass Torts and Due Process*, 65 Vand. L. Rev. 1059, 1085–87 (2012).

36. For one classic treatment, see David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L.J. 561, 573 (1987).

37. A science-heavy drug defect case, for example, can cost upwards of $250,000 to litigate to judgment. *See* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 Fordham L. Rev. 1943, 1952 (2017).

38. *See* David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 Harv. L. Rev. 831, 847–53 (2002) [hereinafter Rosenberg, *Mandatory-Litigation Class Actions*]; Campos, *supra* note 35, at 1076.

dant can play the odds and play for rules, to borrow Marc Galanter's terms, and thus tilt the playing field in its favor.[39]

Unless the plaintiffs can aggregate their claims, underenforcement is nearly inevitable. And the allocation of property rights in the plaintiffs' claims at the individual level means that the plaintiffs will have to incur the transaction costs of any attempts at aggregation.[40] Even if plaintiffs do succeed in aggregating their claims—likely because some lawyer was willing to invest in bundling claims together—the allocation of property rights in claims at the individual level makes it difficult for the repeat players who emerge on the plaintiffs' side to play as effectively as the defendant. The individual plaintiffs own the claims, not the lawyer. Thus the repeat-player plaintiff's lawyer is not allowed to play the odds or play for rules like the defendant by making tradeoffs across her inventory of claims.[41] And, as a result, the defendant is unlikely to internalize all of the costs of its conduct and will be left under-deterred.[42]

On the flip side, once aggregation occurs, claims that are weaker on the merits may flow into the system. One frequent complaint about federal multidistrict litigation (MDL) is that it creates a "Field of Dreams" problem: "If you build it, they will come."[43] Defendants often complain that once an MDL is launched, it is flooded with tagalong claims that lack merit.[44] The property nature of tort claims plays into this dynamic as well. The existence of the plaintiff's property right in a legal claim is independent of the strength of the claim. And, as option theory predicts, those claims have economic value as put options, even if the underlying claim has little merit. If lowering the costs of filing a claim—and thus acquiring a form of property—leads to the filing of, and payment for, non-meritorious claims, it will interfere with achieving optimal deterrence as well.

The individual allocation of property rights in claims can also lead to horizontal inequities in mass torts. There is a degree of randomness built into the tort system that can result in radically different out-

39. Marc Galanter, *Why the "Haves" Come Out Ahead: Some Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 143–44 (1974).

40. *See* Rave, *Anticommons*, *supra* note 34, at 1202–04.

41. *See* Galanter, *supra* note 39, at 117; *see also* Bradt & Rave, *It's Good to Have the "Haves" on Your Side*, *supra* note 17, at 99.

42. *See*, *e.g.*, Rosenberg, *Mandatory-Litigation Class Actions*, *supra* note 38.

43. FIELD OF DREAMS (Universal Studios 1989).

44. *See, e.g.*, LAWYERS FOR CIVIL JUSTICE, *MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules* 1–2 (Sept. 14, 2018), https://www.lfcj.com/uploads/1/1/2/0/112061-707/lcj_memo_-_mdl__tplf_proposals_for_discussion_9-14-18__004_.pdf. The extent of this problem in the real world, however, is much less clear.

comes for seemingly similarly situated plaintiffs. Imagine two identical twin plaintiffs who both took the same defective drug, marketed nationwide by the same manufacturer, and both developed the same cancer five years later. However, one lives in state A with a six-year statute of limitations for torts and the other lives in state B where the statute of limitations is four years. Because their claims are allocated individually, one may recover while the other will get nothing. Or suppose that the drug in question tripled the chance of developing lung cancer in everyone who took it, but one twin was exposed to a substance at work that also causes lung cancer. The twin exposed at work may be unable to prove specific causation because he cannot rule out the workplace carcinogen as a cause, even though he was exposed to the same level of risk by taking the drug as his brother.[45]

When rights are distributed at the individual level, differences in factors like choice of law, the ability to prove specific causation, and even the inherent degree of randomness in jury verdicts may lead to different outcomes for seemingly similarly situated plaintiffs. These sorts of differences among potential plaintiffs do not matter from the defendant's perspective; the defendant deals in aggregate risks. The different outcomes might seem arbitrary from the plaintiffs' perspective, even if they are rooted in state sovereignty or long-standing tort theory. And some differences, like the unpredictable decisions of insufficiently instructed lay jurors, may be truly arbitrary.[46]

The individual allocation of property rights in tort claims reflects the essentially binary nature of tort law. Tort law deals in discrete accidents, determining liability in an on or off fashion for each occurrence, not in probabilities or averages.[47] Defendants generally are not liable for the increased risks they impose on plaintiffs unless and until those risks are realized. And the compensatory damages awarded to make injured plaintiffs whole are not discounted to reflect *ex ante* risk.

This binary approach can lead to inequities and inefficiencies in mass torts. The consequences are stark when it comes to specific causation. A defendant may engage in conduct, such as emitting a toxic substance or manufacturing a defective drug, that is statistically certain to cause cancer to an ascertainable percentage of the exposed

45. For elaboration on the use of relative risk in proving specific causation in toxic tort cases, see Joseph Sanders et al., *Differential Etiology: Inferring Individual Causation in the Law from Group Data in Science* (Mar. 18, 2019) (draft) (on file with author).

46. *See*, *e.g.*, Joseph Sanders, *Reforming General Damages: A Good Tort Reform*, 13 ROGER WMS. U. L. REV. 115, 123–28 (2008).

47. *See* Lee Anne Fennell, *Accidents and Aggregates*, 59 WM. & MARY L. REV. 2371, 2379 (2018).

population, say forty percent.[48] But no individual plaintiff may be capable of proving that it was more likely than not that exposure to the defendant's tortious conduct caused *her* particular cancer.[49] Thus, no plaintiff can recover, and the defendant will not be found liable for any of the harm that it has caused. Conversely, if the defendant's conduct could be shown statistically to cause injury sixty percent of the time, the defendant could be charged with liability for every plaintiff's harm, notwithstanding the fact that it was not to blame in forty percent of the cases. Neither situation is desirable from the standpoint of optimal deterrence or horizontal equity.[50]

These sorts of anomalies occur because tort claims—even in mass harm cases—are allocated at the individual level, and not the group level. Tort law is primarily concerned with whether a particular defendant caused a particular plaintiff's injury, not with the levels of risk that defendants impose on populations. It doesn't have to be this way. Tort law could, for example, recognize a cause of action for increased risk and allocate the claim to the class of exposed persons as a form of common property. Indeed, some states recognize claims for medical monitoring along these lines.[51] But, for the most part, tort law has stuck to its binary and individualistic roots, even in mass torts.

As a result, even if enforcement were costless, the individualized allocation of property rights in claims can frustrate tort law's instrumental goals in mass torts. Under-deterrence is not only a result of litigation costs. If we know that the defendant's conduct causes harm to an identifiable number of people, but we do not impose liability because we cannot figure out which ones, the defendant will not internalize the costs of the harms it causes.[52] The binary nature of tort law combined with the individual allocation of property rights in claims can cause deviations from optimal deterrence (in either direction), even if litigation were costless.

B. Preventing Plaintiffs From Maximizing Claim Value

In addition to frustrating some of the instrumental goals of tort law, the individual allocation of property rights in tort claims can also prevent individual plaintiffs from maximizing the value of their claims. In

48. *See id.* at 2423–25.

49. *Id.*

50. *Id*. As Fennell notes, this is essentially an operation the famous gatecrasher paradox, which illustrates the systematic skew that can result from the more-likely-than-not standard when it is played out over a large number of cases. *See id.* at 2425–27 (citing L. JONATHAN COHEN, THE PROBABLE AND THE PROVABLE 75 (1977)).

51. *See*, *e.g.*, Redland Soccer Club v. Dept. of the Army, 696 A.2d 137, 142 (Pa. 1997).

52. *See*, *e.g.*, Fennell, *supra* note 47, at 2425.

order to litigate effectively against the defendant in a mass tort—and to negotiate the best price for the sale of their claims—plaintiffs need to work together. But plaintiffs face a collective action problem if each plaintiff is the sole decider about what happens with her claim.

Aggregation itself can be costly. Most of the time, mass tort victims will have no preexisting relationship, will be spread out all over the country, and probably will not even be aware of each other's existence. Unless a class action is feasible (which is unlikely in most mass torts), lawyers will have to invest in identifying and aggregating claims informally, which may require expensive advertising and webs of referral arrangements.[53] Additionally, because of the one-way nature of nonmutual issue preclusion, the dominant strategy for many plaintiffs will be to sit on the sidelines and wait to see how other plaintiffs fare before filing their own suits.[54] If other plaintiffs prevail, these wait-and-see plaintiffs can free ride on the preclusive effect of their victory on any common issues; if the early plaintiffs lose, the later ones are not bound and can learn from their mistakes. Either way, later plaintiffs can take advantage of information uncovered in the earlier plaintiffs' case development and discovery.[55]

Beyond the transaction costs of aggregation, the allocation of control rights at the individual level creates additional problems. Defendants in mass tort litigation value peace and will often pay a premium to put the entire litigation behind them.[56] Indeed, defendants often insist on near universal participation as a condition of settling mass tort claims and reserve the right to walk away from a global settlement if more than a handful of plaintiffs refuse to sign on.[57] The plaintiffs therefore stand to gain if they can bundle together all of their claims for sale to the defendant in a single transaction. But because each plaintiff has a property right in his or her individual claim, an

53. *See*, *e.g.*, Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1925, 1928 (2002); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 534–39; Deborah R. Hensler & Mark A Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1024 (1993).

54. *See*, *e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979).

55. This prospect of one-way preclusion was a major impetus for the adoption of the modern class action rule in 1966. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974) ("The 1966 amendments were designed, in part, specifically . . . to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.").

56. *See* Rave, *Anticommons*, *supra* note 34, at 1193.

57. *See*, *e.g.*, D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2179 (2017); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 981 (2010).

anticommons dynamic arises.[58] Too many owners can veto a value-generating assembly transaction.[59] Each plaintiff becomes a potential holdout who can blow up the global deal, and the mere threat of potential holdouts can lead the defendant to withhold the peace premium and prevent the plaintiffs from maximizing the value of their claims.[60]

Finally, the allocation of property rights in claims at the individual plaintiff level instead of the group level handicaps the repeat-player lawyers who emerge and aggregate claims on the plaintiffs' side of a mass tort. Because each single-shot plaintiff is the decider for his or her claim, the lawyers are not free to make the kinds of tradeoffs across an inventory of claims that repeat-player defendants make all the time.[61] Even a savvy repeat-player plaintiffs' lawyer will have difficulty playing for rules if she cannot dismiss a relatively weak claim because the individual plaintiff wants her day in court. The same occurs if she cannot take a strong claim to trial because that plaintiff needs the cash and is unwilling to roll the dice at trial when a middling settlement offer is on the table. A mass tort defendant can play the odds and shape the development of the rules of the game in its favor by making these sorts of tradeoffs. But individual plaintiffs' ownership of their claims prevents repeat-player plaintiffs' lawyers from playing that game as effectively, weakening the hand of all of the plaintiffs vis-à-vis the defendant.[62]

III. The Property Nature of Claims Frustrates Public Ordering and Enables Private Ordering

When property rights are allocated on the wrong scale and there are gains to be had by assembling them, pressure to bundle the rights together will inevitably emerge.[63] Indeed, in the mass tort context, there have been many calls to shift to a system that recognizes the mass nature of the harm, focuses more on instrumental goals, and adopts a more explicitly probabilistic approach based on averages and risk instead of tort law's current binary approach to questions like causation.[64] In other words, to shift to a more administrative model. The

58. Rave, *Anticommons*, *supra* note 34, at 1198–1201.

59. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621, 668–69 (1998).

60. *See* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 La. L. Rev. 397, 417 (2014).

61. *See* Galanter, *supra* note 39, at 117.

62. *See* Bradt & Rave, *It's Good to Have the "Haves" on Your Side*, *supra* note 17, at 98–101.

63. *See* Rave, *Anticommons*, *supra* note 34, at 1207.

64. *See*, *e.g.*, Rosenberg, *Mandatory-Litigation Class Actions*, *supra* note 38.

treatment of tort claims as property rights, however, simultaneously impedes efforts the state might make to shift towards public administration while facilitating a shift towards private administration through private ordering and settlement.

A. Property Rights Impede Public Ordering

The treatment of tort claims as property rights can be an obstacle to government efforts to more fully achieve some of the instrumental goals of tort law. Take the simplest example: Suppose that in the wake of a mass tort, the legislature wishes to displace the tort system entirely with a regularized public administrative system for handing out compensation that it believes will be more efficient and fair—something along the lines of a workers' compensation system, but applied retroactively. Some have argued that such a retroactive elimination of plaintiffs' vested property rights in their claims could open the government up to a due process or takings challenge.[65] Whether or not such challenges would be successful under modern doctrine, the intuitive attachment that people have for *their* legal claims may make such a move politically unpalatable. Thus, there may be limits to how far the legislature can go in retroactively imposing a public administrative system. And the handful of attempts that Congress has made, such as the Black Lung Disability Trust Fund and the 9/11 Victims Compensation Fund, gave plaintiffs the choice of opting into the administrative scheme or keeping their pre-existing tort claims.[66] Prospective shifts towards administrative schemes like workers compensation, by contrast, do not implicate the same concerns about depriving anyone of vested property rights. But it is often hard to manage mass torts prospectively because the government does not know when or where they will occur.

The property nature of tort claims also limits how far the judicial system can go towards adopting an administrative model for mass tort claims, even if such a model would better serve tort law's instrumental

65. *See*, *e.g.*, Ettor v. City of Tacoma, 228 U.S. 148, 155 (1913); Richmond Screw Anchor Co. v. United States, 271 U.S. 331, 333 (1928); Blumenthal, *supra* note 2, at 403; Erin G. Holt, *The September 11 Victims Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. OF AM. L. 513, 540–41 (2004); Radin, *supra* note 2, at 1331–33.

66. *See* Robert L. Rabin, *Reflections on Tort and the Administrative State*, 61 DEPAUL L. REV. 239, 254 (2012); Holt, *supra* note 65, at 526. The Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA), which created the 9/11 Fund, did alter the plaintiffs pre-existing tort rights by limiting the plaintiffs' venue choice to one federal district court and capping the airlines' liability at their insurance limits. 49 U.S.C.A. §§ 408(a), (b)(3). And the ATSSSA has been criticized for retroactively altering the plaintiffs' vested rights in this manner. Holt, *supra* note 65, at 540–41.

goals. Ever since *Phillips Petroleum v. Shutts*, where the Supreme Court recognized that class members' choses in action are constitutionally protected property rights, the Due Process Clause has limited how far the class action can go toward treating plaintiffs in the aggregate.[67] Outside of the limited-fund scenario, plaintiffs with damages claims cannot be forced to litigate together in a mandatory class action, even if that is the best way to achieve optimal deterrence.[68] Nor can they be forced to accept a settlement that sets up an alternative administrative scheme—even one approved and supervised by the court—to hand out compensation in a more streamlined, efficient, and consistent manner.[69] Due process guarantees class members an opportunity to opt out of the class action, thereby preserving each individual plaintiff's role as the decider for what will happen to her claim.[70]

Similarly, the property conception of tort claims and the due process constraints that go along with it have tripped up efforts to use even opt-out class actions to resolve mass torts. Since *Amchem Products, Inc. v. Windsor*, the prevailing wisdom has been that mass torts usually involve too many individual issues to be appropriate for class certification.[71] Choice-of-law problems alone can be enough to doom class certification.[72] These concerns about predominance, class cohesion, and intraclass structural conflicts of interest find their root in, and get their due process flavor from, the allocation of property rights in claims at the individual plaintiff level. Class action doctrine, for the most part, does not view mass tort claims as belonging to the class as an undifferentiated entity, but rather as belonging to the individual plaintiffs.[73] As a result, aggregation of mass tort claims occurs largely

67. 472 U.S. 797, 814 (1985).

68. Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338, 361–62 n.1, 363 (2011); Oritz v. Fibreboard Corp., 527 U.S. 815, 864 (1999).

69. *See* FED. R. CIV. P. 23(e) (requiring court to review settlement for fairness). *Cf.* D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT L. 91 (2014) (arguing that class action settlements are a form of ADR).

70. *See, e.g.*, *Shutts*, 472 U.S. at 812. For federal class actions, Rule 23(b)(3) also guarantees the right to opt out. But that guarantee is motivated by the same due process concerns expressed in *Shutts*. *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 367, 369 (1999).

71. 521 U.S. 591 (1997); *see also* David Marcus, Erie*, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1281 (2007).

72. *See, e.g.*, Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009).

73. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998) (discussing entity and aggregation models of class actions).

in systems like federal MDL, which—at least formally—preserves the individual nature of each claim.[74]

Similarly, this insistence on individual property rights in claims has frustrated efforts to use techniques like statistical adjudication or binding bellwether trials to increase efficiency and consistency in mass tort cases.[75] Courts have eschewed these techniques, even where extrapolation from a sample of cases may be cheaper, more accurate, more consistent, and get closer to optimal deterrence than individual treatment.[76] Because the property rights in claims are allocated at the individual level instead of the group level, courts cannot simply dispose with individualized inquiries into elements like causation.[77]

In short, the property rights that individual plaintiffs hold in their tort claims can impede public efforts to use formal mechanisms, like regulation, class actions, or statistical adjudication to aggregate claims and achieve some of the instrumental goals of tort law in the mass tort context.

B. Property Rights Enable Private Ordering

While the property characteristics of tort claims may frustrate public efforts to shift towards administrative treatment of mass torts, those very same features facilitate private ordering. Because property rights in mass tort claims are allocated at the wrong scale not only to achieve some of tort law's instrumental goals but also to maximize their value, there are potentially massive gains to be captured by those who can successfully bundle them together.[78] It is thus no surprise that entrepreneurial lawyers and other intermediaries emerge as would-be bundlers in mass torts. Indeed, Samuel Issacharoff and John Fabian Witt described this push toward aggregate settlements of claims as "inevitable."[79] More recently, Nathaniel Donahue and Witt explained

74. *See* Andrew D. Bradt & D. Theodore Rave, *The Information Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1269–73 (2017) [hereinafter Bradt & Rave, *Information Forcing*] (explaining how MDL's formal respect for the individual nature of each case enables aggregation of mass tort claims where the class action would not).

75. *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

76. *See, e.g.*, Jay Tidmarsh, *Resurrecting Trial By Statistics*, 99 MINN. L. REV. 1459, 1465–69 (2015).

77. *See, e.g.*, Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 313 (5th Cir. 1998); Tidmarsh, *supra* note 76, at 1471–75. *Cf.* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (disapproving of the "novel project" of "Trial by Formula").

78. Rave, *Anticommons*, *supra* note 34, at 1192, 1207.

79. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlements: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1569, 1634 (2004).

how entire systems of private administration have emerged for the aggregate processing of claims in the shadow of formal tort law.[80] Donahue and Witt catalogue several features of substantive tort law that enable and shape private administration.[81] But procedure and the property-like features of tort claims matter too.

Three features of mass tort claims enable private ordering and form the foundation of private administration: litigation costs, individual control, and alienability. As I explained above, a plaintiff's tort claim is a form of put option to force the defendant to buy the claim at a court-determined price.[82] The cost of litigation, however, means that exercising that put option by litigating the claim to judgment will not usually be the highest value use of the claim. The highest value use will often be to sell the claim to the defendant through settlement; or, more realistically, to engage a lawyer who handles a large volume of similar claims on a contingency fee basis to negotiate the sale of the claim to the defendant. The plaintiff's control over, and ability to alienate, her property right in the claim are essential to this transaction. And a more fulsome embrace of tort claims as property rights opens up the potential for additional avenues of buying and selling ownership stakes in the claims, such as new forms of third-party litigation financing.

Once we see settlement as a property sale, valuation becomes the name of the game. The parties need to figure out how much each plaintiff's put option is worth. And any savings in the process of valuation goes to the parties to the transaction. Valuation of claims through individual trials is very expensive. So, as Donahue and Witt describe (and students of mass torts have long known) repeat-player lawyers collect large inventories of claims and then work together with repeat players on the defense side to simplify the process of valuation.[83] They construct grids based on a handful of salient factors (age, timing of exposure, type of injury, etc.) and assign average awards to different categories.[84] These assignments are based on probabilistic assessments instead of looking at each claim individually and asking binary questions like whether it is more likely than not that the exposure to the defendant's product caused this particular plaintiff's injury.[85]

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80. *See* Donahue & Witt, *supra* note 15.

81. *Id.*

82. *See supra* notes 24–28 and accompanying text.

83. Donahue & Witt, *supra* note 15, at 7, 16.

84. *Id.*

85. *See* Richard A. Nagareda, Mass Torts in a World of Settlement (2007).

In other words, the process of aggregating and settling claims—a process that is possible precisely because the claims are private property—smooths out some of the more individualistic features of tort law. Simple proxies like timing of exposure and injury are substituted for specific causation inquiries. Fine-grained differences based on things like choice of law rarely make it into settlement grids.[86] Recoveries are compressed and smoothed out.[87]

Of course, the parties who design and participate in these settlements do it for the private savings, not to achieve optimal deterrence or horizontal equity. Indeed, accepting approximation in valuation in exchange for aggregation is a common strategy for owners of property rights that are allocated at the wrong scale for their most efficient use.[88] Musicians, for example, often join copyright collectives that sell blanket licenses to media outlets to play any song in the collection.[89] Royalties are then distributed to members according to predetermined pricing grids or other methods of approximate valuation, which generates a substantial transaction-cost savings over negotiating the price of song licenses individually.[90] Similarly, owners of tort claims are willing to trade accuracy in claims valuation for efficiency, not out of any desire to further some instrumental goal like deterrence, but because it yields savings in litigation costs and allows them to avoid the risk of losing on an all-or-nothing question, like causation.

But this sort of private ordering, made possible by the potential for private gain, has the fortuitous result of furthering some of tort law's instrumental goals. A shift towards private administration can increase horizontal equity in many respects. It eliminates some of the randomness built into the tort and litigation systems. And it focuses on the handful of differences among plaintiffs that the settlement designers think are most relevant rather than distinctions that might strike some as arbitrary, such as which plaintiffs had a preexisting medical condition that made it impossible to prove specific causation through the only available epidemiological evidence.[91] Indeed, this sort of private administration might even increase deterrence in some scenarios. Aggregation of claims into the hands of repeat players, who

86. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass Tort Litigation*, 59 B.C. L. Rev. 1251, 1307–08 & n.295 (2018).

87. *See* Donahue & Witt, *supra* note 15, at 51–52.

88. Rave, *Anticommons*, *supra* note 34, at 1229–38.

89. *See* Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Calif. L. Rev. 1293 (1996).

90. *Id.* at 1319, 1329; *see also* Rave, *Anticommons*, *supra* note 34, at 1230–31.

91. *See, e.g.*, Sanders et al., *supra* note 45.

then adopt lower-cost methods of approximating their value, may increase the rate of claiming. In turn, this forces the defendant to internalize the costs of harms done to plaintiffs whose claims could not profitably be litigated on an individual basis. It may also increase deterrence if it allows for at least some recovery in cases where the evidence shows that the defendant's conduct causes harm to some known number of people—but cannot identify the specific people—so that no particular plaintiffs could prove the specific causation necessary to recover at trial.

C. Consequences

Property rights in tort claims are a precondition to private ordering and developing a private market for claims. These same property-right protections have made it difficult for the government to use formal mechanisms to pursue some of tort law's instrumental goals by creating systems of public administration. In turn, the lack of competing public systems of administration channels more claims into the private sphere.[92] It is perhaps ironic that these property-right protections—rooted in civil recourse or corrective justice theories of tort law—have enabled the emergence of private forms of administration that rely on the same sorts of aggregate treatment of claims that civil recourse theorists find so objectionable in public models. This channeling of mass tort claims out of the public and into the private sphere has upsides and downsides. The property-right nature of tort claims continues to shape, and in some ways limit, what private administration can do.

One advantage of the private administration that property rights facilitates is flexibility. As Donahue and Witt explain, "Private settlement matrixes constructed in the shadow of the law are more dynamic and responsive to changing times than the most prominent schedules constructed by statue[,]" like workers compensation.[93] Unlike their public counterparts, systems built on private ordering can more easily incorporate new information—such as new epidemiological studies or jury verdicts—and evolve in response to such information.

Forcing this sort of private ordering to occur outside of formal public processes, however, comes at the cost of transparency and consistency. The individual property protections of tort claims that make mass tort class actions impracticable do not block either aggregation or aggregate settlements. But they do remove those settlements from

92. *Cf.* Donahue & Witt, *supra* note 15, at 20 ("[P]rivate administration in tort will typically emerge when the government has not created a public regime to rationalize the common law claims process.").

93. *Id.* at 36.

scrutiny and supervision in the public courts. As Judge Anthony J. Scirica explained in *Sullivan v. DB Investments, Inc.*, "[O]utside the federal rules governing class actions, there is no prescribed independent review of the structural and substantive fairness of a settlement including evaluation of attorneys' fees, potential conflicts of interest, and counsel's allocation of settlement funds among class members."[94]

Many of the aggregate settlement and private claim administration processes that emerge operate in the dark shadows of the law, independent of any judicial oversight and shielded from public scrutiny by confidentiality agreements.[95] There may be some opportunities to instill a modicum of transparency and consistency back into the process. For example, where mass tort claims are consolidated in federal MDLs, the MDL judge can and should review, and offer a nonbinding opinion on, the fairness of even non-class global settlements.[96] But these opportunities are limited; not all cases proceed under the auspices of an MDL, not all MDLs are resolved through global settlements that are easily amenable to review, and even those that are depend to some degree on cooperation by the lawyers.

Another advantage of this sort of private ordering in mass torts is that it allows powerful repeat players to emerge on the plaintiffs' side who can serve as counterweights to the repeat players that exist on the defense side.[97] Because these repeat players have a financial stake in the litigation and settlement system, they have strong incentives to work to prevent the playing field from tilting too far in the defendants' favor.

In some ways, the private systems that have emerged allow these repeat-player plaintiffs' lawyers to play more effectively than they could in public systems like class action litigation. One of the biggest advantages that repeat-player defendants have over one-shotter plaintiffs—even those represented by repeat-player lawyers—is the ability to make tradeoffs across cases. Defendants can, for example, play for rules by overpaying to settle cases they are likely to lose in order to avoid making bad precedent that will hurt them over a whole series of cases.[98] A repeat-player plaintiffs' lawyer is not supposed to make those kinds of tradeoffs across his one-shotter clients' claims.[99] And under the watchful eye of a class action judge (and other lawyers who

94. 667 F.3d 273, 334 (3d Cir. 2011) (Scirica, J., concurring) (citations omitted).

95. *See* Donahue & Witt, *supra* note 15, at 54.

96. Bradt & Rave, *Information Forcing*, *supra* note 74, at 1264–65.

97. *See* Bradt & Rave, *It's Good to Have the "Haves" on Your Side*, *supra* note 17.

98. Galanter, *supra* note 39, at 100–03.

99. *Id.* at 117.

would be happy to earn a fee by representing objectors), lawyers for the class often cannot make the kinds of tradeoffs that would allow them to play the odds and play for rules as effectively as the defendant. But outside of the formal system, with only the legal ethics rules and amorphous threats of *ex post* malpractice liability to constrain them, these rules against making tradeoffs may not fully penetrate at the ground level, and plaintiffs' lawyers may find the flexibility they need to play for rules and play the odds more effectively.[100] They might voluntarily dismiss weak claims before trial to avoid a loss that would decrease the settlement value of other cases or agree to an aggregate settlement that requires them to recommend the deal to their entire inventory of clients to maximize the value of the claims for the group, even though some individual plaintiffs might be shortchanged.[101]

Of course, empowering repeat players in this manner exacerbates the principal-agent problem inherent in mass litigation and leaves one-shotter plaintiffs vulnerable to exploitation at the hands of their repeat-player lawyers.[102] Without the judicial supervision of a class action or other forms of regulatory oversight, the repeat players on both sides can shape the system of private administration of tort claims to their own advantages.[103] This is not to say that the repeat players will inevitably collude with each other at the expense of the one-shotters; they will remain antagonists in many forums. But they do not design settlements in the public interest or to achieve the instrumental goals of tort law, like deterrence and horizontal equity. They design systems of private administration to benefit themselves. And any progress on instrumental goals is a byproduct that may come with a considerable amount of rent-seeking.

Private property rights in tort claims impose important limits on what private ordering can do. Any system of aggregate settlement or private administration ultimately depends on obtaining buy-in from individual plaintiffs—the ones who own the claims.[104] Each individual plaintiff's role as the decider on the fate of her claim is guaranteed by the property rights she holds in her claim. The market for tort claims cannot override individual plaintiffs' consent. But there are limits on how much that individual control can accomplish in an environment

100. *See* Bradt & Rave, *It's Good to Have the "Haves" on Your Side*, *supra* note 17, at 105–09.

101. *See id.* at 106–08.

102. *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017).

103. *See* Donahue & Witt, *supra* note 15, at 50.

104. *See* Bradt & Rave, *It's Good to Have the "Haves" on Your Side*, *supra* note 17, at 109–10.

shaped by the repeat players that operate in this market with little in the way of transparency or formal public oversight. The structure of private administration that emerges from this private market can shape the plaintiffs' options for how they can use their property rights as a practical matter. While this may often lead to increases in efficiency and horizontal equity, as plaintiffs trade the cost and risk of litigating their individual claims to judgment for a quicker and cheaper private processing and sale of their property rights en masse, it is far from perfect.

Conclusion

Because tort claims are property rights, the plaintiff's role as the decider, which is rooted in civil recourse and corrective justice theory, is constitutionally protected. And attempts in mass torts to move off the individualistic baseline through formal public mechanisms of aggregation run into problems. The irony is that the very same commitment to individual property rights in tort claims facilitates the aggregate resolution of mass torts through private ordering in settlements that rely on the very methods of approximation and averaging that corrective justice and civil recourse theory eschew. While private aggregation and settlement may further some of the instrumental goals of tort law, they operate without the transparency and oversight that come with public models.