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MASS TORTS: DISPUTE RESOLUTION IN FRANCE AND THE UNITED STATES—THE VIOXX AND MEDIATOR CASES COMPARED

Fred Einbinder[†]

Abstract: Dispute resolution in legal systems has largely been designed for handling issues between small groups of individuals or organizations. Obtaining legal redress for those injured by mass torts and using the law as a means to prevent future occurrences has presented challenges for the development of effective dispute resolution mechanisms to obtain relief for plaintiffs and deter future tortfeasors. A comparison of French and American mass tort law and practice offers a fertile field for useful comparative study given the significant differences in approach taken by each country’s legal system. These differences derive as much from history, politics, the attitudes and practice of legal professionals, and business culture as from substantive law. This article describes and analyzes how these procedural and cultural differences impact French and American mass tort dispute resolution and how those differences must be carefully considered in any future attempt to integrate parts of one country’s dispute resolution mechanisms into the other. Using the French Mediator and United States’ Vioxx drug scandals and infrastructure disasters as case studies, this article examines and compares debates over class actions, American “entrepreneurial” lawyers versus French “corporationist” lawyers, the role of administrative agencies, notions of acceptable risk and individual responsibility, and the appropriateness of criminal law in mass tort dispute resolution. This Article concludes with an analysis of whether elements of each system might be adapted or serve to inspire the other legal system’s improvement.

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I. INTRODUCTION

Legal systems developed dispute resolution mechanisms to mediate issues between small groups of individuals or organizations. Attempts to

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apply traditional law solutions to obtain effective relief for plaintiffs and deter future tortfeasors in mass tort cases has therefore been challenging.

The significant differences between French and American mass tort law and practice offer a fertile field for useful comparative study. The different approaches to the inherent challenges in resolving mass tort disputes are informed by the history, legal culture, procedural law, political and economic ideology, and structure and animating forces of the respective legal professions.

This Article will describe and analyze how these procedural and cultural differences impact present French and American mass tort dispute resolution. These cultural differences must be carefully considered in any future attempt to integrate parts of one country's dispute resolution mechanisms into the other.

Using the game-changing French "Mediator" and United States' "Vioxx" drug mass tort scandals as case studies, this Article will examine essential differences between French and U.S. approaches to the aggregation and representation of mass tort litigants. These include differing conceptions of the role of the State and attitudes toward regulation, notions of acceptable risk and individual responsibility, the influence of American "entrepreneurial" lawyers versus French "corporationist" lawyers, and the appropriateness of criminal law in dispute resolution of mass torts. The Article will conclude by offering reflections, based on the Mediator and Vioxx case studies, on how French and American mass tort dispute resolution mechanisms might be modified to inspire confidence in the ability of democratic institutions to respond to individual and societal aspirations for compensatory, corrective, and social justice.

II. ORIGINS AND ESSENTIAL CHARACTERISTICS OF FRENCH AND AMERICAN MASS TORT DISPUTE RESOLUTION

A. *French Law and Practice*

The history of a country's legal system influences its civil procedure. A basic familiarity with that history is therefore essential to inform comparative analysis and evaluate how suggested modifications in a country's dispute resolution system will be received.

Consequently, this section provides an overview of the development of French mass tort litigation. Our focus will be those aspects of French political and legal culture that delayed the adaption of a specific French mass tort litigation framework and that continue to strongly resist incorporation of American entrepreneurial lawyer-led mass tort dispute resolution mechanisms. An examination of an early French mass tort case, the Mont-Blanc tunnel case, and French asbestos cases will permit comparison with similar U.S. cases discussed in Section II. B.

1. *The Slow Development of Mass Tort Litigation Mechanisms*

a. *History*

Group litigation may well have existed in limited cases in early French law, as it did in medieval English common law. The English system historically allowed individuals and entities, including sovereigns, to bring actions to redress group wrongs. Group litigation was also used as a governance tool, as it was far easier for monarchs to execute legal judgments against a community than to attempt to enforce numerous individual judgments.¹

Until very recently, however, contemporary French law did not allow potential litigants to combine their efforts into a mass tort case. Even today, the mass tort framework is highly fragmented with large gaps in coverage.²

¹ Noah Smith-Drelich, *Curing the Mass Tort Settlement Malaise*, 48 LOY. L.A. L. REV. 1, 8–9 (2014); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 82–86 (1987).

² Group litigation procedures (*action de groups*), often translated into English as “class actions”—with attendant confusion for U.S. legal professionals—were recently introduced in France covering specific fields of law, beginning with consumer protection in 2014. *See, e.g.*, Loi 2014-344 du 17 mars 2014 relative à la consommation [Law 2014-344 of March 17, 2014 on Consumer Protection], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 18, 2014, p. 1 [hereinafter *Loi Hamon*]. This law, named, consistent with French practice, after the Minister who introduced it, provides (by U.S. standards) very limited class-action-type remedies to consumers, who must be represented by government-approved associations. The scope of covered class actions under this law was broadened to include discrimination, environmental damage, and breaches of personal data privacy. *See* Loi 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle [Law 2016-1547 of November 18, 2016 on Modernization of Justice in the 21st Century], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016, p. 1.

A mass tort group action in pharmaceutical cases, particularly relevant to the focus of this Article, was commenced in 2016 and its holding was integrated into the Public Health Code. *See* Loi 2016-41 du 26 janvier 2016 de modernisation de notre système de santé [Law 2016-41 of January 26, 2016 on

France's failure to develop mass tort dispute resolution mechanisms since the Industrial revolution is typical of civil law countries.³ Even in the United States, the aggregation of claims in mass tort disputes—and the ability to sue the U.S. government—is of relatively recent origin, dating back to the trial following the Texas City Disaster of April 1947.⁴

Despite major technological changes leading to substantially more harmful industrial disasters, neither the French nor the American legal systems adjusted their legal practices to enable multiple claimants to succeed in litigation in mass disaster cases.⁵ As mass tort scholar John Fleming pointed out, doing so in the U.S. legal system required major changes in society's conception of private and public accountability.⁶

Modernization of the Health System], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 27, 2016, p. 1; see also ANTOINE BÉGUIN & JEAN-CHRISTOPHE BRISARD, EFFETS SECONDAIRES LE SCANDAL FRANÇAIS 262–81 (2016) [hereinafter EFFETS SECONDAIRES]; *Action de Groupe "Santé": Une nouvelle arme pour le consommateur*, INSTITUT NATIONAL DE LA CONSOMMATION (Dec. 6, 2016), <https://www.inc-conso.fr/content/action-de-groupe-sante-une-nouvelle-arme-pour-le-consommateur> (last visited May 16, 2020); Esther Vogel, Alain Gorny, & Faraj Abdelnour, *Action de groupe: et si les victimes de PIP et Mediator avaient pu y recourir ?*, 3 SEA AVOCATS 8, 9 (2016), <https://www.sea-avocats.fr/medias/org-70/shared/article-devicemed-action-de-groupe-pip-mediator-mai-juin2016.pdf>.

³ See Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 406 (2001).

⁴ The Texas City Disaster is one of the worst industrial disasters to occur in U.S. history. Although plaintiffs were successful in obtaining relief from multiple defendants and the federal government—which had waived its absolute immunity to suit under the recently enacted Federal Tort Claims Act of 1946—the decision was overturned on appeal. Claimants were finally compensated out of a fund created by a specific act of Congress in 1955, illustrating the principle that, until the mid-twentieth century, serious obstacles to redress in mass tort cases were not exclusive to civil law countries. For an excellent narrative of the disaster and the legal battle that followed, see generally BILL MINUTAGLIO, *CITY ON FIRE: THE EXPLOSION THAT DEVASTED A TEXAS TOWN AND IGNITED A HISTORIC LEGAL BATTLE* (2014).

⁵ The late nineteenth century and the first half of the twentieth century provide several examples of horrendous man-made mass disasters where appearance of gross negligence did not lead to liability. The denial of compensatory, corrective, and social justice in the legal proceedings following the infamous Eastland boat sinking and the Iroquois Theatre and Triangle fires abundantly illustrate these tragedies. For fascinating narratives of these disasters and the trials, see generally JAY BONANSINGA, *THE SINKING OF THE EASTLAND: AMERICA'S FORGOTTEN TRAGEDY* (2004); ANTHONY P. HATCH, *TINDER BOX, THE IROQUOIS THEATRE DISASTER* (2003); DAVID VON DREHLE, *TRIANGLE: THE FIRE THAT CHANGED AMERICA* (2003). See STUART M. SPEISER, *LAWSUIT* 119–44 (1980) (summarizing the history of the American tort lawyer from colonial times to 1950, with special reference to these cases).

⁶ John G. Fleming, *Mass Torts*, 42 AM. J. COMP. L. 507, 507 (1994).

b. *Reasons Why France Rejected Mass Tort Litigation*

Nevertheless, in bits and spurts during the post-war period, mass tort dispute resolution eventually found a home within the American legal system.⁷ The French legal system, however, was unable to successfully adopt similar mechanisms or find a place to “house” them until very recently. This failure that may be explained by the following:

First, the initial reflex of a French citizen faced with a mass disaster is to look to the State. French citizens, more than any developed country, rely on the State for support in all aspects of their life. When seeking compensatory, corrective, and social justice, as is particularly the case in mass disasters, this reliance is especially strong.⁸

In France, most healthcare expenses are borne by the social security health system. This is so even for the type of long-term care associated with mass torts (e.g., asbestos-related illness or illness resulting from side effects of pharmaceuticals). The system’s generosity is ensured by high mandatory contributions paid by French workers, who naturally expect ample coverage in return.⁹ French victims, while motivated to seek compensation for injury or the death of loved ones, seldom find themselves in the dire financial straits that befall many American mass tort victims because of the far less comprehensive and less generous U.S. healthcare system.¹⁰

⁷ See generally Davis Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565 (2017); Paul D. Rheingold, *Mass Torts—Maturation of Law and Practice*, 37 PACE L. REV. 617 (2017) (dating the beginning of mass tort litigation to the start of the MER/29 litigation). As mentioned in note 4, Texas City may have occurred first, but MER/29 was the first mass tort drug case and the subject matter of this Article’s Vioxx case study. See generally Francis E. McGovern, *Resolving Mass Tort Litigation*, 69 B.U. L. REV. 659 (1990) (using asbestos litigation as a case study in analyzing how mass tort litigation “matures”).

⁸ See BERTRAND BADIE & PIERRE BIRNBAUM, *SOCIOLOGIE D’ETAT* 171–88, 203–10 (1979) (comparing France to the United States); SANCHE DE GRAMONT, *THE FRENCH: PORTRAIT OF A PEOPLE* 196 (1969); VALÉRY GISCARD D’ESTAING, *LES FRANÇAIS: RÉFLEXIONS SUR LE DESTIN D’UN PEUPLE* 123–26 (2000). In this Article, compensatory, corrective, and social justice shall mean, respectively, individual, preventive, and democratically idealized.

⁹ As of January 2020, employees’ contributions to a broad range of social insurance programs exceed 25% of their salaries, while employer contributions exceed 50%. *The French Social Security System: Social Security and Unemployment Contribution Rates*, CLEISS, https://www.cleiss.fr/docs/regimes/regime_france/an_a2.html (last updated Jan. 1, 2020).

¹⁰ Paul V. Dutton, *Health Care in France and in the United States: Learning from Each Other*, THE BROOKINGS INST. (July 1, 2002), <https://www.brookings.edu/wp-content/uploads/2016/06/dutton.pdf>; Charlotte Morabito, *France’s Health Care System Was Rated as the World’s Best—Here’s How It*

After a mass tort injury, the initial French reflex is to seek a compensation fund, which is created either with the assistance of the state or a private company. State assistance in creating a compensation fund is consistent with the primacy and availability of political action in France over legal remedies. This is in contrast with the United States, where legal action has long been preferred.¹¹

Second, there is a sharp distinction in the French legal system, and other civil law systems derived from Roman law, between private law (individual tort, contract, property, etc.) and public law (institutional governmental issues, the rights and obligations of citizens vis-à-vis the State and administrative law (*droit administratif*), etc.). This distinction reinforces the strong individualistic character of French private law, especially its tort law. As a result, the attention of private law French legal professionals—whether judges, lawyers or professors—traditionally focused on individual disputes. Issues concerning groups, including the establishment of funds, capped recoveries, and specific legislation, were resolved by administrative

Compares with the US, CNBC (May 17, 2019), <https://www.cnbc.com/2019/05/17/france-versus-the-united-states-how-the-two-nations-health-care-systems-compare.html>.

¹¹ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252–58 (Harvey C. Mansfield & Delba Winthrop trans., 2000) (1848); JOHN C. COFFEE JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 1–2 (2015); ANTOINE GARAPON & IOANNIS PAPADOPOULOS, *JUGER EN AMÉRIQUE ET EN FRANCE: CULTURE JURIDIQUE FRANÇAISE ET COMMON LAW* 84 (2003) (citing de Tocqueville’s view that American lawyers constituted an aristocracy who channeled sharp conflicts within American democracy into legal disputes). See generally LAURENT COHEN-TANUGI, *LE DROIT SANS L’ÉTAT: SUR LA DÉMOCRATIE EN FRANCE ET EN AMÉRIQUE* (photo. reprint 2016) (1985). Stanley Hoffman, the deceased distinguished Harvard professor of European (and particularly French) politics in the preface qualified the book as the most Tocquevillian work written since De Tocqueville and therefore the best. See *id.* at vii (“le plus Tocquevillien des ouvrages sur les Etats-Unis écrit depuis Tocqueville, et, pour cette raison, le meilleur”). In *LE DROIT SANS L’ÉTAT*, Cohen-Tanugi, a member of the New York and Paris bars and distinguished essayist, contrasted France, a country structured and constrained by excessive legislation, regulation, and bureaucracy, with an America fashioned by contract, lawyers, and civil society. For commentary, see Anne Deysin, *Laurent Cohen-Tanugi, Le Droit sans l’Etat: Sur la Démocratie en France et en Amérique*, 1985, 26 *REVUE FRANÇAISE D’ÉTUDES AMÉRICAINES* 471–72 (1985); Emmanuel Decaux, *Cohen-Tanugi, Le Droit Sans L’Etat*, 50 *POLITIQUE ÉTRANGÈRE* 804–05 (1985) (questioning Cohen-Tanugi’s characterization of the public service role of French administrative law and the coherence of an often “legal imperialist” America); Laurent Cohen-Tanugi, *Le droit sans les États?*, 47 *ACH. PHIL. DROIT* 285–89 (2003) (updating the analysis in *LE DROIT SANS L’ÉTAT* to take account of the need to reinforce state power to deal with the challenges posed by globalization). See also Brian Danoff, *Lincoln and Tocqueville on Democratic Leadership and Self-Interest Properly Understood*, 67 *REV. POL.* 687, 714–15 (2005); Christine Dunn Henderson, *“Plus ça change...”: Innovation and the Spirit of Enterprise in America*, 67 *REV. POL.* 753 (2005).

regulation.¹² Therefore, French criminal courts evolved as the primary venue for responding to corrective and social justice demands arising out of mass disasters. Additionally, French civil law prohibits punitive damages, which prevents recovery above compensatory damages.¹³

Third, until recently, competent French lawyers were not often motivated to take on the demanding task of pursuing group mass tort litigation. The French legal profession may best be classified as “corporationist,”¹⁴ or guild-like, as opposed to the uniquely entrepreneurial

¹² See EVA STEINER, FRENCH LAW: A COMPARATIVE APPROACH 249–303 (2010); John S. Bell, *Comparative Administrative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1261, 1262–64 (Mathias Reimann & Reinhard Zimmermann eds., 2006). The French State was the engine for change and the protector of the rights of individuals; tort law was generally not used to seek redress for major injuries. See COFFEE, *supra* note 11, at 12 (the “masses might revolt, but they did not sue.”).

¹³ See Matthew Parker, *Changing Tides: The Introduction of Punitive Damages into the French Legal System*, 41 GA. J. INT’L & COMP. L. 389, 402–05 (2013) (comparing French and U.S. law on punitive damages and emphasizing the strong commitment to corrective justice in French legal culture); see also Pascale Robert-Diard, *Procès du Mediator: “C’est un poison ce médicament qu’on m’a donné!”*, LE MONDE (Nov. 23, 2019), https://www.lemonde.fr/societe/article/2019/11/22/proces-du-mediator-c-est-un-poison-ce-medicament-qu-on-m-a-donne_6020071_3224.html (quoting Mediator victims preference for criminal court proceedings in their quest for justice).

¹⁴ The term “corporationist” as used in this Article to describe the French legal profession emphasizes the features that distinguish it from the U.S. “entrepreneurial” legal profession. These features include the fragmentation of legal professionals into several categories, prohibitions on legal professionals from engaging in “commercial” activities, and the close attachment and acceptance of regulation by category members. This “corporationist” model is perhaps best illustrated by the use of a religiously derived term *Ordre*—meaning “order” in English—to designate each category. The word “corporationalist” is often pejoratively used in France to refer to the defense by an organization, or “corporation,” of its members’ special privileges. See FRANÇOIS DE CLOSETS, TOUJOURS PLUS! 11 (1982). See generally Tang Thi Thanh Tri Le, *The French Legal Profession: A Prisoner of its Glorious Past*, 15 CORNELL INT’L L. REV. 63 (1982) (discussing the strict rules preventing lawyers (*avocats*) from engaging in any activities other than the practice of law—in particular those classified as “commercial”—and the legal profession’s fragmentation into guild-like monopolies of specific legal activities).

In addition to *avocats*, the French legal profession includes *notaires*, *huissiers*, and *juristes d’entreprise*. *Notaires* are highly educated (law degree required) professionals who hold a centuries old monopoly on real estate transfers and document authentication. Moreover, they play a vital role in providing legal services in the fields of property law, wills and estate planning, and family law. The English translation of *notaire* into “notary public” is misleading, as most of the work of a French *notaire* is performed by lawyers in the United States. See generally Ezra N. Suleiman, *Les Notaires, Les Pouvoirs D’une Corporation*, 21 CAN. J. POL. SCI. 413 (1988).

Huissiers (who have no U.S. counterpart and therefore no accurate translation) are legally trained judicial officers who serve process, seize property for creditors, and play a critical role in evidence gathering through the use of *constats*. A *constat* is a written report, prepared by the *huissier* at the request of lawyers or order of judges that state facts pertinent to the legal proceedings. In practice, *constats* have great probative value and are rarely refuted. See Robert W. Emerson, *The French Constat: Discovering more Efficient Discovery*, 36 BOSTON UNIV. INT’L L. J. 1, 2–8, 13–18 (2018) (recommending the adoption of the French *constat*, modified to comport with American practice, as a means of reducing discovery costs); see also *Dayan v. McDonalds Corp.*, 466 N.E.2d 958, 984–89 (Ill. App. Ct. 1984) (comparative law

American bar.¹⁵ While attached to the broader altruistic traditions of their “*corporation*” and, generally, “*solidaire*” within the profession, French lawyers, and particularly trial lawyers, have historically been intensely individualistic in structuring their offices. This practice inhibits the

analysis of the *huissier*'s role and the *constat* mechanism undertaken by Justice Buckley in a case where the facts placed in evidence through French *constats* were determinative).

Unlike *notaires* or *huissiers*, the term *juristes d'entreprises* may be accurately translated into English. The role played by French *juristes d'entreprises* within companies and their level of legal education is very similar to that of American in-house counsel. Some U.S. courts have explicitly accepted this “functional equivalence” between *juristes d'entreprise* and in-house counsel. See, e.g., *Renfield Corp. v. E. Remy Martin & Co. S.A.*, 98 F.R.D. 442, 444 (D. Del. 1982). The author of this Article can also attest to this similarity based on his 30-year experience working in France as a *juriste d'entreprise*. See Fred Einbinder, *Les Juristes D'entreprise en France: Évolution et Dilemmes*, INSTITUT DES HAUTES ETUDES SUR LA JUSTICE (Mar. 13, 2013), http://forumdelajustice.fr/ihej_wp/wp-content/uploads/2013/04/les_juristes_d_entreprise_en_France_evolution_et_dilemmes.pdf. There is, however, one essential difference between French and U.S. in-house counsel: French *juristes d'entreprises* are denied membership in the French bar. That prohibition also applies to *avocats* who are employed as in-house counsel, which exemplifies the “corporatist” tradition of the French bar. See Nicholas Tollet, *Legal Privilege et Secret Professionnel des Avocats, regards croisés franco-américains*, FRANCE-AMÉRIQUES (Oct. 2, 2017), <https://france-ameriques.org/wp-content/uploads/2017/06/Document-Nicolas-Tollet-3.pdf>.

As a consequence of the incompatibility between in-house legal work and bar membership, French law does not recognize attorney-client privilege for French in-house counsel. This non-recognition can have serious negative consequences for French companies involved in litigation in the United States (and U.S. companies with French-facing discovery requests regarding activities in France), including in mass tort cases. *Id.*; see also Soulez-Larivière *Avocats, Legal Privilege and Professional Secrecy in France*, LEXOLOGY (May 8, 2019), <https://www.lexology.com/library/detail.aspx?g=68973961-f810-415c-9763-22a4b51bb312>. While some U.S. courts have recognized the attorney-client privilege in cases involving French in-house counsel, others have not. See, e.g., *Renfield Corp.*, 98 F.R.D. at 444; cf. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316 RMB MHD, 2006 WL 3476735, at *17 (S.D.N.Y. Nov. 30, 2006).

The negative effects on French companies involved in litigation or government regulation in the United States caused by the non-availability of the attorney-client privilege was addressed in the recent *Gauvin Report* to the French Parliament. The report strongly recommended the creation of a sub-profession of “*avocat en entreprise*” who would be bound by the ethical rules of the French bar and would therefore be able to invoke the “*secret professionnel*” (roughly equivalent to the attorney-client privilege). See Clair Durso & Alain Damais, *Rétablir la Souveraineté de la France et de l'Europe et Protéger nos eEntreprises des lois et Mesures à Portée Extraterritoriale*, ASSEMBLÉE NATIONALE (June 26, 2019) [hereinafter *Gauvin Report*] (French parliamentary report making recommendations for re-establishing France's and Europe's sovereignty and protecting French companies from extraterritorial laws and measures). Based on the fate of previous reports made by distinguished members of the Paris bar, which also recommended integrating in-house counsel into the bar, it is unlikely that the *Gauvin Report* will be adopted. The failure to follow the recommendations of these reports was due to reticence of the French bar, and, in particular, *avocats* from outside Paris. See *Les Principales Recommendations du Rapport Darrois*, MINISTÈRE DE LA JUSTICE 24–26, 30–33 (Apr. 8, 2009), www.justice.gouv.fr/art_pix/rap_com.darrois-20090402.pdf. This resistance to change demonstrates the continued vitality of the “corporatist” nature of French legal professions.

¹⁵ See COFFEE, *supra* note 11, at 11–13 (outlining the development of the uniquely American entrepreneurial model); see also Dietrich Rueschemeyer, *Comparative Legal Professions: From a Professions-Centered to a State-Centered Approach*, 11 AM. BAR FOUND. RES. J. 415, 434–39 (1986).

formation of sufficiently large firms and multi-firm coordination efforts to handle mass tort cases, as is done in America.

Furthermore, legal advertising and solicitation were strictly prohibited in France until very recently, making it more difficult for mass tort victims to find a lawyer.¹⁶ Although overall legal fees were and remain substantially lower than in the United States, cost and risk-shifting mechanisms, such as contingency fee arrangements and third-party financing, remain far more restricted.¹⁷

Fourth, a deep cultural aversion to American-style entrepreneurial litigation and hostility toward lawyer-driven lawsuits have led the French to reject proposed legislation to create class actions.¹⁸ The rejected legislation

¹⁶ Solicitation of potential clients is strictly prohibited by French bar ethical rules. The imagery of American lawyers' unethical conduct following the Bhopal mass tort disaster, and reports of other ethical lapses in BP Horizon and similar cases, have left a negative impression of the practice on French society and the bar. Pure contingency fee arrangements are forbidden. Success fees are now permitted but must not exceed an appropriate percentage of the total fee (10–15%). Limited lawyer advertising is now permitted after centuries of absolute prohibition. See Delphine Iweins, *Publicité des avocats, du rêve à la réalité*, GAZETTE DU PALAIS, June 21, 2016, at 8.

¹⁷ Contingency fee arrangements have only recently been authorized and are restricted to 10–15% of the total fee. See JEAN-JACQUES TAISNE, *LA DÉONTOLOGIE DE L'AVOCAT* 127 (2019); ALEXANNE BOUVIGNIES, UNIVERSITY OF PARIS II PANTHÉON-ASSAS, *LES CLASS ACTIONS: ETUDE DE DROIT COMPARÉ ENTRE LES DROITS FRANÇAIS ET AMÉRICAIN* 116–28 (2011); DANIEL SOULEZ LARIVIÈRE & HUBERT DALLE, *NOTRE JUSTICE* 124–25 (2002). Third party litigation funding, while not prohibited, is rare. See ALEXANDRE BIARD & RAFAEL AMARO, *RESOLVING MASS CLAIMS IN FRANCE* 8 (2016). See generally Ombline Ancelin & Marguerite de Causans, *Les prémices du Third Party Litigation funding en France - ou l'introduction progressive du financement de procès par un tiers*, LA SEMAINE JURIDIQUE ENTREPRISE ET AFFAIRES, Nov. 5, 2015.

¹⁸ More than sixteen bills proposing the introduction of class actions were introduced in the French parliament between 2005 and 2014. None passed. BIARD & AMARO, *supra* note 17, at 5. The Federation of French Employers (*Mouvement des entreprises en France*) (“MEDEF”) intelligently manipulated this strong French cultural aversion of American entrepreneurial lawyers in its successful lobbying efforts against the passage of American-style class action legislation in France. The MEDEF's efforts were spearheaded by its Director of Legal Affairs, Joëlle Simon, who was a constant presence on panels at conferences, witness at parliamentary hearings, and commentator in reviews on the subject. See Panelists Joëlle Simon, *Enjeux juridiques et économiques pour les entreprises*, and Fred Einbinder, *Class Actions à l'Américaine: caractéristiques et dérives, Les recours collectifs: Quels enjeux stratégiques et économiques*, April 28, 2011; Joëlle Simon, *L'action de groupe, panacée ou cheval de Troie, Concurrences*, spéc. N 49, (2008); Joëlle Simon, *Nécessité de l'action du groupe/LE point de vue des entreprises, colloque « L'action de groupe et l'avocat » Conseil national des barreaux*, May 28, 2010; Joëlle Simon, Reply to Questionnaire Regarding the RESOLVING MASS CLAIMS IN FRANCE Report, at 28–35 (on file with author).

In addition, business interests were able to use the hostility to infringements on the freedom of an individual to participate in and control litigation while lobbying against the opt-out mechanism of U.S. class actions. The long-established French law principle of “*Nul ne plaide par procureur*” (no one gives up their right to justice to a proxy) would, in the view of most French scholars, prohibit “opt in” procedures.

would have established a framework for limited consumer class actions and mass tort actions in cases involving pharmaceuticals.¹⁹

c. Initial Mass Tort Cases

The absence of a legislative framework and reticence by both lawyers and victims caused mass tort litigation in France to develop slowly. Nevertheless, a few mass tort cases were litigated with some success prior to the enactment of modern enabling legislation and the litigation of the *Mediator* lawsuits.

i) The Mont Blanc Tunnel Fire Case

The 7.2-mile-long Mont Blanc tunnel, a major Alpine transport link between France and Italy, opened to road traffic in 1965. It is one of the longest and deepest highway tunnels in the world. It was built and is operated by a Franco-Italian public/private joint venture pursuant to an international agreement between France and Italy.²⁰ On March 24, 1999, a truck caught fire in the tunnel.²¹ Thirty-nine persons (of nine different nationalities, but mostly French and Italian) died from carbon monoxide and cyanide poisoning from the smoke.²²

In the days following the tragedy, victims' family members informally met to discuss how to obtain compensatory and corrective justice.²³ One month later, this informal group, which had expanded to include other clusters of victims' families, met with a well-known attorney from the area who was a close friend of one of the victims.²⁴ The attorney,

See VÉRONIQUE MAGNIER, 622 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, REPORT ON FRANCE: THE GLOBALIZATION OF CLASS ACTIONS 114, 119–20 (2009); see also Brief for the Republic of France in Support of Respondents at 26–27, *Morrison v. National Australia Bank*, 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 723010 (contending that the U.S. “opt-out” class action mechanism would violate French constitutional principles and public policy).

¹⁹ See BIARD & AMARO, *supra* note 17, at 7.

²⁰ AUTOROUTES ET TUNNEL DU MONT BLANC (ATMB), <https://www.atmb.com/> (last visited May 3, 2020); XAVIER CHANTELOT & MARIE BRUNET, PL0: AU NOM DE TOUS LES NÔTRES 88 (2007).

²¹ See Mark Gardiner, *A Deadly Blaze in the Alps Made a Biker a Hero and Tunnels Safer for All*, N.Y. TIMES (Mar. 21, 2019), <https://www.nytimes.com/2019/03/21/business/mont-blanc-tunnel-fire-anniversary-rescue.html>.

²² *Id.*

²³ CHANTELOT & BRUNET, *supra* note 20, at 1.

²⁴ *Id.*

who had considerable experience handling multi-plaintiff lawsuits, strongly recommended the establishment of an association that would represent the victims' family members.²⁵ The association (*Association des Familles de Victimes de la Catastrophe du Tunnel de Mont-Blanc*) was legally established soon after.²⁶

The association, an entity with the capacity to sue in its own name on behalf of its members, included almost all the fire victims' families.²⁷ It played a critical role not only in pursuing legal remedies but also in communicating with the press, serving as a liaison with government authorities, the tunnel operator, and other involved companies, and warning members against the risks of accepting hastily proposed indemnification settlements.²⁸ The association provided critical moral support to its members, creating a sense of solidarity without which the successful pursuit of legal remedies would not have been possible.²⁹

The press showed great interest in the disaster and its aftermath. Press coverage went beyond the story of death and destruction at an iconic infrastructure site to focus on the important role played by the French state as the tunnel's major shareholder and regulator. Further, a French prime minister and presidential hopeful, who had been the longtime president of the tunnel-operating company, was called as a witness at trial, which furnished a political dimension that added to the media interest.³⁰

Legal action was limited to criminal process, but the association representing victim family members played a key role as a civil party (*partie civile*).³¹ The party was joined to the criminal action brought by prosecutors after an investigation conducted by investigating magistrates.³²

²⁵ *Id.* at 2.

²⁶ *Id.*

²⁷ *Id.* at 218.

²⁸ *Id.* at 216–17.

²⁹ *Id.* at 65, 84–87.

³⁰ *See id.* at 149–54. Eduard Balladur served as President of the Mont Blanc concession company from 1968–91, Prime Minister of France from March 1993 to May 1995, and was an unsuccessful primary candidate for President in 1995.

³¹ *See* Fred Einbinder, *Corruption Abroad: From Conflict to Co-Operation, A Comparison of French and American Law and Practice*, 3 INT'L COMP. POL'Y & ETHICS L. REV. (forthcoming 2020).

³² *Id.* at 11–14 (draft page numbers) (outlining the powers of investigating magistrates). Investigating magistrates create a file (*dossier*) composed of the results of their investigation during the

On January 27, 2005, the three-month criminal trial concluded and thirteen of the sixteen individual and corporate defendants were convicted of involuntary manslaughter.³³ The ten individuals were sentenced to prison terms ranging between six months and two years (all but one, who served six months prison time, received suspended sentences).³⁴ The three companies constituting the operator of the tunnel were each fined €150,000.³⁵

Pursuant to a negotiated settlement, the families of the thirty-nine victims killed in the disaster received a total of €27 million. That settlement was based on the Italian compensation index for deaths and injuries, which was at that time far more generous than the French analogue.³⁶ To ensure safety, major modifications were made to the tunnel and its entrance.³⁷

The Mont Blanc tunnel case illustrates characteristics of French mass disaster litigation that remain today. First, the establishment of an association to represent victims is crucial to French mass tort resolution. French law and social culture welcome associations in dispute resolution; such organizations are for all practical purposes mandatory in French mass tort disputes.³⁸ Second, unlike in U.S. practice, a specialized entrepreneurial mass tort bar does not exist.³⁹ Third, criminal proceedings are often preferred by victims.⁴⁰ Fourth, plaintiffs tend to look to the French state for

“instruction” phase of criminal proceedings. They also have the power to indict (*mise en examen*) defendants during this phase. At the end of this phase they either dismiss the case or submit a report recommending trial to the prosecutor.

³³ CHANTELOT & BRUNET, *supra* note 20, at 204–09.

³⁴ *Id.*

³⁵ *Id.* at 209.

³⁶ *Id.* at 204–11.

³⁷ Shani Wallis, *Fire Damage Rebuild of Mont Blanc Road Link*, TUNNEL TALK (Jun. 2001), <https://www.tunneltalk.com/Fire-safety-Jun01-Mont-Blanc-highway-fire-reconstruction.php>.

³⁸ French law has explicitly recognized the capacity of associations to represent individuals for over a century. However, the legal framework governing this capacity is not without complication caused by the enactment of legislation specific to a type of organization (e.g., trade unions) and differences in treatment depending on the remedies sought (civil, administrative, or criminal). See BIARD & AMARO, *supra* note 17, at 11–15.

³⁹ See discussion *infra* Section II.A.2(c) and note 73 and accompanying text.

⁴⁰ Victims seemingly prefer criminal trials in French mass tort cases to satisfy their psychological need for an emotional catharsis from the trauma they’ve suffered. The prominence of a small group of French criminal lawyers who have the trial skills required for success contributes to the preference for criminal trials. See discussion *infra* Section III.B.4(a) and note 174 and accompanying text.

both compensatory and corrective justice relief.⁴¹ Fifth, prison terms and corporate fines are modest by U.S. standards. Compensation paid to victims is also relatively modest, and almost always made by reference to previously established indices.⁴²

⁴¹ See Parker, *supra* note 13, at 397–98, 414; Decaux, *supra* note 11, at 805; Adam Nossiter, *Risking Their Livelihood to Breathe Fresher Air*, N.Y. TIMES (April 3, 2010), <https://www.nytimes.com/2020/04/01/world/europe/france-pollution-fos-sur-mer.html>.

⁴² See, e.g., ROBERT BILOTT, EXPOSURE: POISONED WATER, CORPORATE GREED, AND ONE LAWYER'S TWENTY-YEAR BATTLE AGAINST DUPONT 353–64 (2019) (relating the saga of the Dupont Teflon PFOA chemical toxic tort litigation, where \$1.6 million was awarded in a single bellwether jury trial and an overall settlement of \$670.7 million was distributed to 3,500 claimants). The lack of any available sources relating examples of comparable toxic tort litigation in France is itself telling.

Court judgments, even in cases of serious injury or death, rarely reach U.S. levels. See EFFETS SECONDAIRES, *supra* note 2 at 219–22, 243 (noting that a €700,000 award for serious birth defects caused by the drug Distilbène was rare and that discretionary litigation compensation schedules provide for higher recoveries than ONIAM compensation schedules). A few Mediator victims have received significant amounts through the use of the ONIAM compensation (*indemnisation*) procedure after refusing Servier's lowball offers of €390, €415, and €562K. See Pascale Robert-Diard, *Procès du Mediator: "C'est un poison ce médicament qu'on m'a donné!"*, LE MONDE (Nov. 22, 2019), https://www.lemonde.fr/societe/article/2019/11/22/proces-du-mediator-c-est-un-poison-ce-medicament-qu-on-m-a-donne_6020071_3224.html. However, victims who sought relief in civil or administrative courts were generally awarded very modest sums (e.g., €7, 650) in application of the discretionary court damages schedules. See Emeline Cazi, *Mediator: la responsabilité civile de Servier confirmée en appel*, LE MONDE (Apr. 15, 2016), https://www.lemonde.fr/police-justice/article/2016/04/15/mediator-la-responsabilite-de-servier-confirmee-en-appel_4902789_1653578.html; see also Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 20, 2017, Bull. Civ. I, No. 16-19643 (Fr.). Nevertheless, an estimated 1,000 Mediator cases are pending in civil or administrative courts. Almost 10,000 ONIAM indemnity requests have been filed since 2012. At present, Servier claims to have proposed a total of €181.4 million to indemnify 3,974 victims. See Baudoin Eschapaspe, *Mediator: comment le groupe Servier s'occupe (vraiment) des victimes*, LE POINT (Jan. 8, 2020), <https://www.lepoint.fr/societe/mediator-comment-le-groupe-servier-s-occupe-vraiment-des-victimes>.

Prominent scholars have cautioned against concluding that the French legal system will, relative to the United States, fail to adequately compensate mass tort victims in every case. See Eric A. Feldman, *Blood Justice: Courts, Conflict, and Compensation in Japan, France and the United States*, 34 LAW & SOC'Y REV. 651, 654–57, 695–98 (2000). Professor Feldman compares French and U.S. litigation approaches to the HIV hemophiliac-contaminated blood scandal, noting the failure of the U.S. legal system to adequately compensate contaminated-blood victims. He questions the generalizations inherent in the “Iron Triangle” perspective of comparative legal study, *see id.* at 655, which focuses on legal cultural legal institutions and bureaucratic culture. Professor Feldman rightly concludes that the blood scandal cases demonstrate the need to be skeptical in using overly broad socio-legal assumptions to explain the different ways in which the French and U.S. legal and political systems treat mass tort cases. Nevertheless, his study highlights several of the distinctive features of the French legal system discussed in this Article, including: the French tendency to look to the State for protection; how French plaintiffs, when disappointed by State inaction and after a mass tort becomes a “scandal,” will press for political redress and eventually criminal prosecution of responsible agencies and individuals; the conflicting judicial decisions in parallel court systems; and the intolerable delay of the French legal process. *Id.* at 688–93, 697; see also COHEN-TANUGI, *supra* note 11, at 157 (“the French legal tradition is fundamentally hostile to the development of litigation”); Jonas Knetsch, *Mass Accidents: A Challenge for Tort Law, Comparative Analysis of*

ii) Asbestos Cases

The treatment of asbestos dispute resolution in France further illustrates the distinctive features of French mass tort dispute resolution.

France was slow to react to the asbestos crisis. Media coverage existed in the mid-1970s of warnings by members of the scientific community about the dangers of exposure to asbestos—namely pulmonary cancer. But initial legislation enacted in 1977 regulating asbestos use was timid compared to other industrialized countries, especially the United States and the United Kingdom.⁴³ French asbestos companies formed an informal bi-partite employer-union association, the Committee on Asbestos (“CPA”), responsible for the prevention and treatment of asbestos-related injury to employees, which delayed passing stronger legislation and introducing lawsuits in the courts.⁴⁴ Asbestos use was not prohibited until January 1, 1997.⁴⁵ According to a 2005 report by the French Senate, asbestos use was responsible for 35,000 deaths from 1965 to 1995 and an estimated 3,000 deaths per year since.⁴⁶

The first two asbestos lawsuits before the criminal courts were filed in 1996 by the then-recently created National Asbestos Victims Association, (*Association Nationale des Victimes de l’Amiante*) (“ANDEVA”).⁴⁷ ANDEVA, as a *partie civile*, launched a small number of additional criminal

Alternative Compensation Schemes in Japanese and French Law, 21 J. JAPANESE L. 205, 210–13 (2016) (noting an increase in compensation for French mass tort victims since 2000 following plaintiff-favorable court decisions and the establishment of special compensation funds).

⁴³ GÉRARD DÉRIOT & JEAN-PEIRRE GODEFROY, RAPPORT FAIT AU NOM DE LA MISSION COMMUNE D’INFORMATION SUR LE BILAN ET LES CONSÉQUENCES DE LA CONTAMINATION PAR L’AMIANTE [REPORT MADE ON BEHALF OF THE JOINT FACT-FINDING MISSION ON THE BALANCE SHEET AND THE CONSEQUENCES OF ASBESTOS CONTAMINATION], RAPPORT DU SÉNAT NO. 37 at 26–27, 41 (2005) (Fr.), available at <https://www.senat.fr/rap/r05-037-1/r05-037-11.pdf>.

⁴⁴ Concepcion Alvarez, *Scandale de L’Amiante: Vers un Procès au Pénal*, NOVETHIC (Sept. 4, 2019), <https://www.novethic.fr/actualite/environnement/sante-environnementale/isr-rse/scandale-de-l-amiante-vers-un-proces-au-penal-147588.html>.

⁴⁵ Décret 96-1133 du 24 décembre 1996 relatif à l’interdiction de l’amiante, pris en application du code du travail et du code de la consommation [Decree 96-1133, Dec. 24, 1996, relating to the prohibition of asbestos, taken in application of the labor and consumer codes], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 26, 1996, p. 19126 (explaining that by this date, U.S. courts were already flooded with asbestos-related class actions and eight other European countries had already outlawed asbestos use). See DÉRIOT & GODEFROY, *supra* note 43, at 84.

⁴⁶ See *id.* at 8; Alvarez, *supra* note 44.

⁴⁷ DÉRIOT & GODEFROY, *supra* note 43, at 102.

actions over the next few years, all of which were either dismissed outright or languished in the courts for years until final dismissal.⁴⁸ The grounds for dismissal of these cases included the death of the individual defendant, difficulties proving causation, and the strict interpretation of the three-year statute of limitations for involuntary manslaughter or injury.⁴⁹ The first case recognizing criminal liability was rendered twelve years later.⁵⁰ The failure of the courts to impose criminal liability engendered considerable criticism from the press and political leaders, who urged the Ministry of Justice to act by launching criminal actions. The Ministry, prosecutors, and investigating magistrates, relying on the strict interpretation of technical requirements for conviction by the courts, resisted these calls to action.⁵¹ Consequently, few criminal cases have been introduced and convictions are extremely rare, despite numerous judgments recognizing wrongdoing by employers or state bodies in the social security and other civil courts.⁵² The controversy remains vibrant, with renewed efforts by ANDEVA and other victims' associations, decades after the introduction of the first criminal cases, to obtain social justice in a mediatized major criminal trial.⁵³

In contrast to their failures in the criminal courts, ANDEVA, unions, and other associations have succeeded in obtaining compensation for many victims by lobbying for compensatory legislation. These groups persuaded the social security administration to acknowledge that asbestos-induced

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² As an example, in June 2017, the prosecutorial office (*parquet*) of Paris requested the termination of fourteen "instructions" (ongoing investigations by investigating magistrates). In September 2018, the dismissal of a decades-long criminal case against a French automobile equipment company, Valeo-Ferodo, occurred. The lower courts, largely because of the impossibility of proving causation, and higher courts, because of statutes of limitations, have been dismissive of criminal actions. See Anaïs Brosseau, *Procès pénal de l'amiante, la bataille continue*, LA CROIX (Jan. 8, 2019, 6:44 AM), <https://www.la-croix.com/France/Justice/Proces-penal-lamiante-bataille-continue-2019-01-08-1200993802>.

⁵³ See generally Andeva, *FREIX – Retour au Tribunal*, LE BLOG DE L'ANDEVA (Jan. 21, 2019, 2:00 PM), <http://andeva.over-blog.com/2019/01/freix-retour-au-tribunal.html>; Patricia Jolly, *Amiante: l'espoir d'un procès pénal relancé*, LE MONDE (Jan. 8, 2019, 12:04 PM), https://www.lemonde.fr/societe/article/2019/01/08/amiante-l-espoir-d-un-proces-penal-relance_5406293_3224.html. AVA is attempting to bring to justice members of the bi-partite CPA despite the dismissal of charges against eight of the Committee's members. See *Contamination à l'amiante. Une action des victimes pour obtenir un procès pénal*, OUEST-FRANCE (Jan. 8, 2019, 2:47 PM), <https://www.ouest-france.fr/sante/affaires/amiante/contamination-l-amiante-une-action-des-victimes-pour-obtenir-un-proces-penal-6162872>.

injuries were work-related and therefore eligible for indemnification.⁵⁴ Compensation out of a special asbestos fund⁵⁵ is granted in accordance with detailed compensation grids and the decisions of the special bi-partite commission established for asbestos victims.⁵⁶ In the event that disputes cannot be resolved at the agency or commission level (and prior to its establishment), cases are referred to the social security courts, often by associations such as ANDEVA or AVA.⁵⁷ Unlike the criminal courts, the social security courts have held in numerous cases that employers were liable for committing an unexcused fault (*faute inexcusable*) with respect to asbestos.⁵⁸

The administrative courts, including the *Conseil d'Etat*, the highest court in the administrative court system,⁵⁹ have ruled for the plaintiffs and held the French state liable. The *Conseil d'Etat*, in three decisions rendered on March 3, 2004, found the French state liable for its failure to implement the principles of prevention and precaution (*principles de prevention et de precaution*) in its evaluation of the danger of asbestos use. The French State

⁵⁴ *Id.*

⁵⁵ A special fund for compensatory asbestos victims, the *Fonds d'indemnisation des victims de l'amiante* ("FIVA") was created by Article 53 of the Social Security 2001 Budget Law of December 23, 2000. See DÉRIOT & GODEFROY, *supra* note 43, at 61.

⁵⁶ DÉRIOT & GODEFROY, *supra* note 43, at 61.

⁵⁷ France, like other civil law legal systems (in particular Germany), welcomes specialization, in contrast to the common law tradition of general jurisdiction courts with non-specialized generalist judges. Specialized courts within the ordinary court system include, in addition to those for social security, courts for labor disputes, criminal offenses, and rural leases. Prosecutors and investigating magistrates are increasingly specialized and include specialists and panels on financial crimes and—pertinent to this Article's case study—health and safety. See STEINER, *supra* note 12, at 49–50.

⁵⁸ DÉRIOT & GODEFROY, *supra* note 43, at 75.

⁵⁹ France has two separate court systems. First is the ordinary court system, which handles private civil and commercial matters, criminal law matters (which is odd for common law professionals, and admittedly semantically archaic), and specialized courts (for labor, social security, etc.). Second is the administrative court system, which handles inter-governmental cases and claims and disputes between individuals and the State or state bodies, including certain state-owned or controlled companies. Unlike in the United States, the ordinary courts lack jurisdiction to enforce their decisions against the State. Both systems have at their head a supreme court, the *Conseil D'Etat* for the administrative courts and the *Cour de Cassation* for the ordinary courts. A constitutional court (*Conseil constitutionnel*) handles many (but not all) constitutional questions. There is no equivalent to the U.S. Supreme Court. None of these supreme courts is hierarchically superior to the others. See JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* 38–48 (1998).

underestimated the threat to workers' health and delayed legislation necessary to alleviate the danger.⁶⁰

The asbestos cases confirm the distinctive features of mass tort dispute resolution noted in the Mont Blanc tunnel case above, and in addition illustrate:

First, the strong penchant of victims and their representative associations to use political pressure to obtain individual relief through state funding of compensatory schemes with established indexes to ensure equal treatment and reduce arbitrariness. Second, a preference for criminal trials to provide a cathartic public forum for the victims in their quest for corrective or social justice. This preference persists in the face of long delays and serious difficulties encountered in bringing criminal cases. Third, the rising use by associations of prominent, media-savvy criminal defense lawyers. These elite lawyers should not, however, be considered the same as a plaintiffs' mass tort or class action bar as in the United States. Fourth, conflicts of jurisdiction between courts (civil, criminal, administrative, and social security) exacerbate unacceptable delays in dispute resolution, particularly before the criminal courts.

2. *Distinguishing Features of French Mass Tort Dispute Resolution*

A comparison of how different legal systems treat the same problem offers scholars, practitioners, and legislators an opportunity to reflect on the strengths and weaknesses in their own system with a view towards reform. This section provides an analysis of the major role played by the State, the mandatory use of associations, the absence of a strong mass tort bar, and evidence gathering and litigation mechanisms that underly French mass tort dispute resolution.

a. *The Role of the State and Attitudes Toward Regulation*

The French state plays a greater role in the life of the nation than in any other industrialized country.⁶¹ This central role for the state in a highly

⁶⁰ DÉRIOT & GODEFROY, *supra* note 43, at 100; see Maryse Deguegue, *Les Avancées de Principe de Précaution en Droit Administratif*, 58 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 621, 634 (2006) (Fr.).

centralized nation goes far beyond its relatively larger role in the economy as shareholder, employer, and regulator. The stark contrast with the American conception of the state's role in structuring society derives from fundamental political, ideological, and cultural differences between the two countries.⁶² It is unsurprising that French mass tort victims attempt to involve the state by applying pressure on political leaders and largely use state-created, extra-judicial mechanisms to obtain redress.

Unlike their American counterparts, French mass tort victims have immediate access to comprehensive state healthcare, which eliminates the need to sue for the costs of care. Political leaders are pressured to ensure victims compensation payments are made by the state or defendant company to a specifically established fund. As a rule, such political pressure succeeds in large part due to the cultural acceptance that the state should implement society's desire for solidarity. In contrast, in the United States, state-funded mass-tort compensation schemes, such as the one established for the victims of September 11, are outliers.⁶³

The French expect regulatory bodies (and their respective entrusted government ministers) to protect them.⁶⁴ A minister's political future and potential personal criminal liability may therefore depend on their response to regulatory failure. Consequently, successful ministers devote considerable time and effort to ensure that the causes of the mass tort scandal are analyzed and that remedial measures are implemented.⁶⁵ American

⁶¹ See Suleiman, *supra* note 14, at 35, 333, 336; Nick Vlahos, *The Politics of Subnational Decentralization in France, Brazil, and Italy*, 9 J. PUB. DELIBERATION, Oct. 25, 2013, at 8, 15–16; see also BADIE & BIRNBAUM, *supra* note 8, at 171–203; DE GRAMONT, *supra* note 8, at 196; GISCARD D'ESTAING, *supra* note 8, at 123–6.

⁶² STEPHEN W. SAWYER, DEMOS ASSEMBLED 80 (2018). See generally GARAPON & PAPADOPOULOS, *supra* note 11.

⁶³ See generally KENNETH FEINBERG, WHAT IS LIFE WORTH?: THE INSIDE STORY OF THE 9/11 FUND AND ITS EFFORT TO COMPENSATE THE VICTIMS OF SEPTEMBER 11TH (2006); see also Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 344–49 (2011); KENNETH R. FEINBERG, WHO GETS WHAT? 56–62 (2012).

⁶⁴ The use of the French word *tutelle*, roughly translated as “guardian” or “trustee,” to describe the relationship between a ministry and “its” regulatory or administrative body is telling.

⁶⁵ As exemplified by the strong and rapid actions taken by Xavier Bertrand, Minister of Health during the *Mediator* case, who initiated a law establishing a victim compensation fund and established an independent college of experts. See BÉGUIN & BRISARD, *supra* note 2, at 64–67. Minister Bertrand also pushed for a parliamentary inquiry that led to the excellent IGAS and *Assemblée Nationale Social Affairs* reports on the scandal. See generally L'INSPECTION GÉNÉRALE DES AFFAIRES SOCIALES (IGAS), RAPPORT

ideological and cultural antipathy to state regulation and administrative agencies does not exist in France, which largely explains the differences in the two dispute resolution systems.⁶⁶

b. The Mandatory Use of Associations

French law does not strictly require the regrouping of plaintiffs into an association to bring suit in mass tort actions (except for the recent legislatively created specialized class actions). In practical terms, however, the procedural and financial obstacles imposed by a legal system established to treat individualized disputes dictate their involvement.

Moreover, the pursuit of economic, political, regulatory, and judicial objectives through associations is a fundamental and distinctive characteristic of French history and culture.⁶⁷ No mass tort action in France has succeeded or will succeed in the absence of an association capable of uniting plaintiffs behind a coherent strategy for obtaining compensatory, corrective, and social justice.⁶⁸

The legal framework for class actions, established by the Hamon law (*Loi Hamon*) on a limited specialized basis, exemplifies French attitudes towards the role of associations as applied to mass tort cases. First, only not-

No. RM2011-001P ENQUÊTE SUR LE MEDIATOR [SURVEY OF MEDIATOR] (2011), <http://www.igas.gouv.fr/IMG/pdf/RM2011-001P.pdf> [hereinafter IGAS REPORT]; ASSEMBLÉE NATIONALE, COMMISSION DES AFFAIRES SOCIALES, RAPPORT D'INFORMATION No. 3552 [INFORMATION REPORT No. 3552] (2011), <http://www.assemblee-nationale.fr/13/pdf/rap-info/i3552.pdf> [hereinafter AFF. SOC. RAPPORT].

⁶⁶ As summed up by Peter Schuck, “Americans are profoundly, and perhaps incorrigibly, antibureaucratic.” Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 979 (1995). American legal scholars have argued that the entire system of U.S. administrative law is unconstitutional as a result of broad judicial acceptance of “deference” and the system of administrative judges. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2015). This argument is incomprehensible to French legal professionals with respect to their own, vastly different system, which is generally viewed as the most highly developed and influential administrative law system in the world. French administrative judges have over the centuries attained a high degree of independence from the executive and do not hesitate to exercise control over regulatory action by invoking concepts derived from the “legality” principle.

⁶⁷ For example, anti-corruption actions brought by French NGOs. *See* Einbinder, *supra* note 31, at 60–61. *See generally* GARAPON & PAPADOPOULOS, *supra* note 11.

⁶⁸ The use of the word “family” to refer to the relatively successful Mont Blanc Tunnel victim association is illustrative. The difficulties encountered by victims of the AZT (an explosion of an oil company’s plant in Toulouse in 2001) largely resulted from the association’s inability to secure the adhesion of its members to such a strategy. *See* CHANTELOT & BRUNET, *supra* note 20, at 216–17.

for-profit associations previously approved by the state are entitled to represent plaintiffs.⁶⁹ Second, only approved associations, not lawyers, may introduce lawsuits, which demonstrates the deep hostility in France to entrepreneurial lawyers.⁷⁰ Third, associations may not bring actions against the state or its agencies; these may only be brought before the administrative courts by individual plaintiffs.⁷¹ Fourth, associations are encouraged to attempt to assist individuals to obtain compensation from publicly or privately funded institutions and submit disputes to mediation for resolution to avoid or end litigation.⁷²

c. The Absence of a Mass Tort or “Class Action” Bar and Entrepreneurial Lawyers

Despite the strong Parisian presence of large American-based international law firms and some loosening of the strict restrictions on legal advertising, the French legal profession (or “*corporation*”) remains characterized by fierce individualism and traditionalism in the defense of its clients and itself. It also remains hostile to American entrepreneurial lawyers and the encroachments of American law, particularly in procedural practice.⁷³

⁶⁹ Fifteen consumer protection associations were approved to file consumer “class actions” under the Hamon law. *See* Loi Hamon, *supra* note 2. Almost 500 associations have been approved for filing health and safety group actions under the 2016 Health System Modernization Law. *See* SEA AVOCATS, *supra* note 2.

⁷⁰ Associations, not lawyers, are supposed to act in the public interest as a civil society auxiliary to the state, in its role as caretaker of the public good. The assignment of the defense of community social interests and democratic ideals to the state and assisting associations, and not to lawyers, contrasts with the central role that lawyers are urged to play in implementing the idea of communitarianism or public interest law as advocated, respectively, by Judge Weinstein and Abram Chayes. *See generally* Kenneth R. Feinberg, *Lawyering in Mass Torts*, 97 COLUM. L. REV. 2177 (1997) (promoting Judge Weinstein’s communitarian ethic in mass torts); Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1 (2001) (critiquing Abram Chayes call as being outdated).

⁷¹ Associations may, however, bring group actions against professionals (e.g., physicians, public hospitals, etc.).

⁷² SEA AVOCATS, *supra* note 2.

⁷³ *See* Schiller, *infra* note 101, at 177–90; Jean-François Riffard, *Justice: Sommes-Nous tous Condamnés à Devenir des Lawyers Américains?*, THE CONVERSATION (June 10, 2018, 4:40 PM), <https://theconversation.com/justice-sommes-nous-tous-condamnes-a-devenir-des-lawyers-americains-97752>. Commentators have noted a direct and close link between increases in mass tort litigation and the ease of linking lawyers willing to represent victims. In the United States, this linkage was greatly facilitated by the explosion of lawyer advertising in the early 1980s following *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In addition, American attorneys increased their chances of winning mass tort cases by co-

France lacks a mass tort plaintiffs' bar specializing in the identification, development, and resolution of mass tort disputes. Consequently, the intense internal competition that has shaped U.S. mass tort dispute resolution does not yet exist.⁷⁴ While the long Parisian presence and increasing reach of large American and English law firms may have influenced French legal practice in certain areas, such as M&A, financing, and compliance, these have had little influence in the field of mass torts. As illustrated by recent legislation prohibiting the lawyer-led mass tort legal actions, French hostility to the emergence of an entrepreneurial plaintiffs' bar renders any hope of an acceptable return on the large investment for entrepreneurial law firms, as was required in the development and maturation of U.S. mass torts dispute resolution, delusory.⁷⁵

Consistent with the traditions of the French bar, the closest resemblance to a "mass tort" bar is led by a few nationally known media-savvy criminal defense lawyers who represent *partie civile* plaintiffs. Their

operating with other lawyers in sharing resources, information and strategies. See Deborah R. Hensler, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 1967, 1025–26 (1991). In France, advertising is recent and remains timid by U.S. standards, and co-operation between highly individualistic law firms is rare. Finding a lawyer for plaintiffs of a mass tort remains difficult, and, as illustrated in Mont Blanc Tunnel, often serendipitous. Since the passage of the Hamon and Touraine laws, discussed *infra* at Part II.B.5, associations now largely choose lawyers in mass tort cases, limiting the importance of advertising. For a comprehensive analysis of the development of entrepreneurial lawyering and its impact on American law. See generally COFFEE, *supra* note 11; ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2003); Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism—A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1 (1994). For a comparative study, see generally Rueschemeyer, *supra* note 15.

⁷⁴ RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* ix (2007).

⁷⁵ The general lack of interest in handling mass torts is vividly illustrated by the difficulty faced by Irene Fauchon, the whistleblowing pulmonary physician who broke open the *Mediator* scandal, in finding an experienced mass torts lawyer. She eventually found a young attorney, Charles Joseph Oudin, who at the time had no experience in the field but has since acquired a considerable amount representing an association of a large group of *Mediator* victims. See generally LA FILLE DE BREST (Haut et Court 2016) (the well acted and received film about the *Mediator* scandal); Etienne Sorin, *La Fille de Brest: un médecin en campagne*, LE FIGARO (Nov. 22, 2016), <https://www.lefigaro.fr/cinema/2016/11/22/03002-20161122ARTFIG00232-la-fille-de-brest-une-operation-a-coeur-ouvert.php> (favorably reviewing the film starring Sidse Babet Knudsen); IRENE FRACHON, *MEDIATOR 150 MG: COMBIEN DE MORTS?* (2010). Fauchon's compelling and barely contested testimony was a seminal moment in the ongoing *Mediator* criminal trial. See Pascale Robert-Diard, *Au procès du Mediator, le combat d'Irène Frachon*, LE MONDE (Oct. 17, 2019), https://www.lemonde.fr/police-justice/article/2019/10/17/au-proces-du-mediator-le-combat-d-irene-frachon-j-ai-eu-le-sentiment-d-etre-traquee-alors-que-je-ne-faisais-que-mon-travail_6015807_1653578.html.

main goal is to use the criminal proceedings as a means of exerting political and societal pressure on state agencies and defendant companies.⁷⁶

d. Features of French Procedural Law

Comparative law analyses often focus on the substantive law differences between national legal systems. This traditional approach⁷⁷ would be woefully inadequate in the mass torts context, particularly given the primacy of the entrepreneurial lawyer-dominated mass tort legal environment in the United States. An overview of how French and U.S. civil and criminal procedural law and practice differ is therefore essential to analyzing the perils inherent in opportunities for Franco-American cross-fertilization in the mass tort field. Fundamental differences exist in evidence-gathering methods, the types and amounts of recoverable damages, costs of trial, availability of juries and judicial specialization.

i) Evidence Gathering—Limited “Discovery,” Witness Testimony, and Court Mandated Experts

Evidence gathering in France is vastly different from U.S. law and practice in both civil and criminal cases. Consistent with civil law tradition and the principle of judicial sovereignty, French judges play the central role in evidence gathering, be it in the production of documents, party and witness examination, or the choice and supervision of expert witnesses.⁷⁸

Discovery is limited in France.⁷⁹ Parties are not generally required to disclose particular documents or categories of documents⁸⁰ and parties need

⁷⁶ For example, Patrick Maisonneuve and Eric Dupont-Moretti, two of France’s best-known criminal defense lawyers. In contrast to U.S. practice, mass tort criminal cases, if not dismissed prior to or during the instruction phase, are not settled by plea bargains and go to trial. Corporate plea bargaining has only recently been permitted in French criminal law and has been limited to a few recent cases of international corruption following the enactment of the Sapin II law. Individuals cannot enter a plea bargain in a serious criminal case. See Einbinder, *supra* note 31, at 14–21, 58–59.

⁷⁷ See generally Joachim Zekoll, *Comparative Civil Procedure*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1328 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

⁷⁸ See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1261–62 (2005) (providing an excellent comparative study of French and U.S. civil procedure in support of her proposal to incorporate more French-inspired inquisitorial court control in complex litigation). See also Einbinder, *supra* note 31.

⁷⁹ Whether “discovery” exists at all in France is a subject of controversy, mostly turning on semantic arguments when the question is asked relative to the extensive discovery practice in the United States. Some practitioners, however, undoubtedly are reacting to many American lawyers’ bewilderment and

not disclose documents favorable to the other party.⁸¹ No penalty exists for a party's non-disclosure; the remedy for failing to do so is limited to the adverse inference argument made to the judge by the opposing party.⁸²

French judges tend to be wary of the oral testimony of witnesses, preferring written declarations (*attestations*). Cross examination is extremely limited, certainly not a skill required to be a successful trial lawyer, as it is the judge who questions witnesses and who may comment on the answers.⁸³ The absence of civil juries in the civil law tradition, and their relatively limited use in criminal trials, largely eliminated the need for complex rules excluding evidence.

French law relies on presumptions, such as the one that the testimony of an employee is made for the benefit of their company, to facilitate the evidence gathering process. This contrasts with the need to weigh credibility after direct and cross examination as required in an American trial.⁸⁴

expressions of disdain on being refused the broad document production to which they are accustomed, protest vociferously that French law does permit limited discovery *a la française*. See Mullenix, *supra* note 70, at n.22 (quoting internationally experienced practitioners, Elie Kleiman and Daniel Soulez-Lariviere, stating that discovery, *as it is known in the United States, does not exist*); see also COFFEE, *supra* note 11, at 200; see also Diego Zambeano, *A Comity of Errors: The Rise, Fall and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT'L L. 157, 167–69 (2016) (noting that it is the judge rather than the parties who has the primary duty to gather facts). Lawyers for the parties may request a judge for documents and that judge may at their discretion order the other party to produce evidence. Zambeano underlines that France has been vociferous in expressing disfavor of U.S. attempts to compel discovery in cases involving French defendants. *Id.* at 179. France enacted a “blocking statute” criminalizing the production of documents to U.S. authorities. Loi 80-538 du juillet 1980 relative à la communication de documents et renseignements d'ordre économique ou technique à des personnes naturelles ou morales étrangères [Law 80-538 of July 16, 1980 on the Communication of Economic, Technical or Commercial Documents or Information to Foreign Natural or Legal Persons] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1980, at 1799.

⁸⁰ *Gathering Evidence: How Does France Compare?*, SQUIRE PATTON BOGGS LLP (June 10, 2013), https://larevue.squirepattonboggs.com/gathering-evidence-how-does-france-compare_a2075.html. For an account of how procedural and other legal cultural differences concerning evidence gathering impacted an early, successful U.S. mass tort case against a French defendant—namely, the 1949 crash of an Air France plane carrying Marcel Cerdan, the French middle-weight boxing world champion, and tens of American victims, see SPEISER, *supra* note 5, at 177–81.

⁸¹ *Gathering Evidence*, *supra* note 80; John Bell, *supra* note 59, at 93–96.

⁸² *Id.*

⁸³ *Id.* at 98–100.

⁸⁴ *Id.* at 99.

Experts are judge-appointed—usually from a list of approved neutral experts in the field.⁸⁵ Judges, particularly if the case involves highly technical questions, tend to essentially delegate their decision-making obligations by following the expert’s report (*expertise*).⁸⁶

The possibility for associations of mass tort victims to join, or in some cases initiate, criminal proceedings as civil parties offers two advantages. First, it enables the civil party a means to acquire, at no cost, evidence obtained by an investigating magistrate or prosecutor in the instruction phase of the criminal trial. Second, criminal trials provide a public forum for the pursuit of social justice.

The above features ensure that the costs associated with French civil proceedings are substantially lower than in the United States.⁸⁷ The cost incentive driving settlement of mass tort cases is therefore not as great in France as it is in the United States. However, other incentives and constraints militate settlement in France, such as the availability of compensation through state or company funded schemes, limited access to lawyers, constraints on contingency fees, and court system delay.

ii) Damages and the Absence of a Jury

The level of damages and fines recovered in mass tort litigation in France pales in comparison to those awarded in the United States. In the Mont-Blanc tunnel cases, three corporate entities were fined €150,000 each for involuntary manslaughter, and €27 million was obtained in a settlement agreement for the deaths of the thirty-nine victims.⁸⁸ In *Alstom*, the company was fined €75,000 following convictions for imposing a risk and its attendant anxiety on its employees, and damages of €10,000 were awarded to each of the 150 plaintiff-employees, €1.5 million in total.⁸⁹

⁸⁵ *Id.* at 100–01; Kessler, *supra* note 78, at 1265–67.

⁸⁶ John Bell, *supra* note 59, at 101–02; Kessler, *supra* note 78, at 1267.

⁸⁷ See FREDERICK T. DAVIS, AMERICAN CRIMINAL JUSTICE: AN INTRODUCTION 150 (2019). The cost differentials in both civil and criminal matters are highly significant. See also Kessler, *supra* note 78, at 1151, 1189 (decrying the systemic wealth based inequities resulting from the misuse of discovery and expert testimony mechanisms to drive up costs to wear down the adversary).

⁸⁸ CHANTELOT & BRUNET, *supra* note 20, at 209–11.

⁸⁹ Cour d’appel [CA] [regional court of appeal] Douai, 6e ch., Mar. 6, 2008, 07/01123.

Fines and damages in mass tort cases are increasing in France, but the rate of increase is lower than in the United States, and average awards remain relatively low. The pharmaceutical company Servier, which developed and sold the drug Mediator, has offered a total of €164.4 million in settlements to 3,732 patients (an average of approximately €44,000 per patient).⁹⁰ Recovery for plaintiffs based on compensation grids and averages from court cases range from €50,000 to €100,000 for a death, including “moral damages” for loss of a loved one or serious injury.⁹¹

Punitive damages are not recoverable because their deterrence and punishment goals are implemented by the French state or victims bringing criminal charges.⁹² Juries do not exist in civil trials and the charges generally brought against criminal mass tort defendants are not sufficiently serious to warrant a jury trial under French law.⁹³ The French criminal trial in heavily reported cases, such as that presently underway in the Mediator scandal, plays a similar democracy-affirming, social-justice function as the American jury trial. A unique criminal proceeding in a dedicated court, *Cour de justice de la République*, exists for ministers accused of serious misfeasance in the conduct of their mission.⁹⁴

⁹⁰ Emeline Cazi, *Le Scandale du Mediator en Procès*, LE MONDE (Sept. 21, 2019, 9:26 AM), https://www.lemonde.fr/societe/article/2019/09/21/le-scandale-du-mediator-en-proces_6012535_3224.html.

⁹¹ Marie-Christine Tabet, *La Contre-attaque des Laboratoires*, JOURNAL DU DIMANCHE (Mar. 27, 2011).

⁹² See Parker, *supra* note 13, at 413–17.

⁹³ See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 113 (3d ed. 2007) (juries in civil trials); Pascale Robert-Diard, *Réforme de la justice: le lente érosion du rôle des jurés citoyens*, LE MONDE (Mar. 9, 2018, 12 :00 PM), https://www.lemonde.fr/police-justice/article/2018/03/09/la-lente-erosion-du-role-des-jures-citoyens_5268188_1653578.html; Jean-Baptiste Jacquin, *Affaires de viol: le jugement hors des cours d'assises est déjà une réalité*, LE MONDE (Mar. 9, 2018, 12 :00 PM), https://www.lemonde.fr/police-justice/article/2018/03/09/affaires-de-viol-le-jugement-hors-des-cours-d-assises-est-deja-une-realite_5268185_1653578.html.

⁹⁴ This court was notably used in the trial of several ministers, including the minister of health and a former prime minister in the infamous scandal of tainted blood in HIV treatments (*l'affaire du sang contaminé*), a mass tort precursor to Mediator that also led to parliamentary investigations and reform of the procedures in the health field. The scandal was not limited to France—it spread to the United States, where it was the subject of the filing of class action lawsuits against the French manufacturer. See generally *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

iii) *Conflict of Jurisdictions and Judicial Specialization*

France is a unitary state and its law and court system are therefore devoid of the forum-shopping opportunities that exist in the United States' federalist structure. Nevertheless, the existence of specialized independent court systems (ordinary, administrative, and constitutional) has led to confusion and delay in mass tort cases, notably in *Mediator*.

Executive and administrative acts are not susceptible to review by the ordinary courts and can only be contested in the parallel administrative court system, which has earned its independence from the executive through institutional tradition. This is an example of the French Revolution's hostility to judicial power, which is seen as a means of suppressing the popular will. Issues of categorization (e.g., is the defendant a government or private entity?) may lead to significant delay and confusion from conflicting decisions.⁹⁵

Confusion and delay may also result from jurisdictional issues between civil and criminal courts, which are both housed in the ordinary court system.⁹⁶ In addition, recent innovations expanding judicial review of the constitutionality of legislation, and thereby the potential for the involvement of the parallel constitutional court system, has increased the potential for complication and delay in mass tort cases.⁹⁷

Lastly, arguments based on European Union law may also be a source of conflict and delays in mass tort cases.⁹⁸ For example, the French legal cultural preference for promoting specialized expertise within the judicial system is pertinent to mass tort dispute resolution as evidenced by the

⁹⁵ Conflicts about categorization between the two systems are ultimately resolved by the *Tribunal des Conflits*, a tribunal composed of an equal number of judges from the *Cour de Cassation* and *Conseil d'Etat*. See STEINER, *supra* note 12, at 98; John Bell, *supra* note 59, at 86. Tort cases brought against the French state are governed by tort law fashioned by the administrative courts which may differ from the civil code-based law applied in the ordinary court system. See Richard Azarnia, *Tort Law in France: A Cultural and Comparative Overview*, 13 WIS. INT'L L.J. 471, 485–86 (1995).

⁹⁶ See discussion *infra* Part III.A.4.

⁹⁷ See MICHEL DE GUILLENCHMIDT, *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES* 427–28 (3d ed. 2010).

⁹⁸ See generally WILLEM H. VAN BOOM & GERHARD WAGNER, *MASS TORTS IN EUROPE – CASES AND REFLECTIONS* (European Ctr. of Tort and Ins. Law ed., 2014).

existence of special social security courts and a prosecutorial office devoted to health and safety cases.⁹⁹

B. U.S. Law and Practice

1. History and the Role of Entrepreneurial Lawyers in the Development of Class Actions and Mass Tort Dispute Resolution

a. Introduction

France and the United States are situated on opposite ends of a continuum of industrialized countries for the development, intensity, and maturation of mass tort dispute resolution. The origins of mass tort (and class action) cases, their dramatic rise in volume and amounts recovered, and arguable state of maturity,¹⁰⁰ occurred earlier in the United States than in France.

The rapidity and intensity of change in mass tort dispute resolution in the United States, combined with attempts by U.S. law firms to impose aspects of the model abroad,¹⁰¹ has tended to obscure the fact that aggregated mass tort litigation in the United States is relatively nascent. Narratives of victim recovery and the restoration of social justice in print and film have contributed to a mythification of mass tort development that ignores the many decades when, despite egregious cases of gross negligence, criminal and civil resolutions invariably favored defendants.¹⁰² Moreover, class actions and mass torts were as much subjects of battle in the “tort wars” of the 1990s as punitive damages and contingency fees.¹⁰³

⁹⁹ The specialized prosecutorial office was created by the Health *Santé* law. See *supra* note 2. French prosecutors (*procureur*) are referred to and consider themselves to be an integral part of the judiciary—a source of considerable controversy and judicial rebuke by other European legal institutions, such as the European Court of Human Rights. See Einbinder, *supra* note 31, at 5–11.

¹⁰⁰ See generally Marcus, *The Short Life*, *supra* note 7; Rheingold, *supra* note 7. As detailed in Part II.A, it is hardly a foregone conclusion that France will follow American mass tort developments, nor does it desire to do so.

¹⁰¹ See Sophie Schiller, *Hypothèse de l'Américanisation du Droit de la Responsabilité*, in V. MAGNIER, RECEPTION DU DROIT AMERICAIN DANS L'ORGANISATION INTERNE DES SOCIETES COMMERCIALES 177-190 (2001); see also Jean-François Riffard, *supra* note 73.

¹⁰² For example, the books and star-studded films on toxic contaminants. See, e.g., A CIVIL ACTION (Touchstone Pictures 1995) (starring John Travolta) and ERIN BROCKOVICH (Universal Pictures 2000) (starring Julia Roberts).

¹⁰³ See Marcus, *The Short Life*, *supra* note 7, at 1570–71; JOEL LEVIN, TORT WARS 212–15 (2008).

b. *The Central Role of Entrepreneurial Lawyers in Developing Mass Tort Dispute Resolution*

The relative early development and consequent rapid increase in intensity of American mass tort dispute resolution is the product of several factors: technological and economic changes, the 1960s tort revolution, the recognition of strict product liability, the development of new categories of compensable harms, the growth of punitive damages, increasing healthcare costs, liberalized bankruptcy law, and the passage of class action legislation.¹⁰⁴

While recognizing the importance of these factors, this Article argues that the typical path of U.S. mass tort disputes is distinguished from French efforts by the role of the entrepreneurial lawyer.

The distinctively entrepreneurial nature of the bar in the United States was apparent even in colonial times. Unlike the highly socially stratified bifurcated bars of the mother country or the several “*corporations*” comprising the legal profession (*magistrats, avocats, avocats auprès des cours suprêmes, avoués, notaires, juristes d’entreprise, conseils juridiques, huissiers*) in France, American lawyers were members of a unified profession which included members who entered the profession as a means of improving their social and economic status.¹⁰⁵

The extraordinarily prominent role played by lawyers in all facets of life comports with the unifying and idealized “sacred” role of law in the United States. America’s archetypal lawyer, Abraham Lincoln, fully admitted that he entered the legal profession to “better himself” socially and economically. His view of the law as the secular religion of the country and acceptance of difficult, but potentially lucrative, cases requiring novel theories, and approaches to win exemplifies the aspirations of the American entrepreneurial lawyer.¹⁰⁶

¹⁰⁴ Schuck, *supra* note 66, at 947–48.

¹⁰⁵ See SPEISER, *supra* note 5, at 145–62.

¹⁰⁶ See generally ABRAHAM LINCOLN, THE WIT AND WISDOM OF ABRAHAM LINCOLN (H. Jack Lang ed., 1965) (collecting Lincoln’s quotes). Some of Lincoln’s quotes illustrate distinctive features of the American legal profession claimed by entrepreneurial lawyers—i.e., social mobility, faith in the law as a unifying force in society, and the need for lawyers to be “folksy” with juries: “My early life . . . the short

In the years following the end of World War II, modern entrepreneurial lawyers were able to gradually reverse the highly favorable legal environment for mass tort defendants, and either win at trial or negotiate satisfactory damage recoveries for plaintiffs.¹⁰⁷ These breakthroughs occurred prior to the use of either federal multidistrict litigation (“MDL”) or use of class actions for aggregating claims, which commenced in a limited fashion, in the late 1960s. Under the MDL procedure, common fact mass torts lawsuits may be consolidated in federal courts to promote efficiency, an objective that has largely been attained since the introduction of MDLs in 1968.

The use of Federal Rule of Civil Procedure 23 class actions in mass tort cases, however, has not furthered effective disposition of mass tort cases. Following significant revision to Rule 23 in 1966, Rule 23 has generated considerable judicial and academic controversy.¹⁰⁸

The early successes of the 1950s and early-to-mid 1960s may be attributed to the development of an embryonic bar of mass tort practitioners: practitioners who combined their familiarity with specialized technology,

and simple annals of the poor[;]” “[l]et reverence for the laws be . . . preached from the pulpit . . . [and] become the political religion of the nation[;]” “young lawyer, don’t shoot too high—aim lower and the common people will understand you.” *Id.* at chs. 2, 5, 9; *see also* DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 28–29, 47, 150–51 (2005) (discussing the camaraderie and folksiness of Lincoln and his legal colleagues and noting how law furnishes an avenue for social mobility—and quoting de Tocqueville that, “all men want to quit their former social position”). Lincoln was also fascinated by innovative technology; being the only U.S. president to have filed for and obtained a patent—for a lift to hoist riverboats over sandbars and shallow waters. Lincoln, on occasion, attempted to use novel theories in his legal arguments. He also anticipated modern mass tort practice in strongly urging settlement in costly and uncertain litigation. *See* BRIAN R. DIRCK, *LINCOLN THE LAWYER* 87, 160–61 (2007).

¹⁰⁷ *See generally* SPEISER, *supra* note 5, at 302–36, 355–66 (detailing the author’s personal experience handling pre-multi-district products liability litigation in major aviation (Alouette II) and automobile (Ford Pinto) mass tort cases).

¹⁰⁸ MDLs were launched in 1968 pursuant to a law passed by Congress that established the Judicial Panel on Multidistrict Litigation, responsible for determining whether an MDL is appropriate and selecting the presiding judge in pretrial proceedings. *See* 28 U.S.C. § 1407; Rheingold, *supra* note 7, at 621–22; FED. R. CIV. P. 23. For a detailed and comprehensive history of the mass tort, class action saga and the problems encountered by attempted use of the Rule 23 class-action framework, *see* Marcus, *The Short Life*, *supra* note 7, at 1568–69, 1584, 1589, 1592–97; Schuck, *supra* note 66, at 945–63; COFFEE, *supra* note 11, at 108–18.

particularly in aviation, with entrepreneurial risk-taking in pursuing recovery for victims of aircraft and automobile crashes and large fires.¹⁰⁹

The late 1960s and 1970s saw a confluence of older form mass tort litigation, such as the Buffalo Creek mining dam litigation,¹¹⁰ and newer forms, where attempts (almost all failures) were made to use Rule 23 class action procedures or MDL (with more success).¹¹¹ The mass tort bar

¹⁰⁹ SPEISER, *supra* note 5, at 145–92 (recounting the beginnings of the entrepreneurial lawyer); Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VIRGINIA L. REV. 845, 846 (1987) (discussing the “Abraham, Dilemma” and noting the Ringling Bros. and Coconut Grove Fires). See generally HENRY S. COHEN & DAVID BOLLIER, *THE GREAT HARTFORD CIRCUS FIRE: CREATIVE SETTLEMENT OF MASS DISASTERS* (1991); JOHN C. ESPOSITO, *FIRE IN THE GROVE: THE COCOANUT GROVE TRAGEDY AND ITS AFTERMATH* (2005).

¹¹⁰ See generally GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (2d ed. 2008) (narrating the fascinating story of the mass tort litigation Stern brought on behalf of over 600 plaintiffs, those injured or the descendants of more than 125 persons killed when a coal waste “dam” collapsed wrecking death and destruction from the tidal wave that descended on the Buffalo Creek valley in West Virginia in February 1972). Gerald Stern’s book, a staple for outside reading in undergraduate and law school courses for decades (including the author’s classes), vividly recounts how entrepreneurial mass tort lawyering was successful in obtaining a large settlement (for the time and place) of \$13.5 million against the Pittson Mining company. Stern’s entrepreneurial lawyering is demonstrated by his financial risk-taking in preparing the case on a contingent fee basis although—unlike most mass tort entrepreneur-lawyers—he was a partner in a prestigious, large law firm whose fellow partners expressed serious misgivings as the expenses and opportunity costs of handling the case climbed. Also consistent with entrepreneurial litigation were the breaking of new ground in the law (it was the first case in the state accepting claims based on “psychic impairment”) and artful settlement negotiation just prior to trial with a corporate defendant with a reputation for scorched earth, delay, and fight-to-the-end tactics. Stern emphasizes that the key to success was the arduous and emotionally draining task of retaining coherence and a sense of a like-minded community amongst the many individual plaintiffs.

¹¹¹ Throughout the 1970s the federal judiciary refused to warm to the notion that Rule 23 class action certification was appropriate in mass torts cases. Certification was denied or reversed on appeal in all but a few cases. See Marcus, *supra* note 7, at 1568–69.

MDL’s fared better. For example, yet another case, with a French connection—the Turkish Airlines DC 10 that went down over the Ermenenville forest soon after takeoff from Orly airport in Paris killing 346 passengers and crew—was one of the first major mass tort cases so consolidated. Stuart Speiser, *LAWSUIT* author, former pilot, and aviation mass tort lawyer handled this international case (on behalf of plaintiffs from twenty-four nations) that raised complex questions, including issues of jurisdiction, conflicts of law, and forum non conveniens. The case ended in a settlement of over \$62 million, the largest amount yet paid in an aviation case. See SPEISER, *supra* note 5 at 420–69. Speiser was the proto-typical entrepreneurial lawyer for his time, and, consistent with the methods and ethos of the growing mass tort specialist bar, was unafraid of taking economic risks, tried out novel legal theories, pursued settlement while preparing for a “folksy” presentation of his case to the jury, and avidly promoted American entrepreneurial litigation worldwide.

Especially pertinent to this Article’s comparative case studies of pharmaceutical cases, the MER-29 cholesterol reducing drug case is considered a watershed mass tort case, as it saw for the first time the voluntary grouping and wide-ranging co-operation, including in negotiations of 288 lawyers handling civil cases throughout the nation. This successful co-operative model, which pre-dated MDLs and mass tort class actions, was a precursor to the well-established work relationships of the mass tort bar today. See

gradually expanded and became increasingly specialized as its members became familiar with MDLs and navigated the challenges posed by the increasing volume and intensity of liberal discovery. They remained trial lawyers, but their appearances before a jury became rarer. Trial work has increasingly been replaced by risk and reward analysis and settlement negotiation skills. Most importantly, the small bar had discovered that the field could be lucrative.¹¹² Entrepreneurial plaintiff lawyers successfully displaced their entrepreneurial defense lawyer ancestors, the best of whom were ironically drawn from similar social-economic backgrounds and mostly shared similar Lincolnian views of their profession.¹¹³

Mass tort litigation in the 1980s and 1990s expanded exponentially. Many thought it threatened the very stability of the court system amid political tensions that reached a fever pitch in the mid-1990s.¹¹⁴

A now experienced and specialized mass tort bar was able to channel and accentuate the propensity of individuals to seek legal redress for harm caused by the selling of new products extensively marketed to improve well-being. Entrepreneurial “scientific” tort lawyers’ greater access and ability to effectively use advances in epidemiological studies in mounting high profile

generally Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968); Schuck, *supra* note 66, at 945–46.

¹¹² Arnold & Porter LLP earned \$3 million in legal fees from the Buffalo Creek settlement. STERN, THE BUFFALO CREEK, *supra* note 110, at 272. Stern, immediately after the Buffalo Creek settlement, took two other cases arising out of two 1976 Scotia mine explosions in eastern Kentucky, near Buffalo Creek, on behalf of a total of twenty widows. The two cases settled for approximately \$6 million in total. Stern’s new “boutique” firm, which he had just founded with two friends, earned \$2 million in contingency fees on the risky investment. As in Buffalo Creek, Stern won the legal battles that led to settlement thanks to a novel and risky corporate veil-piercing theory. See GERALD M. STERN, THE SCOTIA WIDOWS: INSIDE THEIR LAWSUIT AGAINST BIG DADDY COAL 133–35 (2008). The plaintiffs’ lawyers in the Ermenonville case appear to have shared \$20 million of the \$62 million award, based on Stuart Speiser’s usual one-third contingency fee arrangement. Speiser, writing in 1980 at the twilight of the “old” mass tort period, is not reticent in defending high-percentage contingency fees. SPEISER, *supra* note 5, at 559. Given the shift in investment necessary to prevail, Speiser concludes that “tort law has become more egalitarian, more scientific, and more lawyer-oriented . . . also more money-oriented.” *Id.* at 592.

¹¹³ For example, the defendants in Triangle benefitted enormously from the brilliance of Max Steuers, one of the greatest trial lawyers in American history. Likewise, their counterparts in the Iroquois Fire defended by Lev Mayer, the highly successful trial lawyer who founded Chicago-based Mayer Brown, one of the largest and most prestigious law firms in the world. Both of these defense lawyer-entrepreneurs were innovative risk-takers in trial strategy and poor immigrants who implemented Lincoln’s advice in their law practices. Like Lincoln and celebrated attorney Clarence Darrow, both Steuers and Mayer often acted as defense entrepreneurial lawyers for the railroads. See TRIANGLE, *supra* note 5, at 222–58; and SPEISER, *supra* note 5, at 128–144.

¹¹⁴ See Marcus, *The Short Life*, *supra* note 7, at 1587–92.

actions coincided with a societal movement as expressed by juries to hold formerly untouchable companies accountable. High profile cases such as Dalkon Shield contraceptive devices,¹¹⁵ prescription morning sickness drugs (Bendectin),¹¹⁶ Bjork-Shiley heart valves,¹¹⁷ Agent Orange,¹¹⁸ and the asbestos and tobacco cases.¹¹⁹

The caseloads, influence, and power of entrepreneurial mass tort lawyers increased with the greater use of MDLs and the controversial Dalkon Shield and Agent Orange class action certifications in the early 1980s. The growth of the mass tort bar was also furthered by the adoption of MDLs in the asbestos litigation of the early 1990s as a way out of the chaos caused by the bankruptcy of the dangerous fire-resistant material manufacturer, Jones-Manville.¹²⁰

To meet the challenges and reap the benefits of the aggregation of mass tort claims, the mass tort bar adapted by cooperating individually, despite intense business competition between firms. Forced to work together, entrepreneurial lawyers, acting in their own best interest, shared more knowledge, resources, and finances to reduce the cost of fueling their individual “investment engines.”¹²¹

The use of Rule 23 class actions in mass tort cases was effectively ended by the Supreme Court’s *Amchem* decision in 1997.¹²² In *Amchem*, the Supreme Court narrowly construed Rule 23 in affirming the Third Circuit’s denial of certification of a proposed class who had been exposed to different products containing asbestos, over different periods of time in a suit against twenty former asbestos manufacturers.¹²³ In doing so, the Supreme Court

¹¹⁵ Hensler, *supra* note 73, at 983–86.

¹¹⁶ *Id.* at 978–81.

¹¹⁷ *Id.* at 989–92.

¹¹⁸ *Id.* at 1001–03.

¹¹⁹ *See id.* at 10033–06 (asbestos); *see Cabraser & Issacharoff, infra* note 276, at 871–74 (tobacco).

¹²⁰ Hensler, *supra* note 73, at 1572–75; *see Schuck, supra* note 66, at 947–53; Fleming, *supra* note 6, at 515–18. The author takes no position on the accuracy of these mass tort class action certifications as this largely historical debate is beyond the scope of this Article. What is important from a comparative law perspective is that American entrepreneurial lawyers increased their power by adapting to the opportunities and challenges of the greater use of MDLs and the short but intensive use of Rule 23 class action procedures in mass torts.

¹²¹ Schuck, *supra* note 66, at 952 (quoting Francis McGovern’s phrase).

¹²² *See generally* *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

¹²³ *Id.*

relied on the Advisory Committee to the 1966 Revision of Rule 23 opinion that class actions were not appropriate for mass torts.¹²⁴

Commentators, notably Richard Nagareda, have argued that since *Amchem* the paradigm for mass torts practice has transitioned from tort litigation to an administrative model.¹²⁵ Nagareda contends that mass tort dispute resolution is driven by a process whereby entrepreneurial peacemaking lawyers craft settlements that strike a balance between present and future claimants, which raises governance, equity, and ethical issues.¹²⁶

c. Asbestos Cases: A Comparison

Asbestos case litigation caused chaos in the U.S. court system, threatening its overall capacity to operate efficiently as court dockets became overwhelmed and lacked an overall strategy to handle the crisis.¹²⁷ The extreme tensions created by this episode are reflected in the academic debates and narratives of practitioners it engendered.¹²⁸ The asbestos litigation crisis of the 1980s and 1990s provides a vehicle for comparing French and U.S. mass tort dispute resolution as a prelude to the Mediator/Vioxx cases of the 21st century. Asbestos dispute resolution treatment in both countries shares two essential characteristics. First, both countries' systems failed miserably in handling the situation. Neither compensatory nor corrective justice was obtained as victims were denied timely relief due to systematic delays and an actual or apparent avoidance of accountability by corporate defendants. Second, a major factor contributing to the shared failure was the "temporal dispersion"¹²⁹ caused by the time gap between exposure to asbestos and the actual manifestation and causal legal recognition of harm to the individual victim.

The asbestos cases illustrate the following distinctive characteristics of U.S. mass tort law and practice:

¹²⁴ See Smith-Drelich, *supra* note 1, at 28–29.

¹²⁵ See generally NAGAREDA, *supra* note 74, at viii, 105, 220–35.

¹²⁶ *Id.*

¹²⁷ Marcus, *The Short Life*, *supra* note 7, at 1580–92.

¹²⁸ See generally *id.*; Deborah Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation/ A Reply to Professor Brinkman*, 13 CARDOZO L. REV. 1967 (1992); Schuck, *supra* note 66; Smith-Drelich, *supra* note 1.

¹²⁹ NAGAREDA, *supra* note 74, at xv.

First, a single-minded focus on seeking relief through the legal system either through the use of existing litigation procedures or devising innovative alternatives fashioned by entrepreneurial lawyers or “activist” (who might be more objectively termed “entrepreneurial”) judges.¹³⁰ Second, near unanimity that the State cannot or ought not play a major role in the resolution (and prevention) of the problem, either as a source of funding for compensation or in its regulatory role.¹³¹ Third, limited and ineffective use of criminal law to secure “social justice.” Fourth, high preparatory legal costs and excessive or abusive legal fees.¹³²

2. *Exceptional Features of U.S. Procedural Law*

There are hazards in labelling American procedural law as “exceptional,”¹³³ nevertheless the following aspects are exceptional from the French perspective.

a. *The Role of the Jury in Civil Cases*

Civil juries do not exist elsewhere in the world, even in England.¹³⁴ Despite the continuing decline in the already small percentage of cases finally resolved by jury trials, their role in fashioning legal procedure, legal

¹³⁰ Unlike French legal professionals, divided by a wide gulf between judges (*magistrats*) and lawyers (*avocats*) who rarely have had shared career experiences, the American legal profession is unified and dominated by lawyers. Further, almost all judges are former lawyers. On the “deplorable” relations between French lawyers and judges, see Nicolas Bastuck & Marc Leplongeon, *Maitre Darrois: “Il Faut Supprimer l’Ecole de la Magistrature,”* LE POINT (Oct. 31, 2019), https://www.lepoint.fr/justice/jean-michel-darrois-il-faut-supprimer-l-ecole-de-la-magistrature-03-11-2019-2344945_2386.php.

¹³¹ See, e.g., Richard A. Epstein, *Regulatory Paternalism in the Market for Drugs: Lessons from Vioxx and Celebrex*, 5 YALE J. HEALTH POL’Y L. & ETHICS 741 (2005).

¹³² See, e.g., *How Lawyers, Not Plaintiffs, Wind up the Winners in Mass Tort Lawsuits*, INS. JOURNAL (July 11, 2019) <https://www.insurancejournal.com/news/national/2019/07/11/531801.htm> [hereinafter *Lawyers Not Plaintiffs*] (interviewing Elizabeth Burch on her book, *MASS TORTS, BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION*, *infra* note 275).

¹³³ See generally Mullenix, *supra* note 70 (contending that the gulf between civil law systems, including the France’s, and American civil law procedures may not be as great as generally thought and that globalization will further converge). Although the “exceptionalism” and “convergence” debate may be largely a matter of semantics, the perception—if not the reality—as accurately pointed out in *Lessons*, of exceptional procedural mechanisms (e.g., jury trials, punitive damages, and entrepreneurial lawyer fees) has dampened the move towards convergence in France since the early, more global-oriented days of this century. See also Zekoll, *supra* note 77, at 1334–35.

¹³⁴ Juries were never used in civil proceedings in civil law nations and have been abolished in almost all common law jurisdictions except the United States and for libel cases in England. MERRYMAN & PEREZ-PERDOMO, *supra* note 93, at 113.

training, and the practice of entrepreneurial lawyers remains. Mass tort lawyers continue to develop innovative jury trial practices in their search for settlement, as evidenced by the use of bellwether trials, notably in the Vioxx case.¹³⁵ Lawyers' risk analyses of how a jury would decide a mass tort case is crucial in determining settlement strategy. Beyond this role in framing compensatory justice, civil and criminal juries continue to be perceived as vehicles for obtaining social justice in mass torts, both in their reflection of the fundamental cultural and political ideals of egalitarianism and popular autonomy.¹³⁶

b. High-Damages Recovery Amounts, Punitive Damages, and Corporate Criminal Liability

As discussed in Section I.A.2(d), whether awarded by juries or through negotiated settlements, the amounts recovered in U.S. mass tort actions dwarf those in France. The banalization of billion-dollar settlements following multi-million-dollar jury awards shocks French sensitivities. Opponents of proposed changes to mass tort legal framework, often corporate advocacy groups, label modifications as inspired by the "American model," and such characterization has been an effective tool to thwart legislative change.

The specter of mass tort punitive damages is bandied about in such labeling efforts, in spite of their limited actual recovery.¹³⁷ French critics also ignore academic criticism in the United States of punitive damages,¹³⁸ and their limitation by the Supreme Court on due process grounds.¹³⁹ Punitive damages in the U.S. system are designed to achieve objectives of corrective and social justice, which are assigned to the criminal law in France.¹⁴⁰

¹³⁵ See generally Thomas Sekula, *Selective Settlement and the Integrity of the Bellwether Process*, 97 TEX. L. REV. 859 (2019).

¹³⁶ Zekoll, *supra* note 77, at 1325.

¹³⁷ See generally James A. Jr. Henderson, *The Impropriety of Punitive Damages in Mass Torts*, 52 GA. L. REV. 719 (2018).

¹³⁸ *Id.*

¹³⁹ See generally George Clemon Jr. Freeman & Makram B. Jaber, *Further Progress in Defining Constitutional Constraints on Punitive Damages and Other Monetary Punishments*, 61 BUS. LAW. 517 (2006).

¹⁴⁰ *Id.* at 534–35 (criticizing the use of punitive damages in the United States as a substitute for the criminal law); see Parker, *supra* note 13, at 411–15.

c. *Party-Centric Evidence Gathering*

Pure adversarial tort litigation arguably was replaced by a settlement driven model in U.S. mass tort dispute resolution, which has been qualified by Richard Nagareda as “private administrative regime” evidence.¹⁴¹ Nevertheless, American entrepreneurial lawyers in mass tort cases continue to gather evidence through intensive and expensive discovery.¹⁴²

U.S. procedure does not have an equivalent to the French civil party mechanism that permits victims, acting through their representative associations, to benefit at no cost from the *instruction* (evidence gathering and evaluation) phase of criminal proceedings conducted by investigating magistrates.¹⁴³ Nor has the U.S. system abandoned party expert witnesses in favor of the French neutral *expertise* procedure. However, the successful use in the United States of masters and other innovative, entrepreneurial-lawyer or judicially created mechanisms designed for a more neutral production of evidence may present a future opportunity for carefully adapted legal transplants.¹⁴⁴

¹⁴¹ See NAGAREDA, *supra* note 74, at ix (noting that mass torts are resolved by settlement, not at trial, by specialized, mass-tort lawyers’ use of the “private administrative regime”); Marcus, *The Short Life*, *supra* note 7, at 1589.

¹⁴² See Grabill, *infra* note 253, at 170–71 (noting that most mass tort settlements, including Vioxx, occurred after significant discovery and bellwether jury trials). Grabill contends that discovery furthers settlement by flushing out facts and legal issues useful in structuring complex settlement formulae and matrices. *See id.*

¹⁴³ See ABIOLA O. MAKINWA, PRIVATE REMEDIES FOR CORRUPTION: TOWARDS AN INTERNATIONAL FRAMEWORK 141–43 (2013); Einbinder, *supra* note 31, at 5–11 (describing the role of the investigative magistrate (*juge d’instruction*) and the controversy over the institution’s maintenance). The continued existence of the *juge d’instruction* in the wake of calls for its demise during the Sarkozy presidency, and its abandonment by most other European civil law nations, vividly illustrates the twin risks in ignoring the specificities of national legal systems in generalizations about legal traditions and assuming the inevitability of “convergence.” It is inconceivable that the United States will adopt an institution so utterly foreign as the *juge d’instruction*. However, calls for the integration of an *action civile*, modified to fit with U.S. norms, to permit the joinder in criminal cases of mass tort victims’ claims may be possible and is worthy of further comparative law study. Judge Weinstein, one of the foremost experts on U.S. civil and criminal procedure, has advocated for just such a change. Mullenix, *supra* note 70, at n.70 (quoting Judge Weinstein in *U.S. v. Ferranti*, 928 F. Supp. 206, 217–18 (E.D.N.Y. 1996)) (“The *action civile* does two things: it initiates a claim for compensation, and it begins a public criminal action . . . The United States is in a state of transition on restitution. How far it will move toward an integrated criminal-civil-administrative system in areas such as mass torts . . . [is] just beginning to be addressed.”).

¹⁴⁴ See Kessler, *supra* note 78, at 1194–98 (noting the use of masters in complex litigation and that their use is consistent with long established Anglo-American equity practice). Professor Kessler contends that a careful examination of French civil procedural mechanisms can serve as inspiration to alleviate the

d. Federalism

Multiple independent specialized court systems do not exist in the United States as they do in France. However, the complicated and dynamic interplay between state and federal courts lies at the heart of the American constitutional framework. Attempts to modify the respective powers of states or the federal government within this framework risks creating serious legal and political tension.

Mass tort claims are brought in both state and federal courts. The maturing of the federal MDL process has considerably improved the handling of mass tort cases. The success of this initiative at the federal level has led to adoption of similar mechanisms by many states. Consistent with federalism, each state is free to establish its own procedure, and significant differences exist—notably in the procedures of New Jersey (home to most of the large pharmaceutical companies) and California.¹⁴⁵

The vitality of Federalism coupled with the creativity of entrepreneurial lawyers' intent to retain their influence is evidenced by the failure of federal laws designed to “federalize” mass tort litigation by facilitating removal of cases as federal MDLs.¹⁴⁶

III. THE MEDIATOR AND VIOXX SCANDALS AS COMPARATIVE CASE STUDIES

The scandals that erupted in France and the United States following the discovery of the serious harm caused by two drugs—respectively Mediator, manufactured by Servier Laboratories of France, and Vioxx, produced by Merck & Co. in the United States—affords a relatively rare opportunity to compare “test” cases of the dispute resolution mechanisms of two national legal systems from different legal traditions. Differences between the two drugs exist; control groups, even in scientific cases, are seldom identical. Mediator was, supposedly, developed to treat diabetics¹⁴⁷

weaknesses in US civil procedure attributable to botched attempts to import equity's inquisitorial devices, such as masters, into a common law adversarial framework. *Id.* at 1251–60.

¹⁴⁵ Rheingold, *supra* note 7, at 623.

¹⁴⁶ *Id.* at 624–25 (recounting the failures due to plaintiffs' lawyers' actions under the Class Action Fairness Act of 2005 (“CAFA”) and the useless Multiparty, Multiforum Trial Jurisdictional Act of 2002).

¹⁴⁷ MIKKEL BORCH-JACOBSEN, *LA VÉRITÉ SUR LES MÉDICAMENTS* 218 (2014).

and Vioxx for the treatment of arthritis and rheumatism.¹⁴⁸ The chemical composition and real purpose of Mediator was very similar to the obesity-treatment drug, Fen-Phen, also the subject of major U.S. mass tort litigation.¹⁴⁹

The similarities between Mediator and Vioxx, however, greatly outnumber any such differences and fully justify their choice as reciprocal control cases. First, the drugs caused the same type of injuries—cardiac arrests and strokes.¹⁵⁰ Second, the mortality and serious injuries were roughly equivalent relative to the number of patients and their volume of use.¹⁵¹ Third, both companies endeavored to expand the original approved

¹⁴⁸ EFFETS SÉCONDAIRES, *supra* note 2, at 38.

¹⁴⁹ BORCH-JACOBSEN, *supra* note 147, at 62–70 (describing the worldwide collaboration between Servier and Wyeth in the development of a dexfenfluramine). Dexfenfluramine, an appetite suppressor used in the treatment of obesity, similar to Fen-Phen, was marketed under the name “Redux.” Ominously for the later Mediator scandal, Redux was found to cause heart valve damage and was voluntarily removed from the U.S. market by Wyeth in 1997. For a comprehensive study of the Fen-Phen scandal, see generally ALICIA MUNDY, *DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN* (2001).

See Scott Sayare, *Drug Executive Faces Manslaughter Charges*, N.Y. TIMES (Dec. 11, 2012), <https://www.nytimes.com/2012/12/12/business/drug-executive-faces-manslaughter-charge.html> (Servier, which marketed the Fen-Phen family of drugs and Redux in North America respectively under the European trademarks of Pondéral (fenfluramine) and Isoméride (dexfenfluramine), was sued in Canada and paid \$38 million to settle).

See EFFETS SÉCONDAIRES, *supra* note 2, at 58–60 (in stark contrast to the United States, where tens of thousands of Fen-Phen victims were indemnified following the filing of class-action mass tort suits, Servier’s lawyers in France were able to obtain the dismissal of all but a handful of Isoméride lawsuits despite the massive use of the drugs by millions and the publicity given to the cases by a well-known journalist and the support of victim associations); see also Anne-Laure Barret, *Servier Condamné pour L’Isoméride*, LE JOURNAL DU DIMANCHE (January 23, 2011), <https://www.lejdd.fr/Societe/Justice/Isomeride-Un-plaignant-obtient-la-condamnation-du-laboratoire-Servier-258009-3240446> (relating the uphill battle of the very few successful litigants (10) who faced Servier’s pugnacious legal defense despite earlier optimism following award of €417,000 by the *Cour de Cassation* in 2006).

¹⁵⁰ For Mediator, see EFFETS SÉCONDAIRES, *supra* note 2, at 38 and BORCH-JACOBSEN, *supra* note 147, at 218. For Vioxx, see David J. Graham et al., *Risk of Acute Myocardial Infarction and Sudden Cardiac Death in Patients Treated with Cyclic-Oxygenase 2 Selective and Non-Selective Non-Steroidal Anti-Inflammatory Drugs: Nested Case-Control Study*, 365 THE LANCET 475 (2005).

¹⁵¹ For Mediator, see generally Agnès Fournier and Mahmoud Zureik, *Estimate of Deaths Due to Valvular Insufficiency Attributable to the Use of Benflurex in France*, 21 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 343 (2012); Paul Benkimoun & Mathilde Damgé, *Combien de Morts Imputer au Mediator*, LE MONDE (July 5, 2016), https://www.lemonde.fr/les-decodeurs/article/2016/07/11/combien-de-morts-imputer-au-mediator_4967832_4355770.html; FRACHON, *supra* note 75; IGAS REPORT, *supra* note 65. For Vioxx, see Graham et al., *supra* note 150 (noting estimation that Vioxx caused between 88,000 deaths and 140,000 cases of serious heart disease with an approximate 50% mortality rate); Eric Topol, *Failing the Public Health-Rofecoxib, Merck, and the FDA*, 351 N. ENGL. J. MED. 1707 (2004). See also Alec Johnson,

usage for their drugs to other treatments.¹⁵² Fourth, the intensive marketing of both drugs was deceptive.¹⁵³ Fifth, both companies falsified or withheld important data from their respective regulatory authorities.¹⁵⁴ Sixth, both drugs were lucrative blockbusters viewed as critical to maintain the competitive position of their makers as corporate leaders in their respective countries.¹⁵⁵ Seventh, both companies strongly denied allegations of wrongdoing and mounted scorched earth legal defense strategies.¹⁵⁶ Lastly, both cases became highly mediatized national scandals, the subjects of books and film, and transformed mass tort dispute resolution in their countries.¹⁵⁷ The manner in which these transformations occurred greatly differed as they were a product of the vastly different dispute resolution methods.

Vioxx and Consumer Product Pain Relief: The Policy Implications of Limiting Courts' Regulatory Influence over Mass Consumer Product Claims, 41 LOY. L.A. L. REV. 1039, 1042, 1089 (2008).

¹⁵² For Mediator, see EFFETS SÉCONDAIRES, *supra* note 2, at 38–43, 56–60; BORCH-JACOBSEN, *supra* note at 218–219. See Laura Karas, Robin Feldman, So Yeon Kang, & Gerard Anderson, *Pharmaceutical Industry Funding to Patient-Advocacy Organizations: A Cross-National Comparison of Disclosure Codes and Regulations*, 42 HASTINGS INT'L & COMP. L. REV. 453, 466 (2017). For Vioxx, see Office of Public Affairs, *U.S. Pharmaceutical Company Merck Sharp & Dohme Sentenced in Connection with Unlawful Promotion of Vioxx*, DEP'T OF JUST. (Apr. 19, 2012), <https://www.justice.gov/opa/pr/us-pharmaceutical-company-merck-sharp-dohme-sentenced-connection-unlawful-promotion-vioxx> [hereinafter *DOJ Vioxx Illegal Marketing*] (Merck was sentenced to a criminal fine of almost \$322 million for illegal off label marketing of Vioxx. Merck had in November 2011 agreed to pay over \$628 million in a settlement with the U.S. government of civil actions for illegal marketing and false statements relating to Vioxx's safety).

¹⁵³ For Mediator, see EFFETS SÉCONDAIRES, *supra* note 2, at 38–43, 56–60 and BORCH-JACOBSEN, *supra* note 147, at 216–18. For Vioxx, see *DOJ Vioxx Illegal Marketing*, *supra* note 152. See also NICHOLAS FREUNDENBERG, LETHAL BUT LEGAL: CORPORATIONS, CONSUMERS AND PROTECTING PUBLIC HEALTH 55 (2014); SNIGDHA PRAKASH, ALL THE JUSTICE MONEY CAN BUY: CORPORATE GREED ON TRIAL 121–22, 126–28 (2011); Johnson, *supra* note 151, at 1041, 1089.

¹⁵⁴ For Mediator, see *Pharma Funding*, *supra* note 152, at 466. See generally IGAS Report, *supra* note 65. For Vioxx, see *DOJ Vioxx Illegal Marketing*, *supra* note 152. See also PRAKASH, *supra* note 153, at 166; Johnson, *supra* note 151, at 1041, 1089; Topol, *supra* note 151, at 1707–08.

¹⁵⁵ For Mediator, see BORCH-JACOBSEN, *supra* note 147, at 218. For Vioxx, PRAKASH, *supra* note 153, at 8; Topol, *supra* note 151, at 1708–09.

¹⁵⁶ For Mediator, see BORCH-JACOBSEN, *supra* note 147 at 69–70; Yacha Hajzler, *Procès Mediator: Les laboratoires Servier veulent gagner du temps*, FRANCEINFO (Sept. 27, 2019, 10:16 AM), <https://france3-regions.francetvinfo.fr/centre-val-de-loire/proces-mediator-laboratoires-servier-veulent-gagner-du-temps-1728617.html>. For Vioxx, see PRAKASH, *supra* note 153, at 25 (quoting Merck's general counsel, Kenneth Frazier, saying “[w]e’ll fight every case.”). See Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV. 509, 514, 517 (2008).

¹⁵⁷ For Mediator, see FAUCHON, MEDIATOR, *supra* note 75, (2010); LA FILLE DE BREST, *supra* note 75. For Vioxx, see PRAKASH, *supra* note 153.

A. *The Mediator Scandal*

1. *Servier Laboratories—Origins and Culture*

Mediator's manufacturer, Servier laboratories, was founded by Dr. Jacques Servier in 1954.¹⁵⁸ The company developed rapidly and through the efforts of its founder became the second largest pharmaceutical company in France.¹⁵⁹ Servier was well-known in France for its capacity to avoid attention. Artfully relying on the French cultural preference for discretion, Jacques Servier built a company that elevated secrecy, loyalty, and hard work as the preeminent obligations of its employees. The remarkable financial success of his company enabled Servier to create strong but discrete personal relationships with a succession of France's leading politicians, including a former Minister of Justice who later worked for Servier and was indicted for illegal influence peddling in the Mediator scandal.¹⁶⁰ Relations with Nicholas Sarkozy, first as mayor of Neuilly, the wealthy Parisian suburb where Servier's headquarters were located, and then as Minister of Finance and President France, were particularly close. Servier was a treasured symbol of a French national champion in the highly competitive pharmaceutical industry.¹⁶¹

As in the United States and other countries, the French pharmaceutical regulatory agencies were subject to either direct or subtle industry capture,

¹⁵⁸ See Eric Faverau, *Laboratoires Servier, Anatomie d'un Système*, LIBÉRATION (Sept. 20, 2019), https://www.liberation.fr/france/2019/09/20/laboratoires-servier-anatomie-d-un-systeme_1752695 (detailing the close relations with politicians, scientific experts nurtured by a dedicated department with Servier); Valérie Lion, *Mediator: Les Mystères du Dr. Servier*, L'EXPRESS (Apr. 17, 2014), https://www.lexpress.fr/actualite/societe/sante/mediator-les-mysteres-du-dr-servier_949751.html (describing Jacques Servier's rise to power, discretion, and iron-handed control of a disciplined, extremely loyal, and well-compensated Servier workforce).

¹⁵⁹ SERVIER, 2019 ANNUAL REPORT 14 (2018–19), available at https://servier.com/wp-content/uploads/2020/03/Servier_AnnualReport_2019.pdf.

¹⁶⁰ Henri Mallet worked for Servier from 1997 to 2008 earning €2.7 million. As with all the legal proceedings related to Mediator, the criminal procedure has been slow moving. See Anne Jouan, *Mediator: Les Failles de l'Instruction Judiciaire*, LE FIGARO, <https://www.lefigaro.fr/cinema/2016/11/22/03002-20161122ARTFIG00243-mediator-les-failles-de-l-instruction-judiciaire.php> [hereinafter *Les Failles*]. Irène Frachon qualified the Servier company as a “cult,” a term also used in the instruction file of the criminal case filed against Dr. Servier. See Pascaline Minet, *Irène Frachon, Dénonciatrice du Médiateur: La Conscience des Conflits d'intérêts fait Défaut chez les Médecins*, LE TEMPS (Sept. 28, 2018, 4:53 PM), <https://www.letemps.ch/sciences/irene-frachon-denonciatrice-mediator-conscience-conflits-dinterets-defaut-chez-medecins>.

¹⁶¹ Lion, *supra* note 158.

and Servier was able to place its former employees and consultants who were favorable to its interests in positions of influence in the regulatory agencies.¹⁶²

2. *Mediator Approval Process—Mediator’s Pharmacological Nature and Undesirable Side Effects*

Mediator (Benfluorex) was first placed on the market on September 1, 1976, after receiving authorization for its use in the treatment of diabetes from the competent regulatory authority in July 1974.¹⁶³ From the outset of the authorization process, and even after its authorization was suspended in late 2009, Servier contended that Mediator was not an amphetamine and had an originality distinct from the two fenfluramine family drugs, Podéral and Isoméride, the company’s most lucrative blockbuster drug.¹⁶⁴

Servier’s purpose in insisting on Mediator’s supposed originality was to avoid the drug being linked with either Aminorex, an appetite-suppressing amphetamine marketed by McNeil laboratories, or Servier’s appetite-suppression fenfluramine family of drugs.¹⁶⁵ Aminorex was withdrawn from the U.S. market in 1968 after it caused an epidemic of 600 deaths by pulmonary arterial hypertension in Europe.¹⁶⁶ Mediator would be linked to both pulmonary hypertension and heart valve damage.¹⁶⁷

¹⁶² *Id.* Industry regulatory capture by Servier (and the pharmaceutical industry in general) was clearly acknowledged by the Mission of Inquiry on Mediator and *Pharmacovigilance* established by the Commission on Social Affairs of the French parliament. See also Anne Jouan, *La Grande générosité de Servier Envers un Expert*, LE FIGARO (Dec. 19, 2011, 6:49 PM), <https://sante.lefigaro.fr/actualite/2011/12/19/16526-grande-generosite-servier-envers-expert>; Emeline Cazi, *Le Lobbying Très Politique des Laboratoires Servier*, LE MONDE (Sept. 26, 2011), https://www.lemonde.fr/societe/article/2011/09/26/le-lobbying-tres-politique-des-laboratoires-servier_1577727_3224.html; Aquilino Morelle & Marc-Olivier Padis, *Médiator: histoire d’une seconde défaite de la santé publique: A propos du rapport de l’Igas*, 374 ESPRIT 71, 78 (2011) (noting that four Servier-associated experts were present at the April 5, 2007 meeting of the commission in charge of pharmaceutical marketing authorizations at which the decision whether Mediator should be withdrawn, and only one excused himself from the debate). Dr. Aquilino Morelle was one of the three authors of the seminal IGAS Report. IGAS REPORT, *supra* note 65 at 123.

¹⁶³ BORCH-JACOBSEN, *supra* note 147, at 217; Morelle & Padis, *supra* note 162, at 73.

¹⁶⁴ See BORCH-JACOBSEN, *supra* note 147, at 62–64; EFFETS SÉCONDAIRES, *supra* note 2 at 58.

¹⁶⁵ BORCH-JACOBSEN, *supra* note 147, at 61–70, 217–18.

¹⁶⁶ *Id.* at 61.

¹⁶⁷ See *id.* at 61, 217–20.

Mediator's 1974 authorization was limited to the treatment of type 2 diabetes.¹⁶⁸ Nevertheless, the drug was heavily marketed to obese and overweight patients as an appetite suppressant, which explains its use by five million French citizens.¹⁶⁹ By 1995, French regulatory agencies were in possession of clear evidence of the risk of serious pulmonary and cardiac danger which could occur with long term use of the drug.¹⁷⁰ On September 15, 1997, Servier, "by extreme precaution," voluntarily withdrew its blockbuster drugs Isomeride and Ponderal from the French market following the outbreak of the Fen-Phen scandal and the withdrawal of Redux by Wyeth from the U.S. market that same year.¹⁷¹ Nevertheless, Mediator's authorization would not be suspended in France until November 30, 2009.¹⁷²

The chief cause of the agency's suspension of Mediator was the eruption on the scene of a pulmonary physician practicing in the provincial Breton city of Brest, Dr. Irene Frachon, the whistleblowing "*Fille de Brest*" (girl from Brest). Dr. Frachon had noticed, and was later able to convincingly establish, a striking correlation between patients taking Mediator and unexplained heart-valve damage.¹⁷³ In June 2010, her book *Mediator, 150 mg, How many deaths? (Combien de morts?)*, that asserted that Mediator had claimed approximately 1500 lives was published, precipitating a mediatization of a health scandal with major political and legal overtones.¹⁷⁴

¹⁶⁸ *Id.* at 217-18.

¹⁶⁹ *Id.* at 218.

¹⁷⁰ EFFETS SÉCONDAIRES, *supra* note 2, at 65.

¹⁷¹ *Id.* at 60; IGAS REPORT, *supra* note 65, at 43 (the drugs were withdrawn *par extreme precaution* (with extreme precaution)).

¹⁷² EFFETS SÉCONDAIRES, *supra* note 2, at 57. IGAS REPORT, *supra* note 65, at 43; RAPPORT D'INFO AFF. SOC., *supra* note 65, at 173.

¹⁷³ EFFETS SÉCONDAIRES, *supra* note 2, at 63-64.

¹⁷⁴ Dr. Frachon had great difficulty finding a publisher for her book. She was rejected by Parisian-based national publishers who feared defamation or perceived a lack of public interest in her work. But Charles Kermarec, the owner of Dialogues, a Brest bookstore, consented to take the risk. A preliminary injunction requiring the deletion of the phrase "how many deaths?" demonstrates the risk undertaken. *Id.*; IGAS REPORT, *supra* note 65, at 174. See generally LA FILLE DE BREST, *supra* note 75; Emeline Cazi, *Irène Frachon, Vigie de la Santé*, LE MONDE (July 10, 2015), https://www.lemonde.fr/festival/article/2015/07/21/irene-frachon-vigie-de-la-sante_4691933_4415198.html. French defamation law is far more favorable to plaintiffs than American law, and suits are often brought as criminal cases. See Einbinder, *supra* note 31, at 37 n.109. In 2013, on Servier's instigation action, Dr. Georges Chiche, an initial whistleblower (*lanceur d'alerte*), who in 1999 had drawn the pharmacological vigilance office's attention to Mediator's link with heart valve failure, was

3. *Mediatization and Politicization of the Mediator Scandal*

The publication of Dr. Frachon's book unleashed a media storm with immediate political consequences. On August 24, 2010, France's leading newspaper, *Le Monde*, published an article entitled, *Mediator: Combien de morts?*, by a socialist *député* (congressman) who would strongly support Dr. Frachon's efforts.¹⁷⁵ The *Le Monde* article generated considerable media attention—breaking the taboo on questioning the number of fatalities—and lead to the mobilization of victim associations and of Xavier Bertrand, Minister of Labor, Employment, and Health in the government of President Sarkozy.¹⁷⁶

Xavier Bertrand's rapid response to the scandal included counseling all persons who had used Mediator to consult their doctors and ordering an immediate investigation of the Mediator case.¹⁷⁷ In 2011, the compensatory fund framework proposed by Servier faced delays and deficiencies. In the face of delays and deficiencies and in concert with victim associations, Bertrand introduced and forcefully urged the passage of a law providing for a government funded and administered indemnification scheme.¹⁷⁸ His actions were universally applauded in France as signaling a departure from the delay-and-deny stance taken by politicians in previous scandals.¹⁷⁹

The 2011 law setting up the special fund for Mediator victims improved in three specific ways from the existing general framework for

indicted for criminal defamation together with journalists from the well-known "*Envoyé Spécial*" (akin to *60 Minutes*). The indictment was dismissed in 2015. See Irène Frachon, *Irène Frachon: « Il faudrait pouvoir punir ceux qui attaquent les lanceurs d'alerte »*, LE MONDE (Apr. 26, 2016), https://www.lemonde.fr/idees/article/2016/04/25/irene-frachon-il-faudrait-pouvoir-punir-ceux-qui-attaquent-les-lanceurs-d-alerte_4907965_3232.html.

¹⁷⁵ See Tabet, *La contre-attaque*, *supra* note 91.

¹⁷⁶ *Id.*

¹⁷⁷ Marie-Christine Tabet, *Bertrand: "Je suis Choqué par l'attitude des laboratoires Servier"*, LE JOURNAL DU DIMANCHE (Mar. 26, 2011), <https://www.lejdd.fr/Societe/Sante/Le-ministre-de-la-Sante-Xavier-Bertrand-s-en-prend-vertement-a-Jacques-Servier-et-a-son-laboratoire-dans-l-affaire-du-Mediator-interview-289727-3223403>.

¹⁷⁸ The special fund for Mediator victims was created pursuant to a law passed unanimously by the French Parliament (*Assemblée Nationale*) in July 2011. See generally Loi 2011-900 du 29 juillet 2011 de finances rectificative pour 2011 [Law 2011-900 of July 29, 2011, amending finances for 2011], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 30, 2011.

¹⁷⁹ See Estelle Saget, *Irène Frachon: "Je suis devenue sans le vouloir, Mediatorologue"*, L'EXPRESS (May 14, 2012, 7:00 AM), https://www.lexpress.fr/actualite/societe/sante/irene-frachon-je-suis-devenue-sans-le-vouloir-mediatorologue_1113103.html; Tabet, *Bertrand*, *supra* note 177.

indemnification established in 2002.¹⁸⁰ First, the alternative dispute resolution mechanism was credited with significantly reducing the number of lawsuits filed and earned the admiration of many other countries, and was rendered more impartial through the introduction of a neutral College of Experts. Second, Mediator victims whose injury had manifested prior to September 5, 2001 (the cut-off date for actions under the 2002 law) would be permitted to file indemnification claims. Third, indemnification was broadened to include those temporarily incapacitated, thereby modifying the 2002 law's requirement of a twenty-five percent incapacity rate.¹⁸¹

Payments to acknowledged Mediator victims are guaranteed by government funding administered by the National Office for the Indemnification of Medical Accidents (*L'Office national d'indemnisation des accidents médicamenteux*) ("ONIAM"), which has subrogation rights against Servier.¹⁸² This feature arguably made ONIAM overly cautious out of fear of insufficient reimbursement, given Servier's delay-and-deny strategy that, when coupled with the difficulties of reviewing over 9,000 claims together with the College of Experts, led to substantial delay and disappointment.¹⁸³

The political orientation of the mediatized scandal and the government's rapid involvement and take-over of the critical issue of compensation illustrates a fundamental distinguishing feature of French mass tort dispute resolution in comparison to the prominence of legal solutions in the United States. The difference is best illustrated by the sobriquet given to Dr. Frachon as France's "Erin Brockovich."¹⁸⁴

¹⁸⁰ Loi 2002-303 du 4 mars 2002 relative aux droits des maladies et à la qualité du système de santé et le décret 2002-886 du 3 mai 2002 [Law 2002-303 of March 4, 2002 on the Rights of the Ill and the Quality of the Health System and its Implementing Decree], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 5, 2002.

¹⁸¹ IGAS REPORT, *supra* note 65, at 97–98.

¹⁸² Claire Bright & Christopher Hodges, *France: The ONIAM Scheme*, in REDRESS SCHEMES FOR PERSONAL INJURIES 433 (Sonia Macleod & Christopher Hodges eds., 2017); *see also* BIARD & AMARO, *supra* note 17, at 16 (noting that the creation of the first French compensation schemes in 1951 initiated the "socialization of risks (*socialization du risqué*) movement). The ONIAM scheme was created in 2002.

¹⁸³ *See* EFFETS SÉCONDAIRES, *supra* note 2, at 68–70; *see also* BIARD & AMARO, *supra* note 17, at 26; Marie-Christine Tabet, *Mediator: Servier face aux victimes*, LE JOURNAL DU DIMANCHE (May 13, 2012), <https://www.lejdd.fr/Societe/Justice/Mediator-Servier-face-aux-victimes-510528-3270404>.

¹⁸⁴ *See* Minet, *supra* note 160.

4. *A Tangled Continuing Legal Imbroglia*

The Mediator scandal has engendered a complex web of litigation. The existence of independent, specialized court systems, as well the absence either of a mass tort litigation framework or specialized mass tort bar,¹⁸⁵ have resulted in unacceptable delays and considerable confusion. As a result, the public has questioned the judicial system's ability to achieve individual and collective compensatory and social justice.

The following subsections provide an analysis of the principal legal actions before the French courts to offer a comparative law window into French and American mass tort dispute resolution.

a. *Criminal Law Is the Primary Focus of Legal Action, Media Attention, and Political Debate*

The first legal action in the Mediator saga was civil in nature and filed a few days after the publication of Irene Frachon's book in June 2010. It was filed in the district court of Nanterre (*Tribunal du Grande Instance* ("TGI")), the jurisdiction where Servier's headquarters is located. The Nanterre TGI granted the request of a plaintiff who suffered from heart valve damage to appoint an expert to determine causation.¹⁸⁶

Contrary to the situation in the United States, where the response would likely be civil, the primary focus of almost all the actors in the French Mediator drama has been, and remains, criminal prosecution. The first criminal action was introduced in November 2010, also in Nanterre, by the filing of the seldom used direct complaint (*citation directe*) by the family of

¹⁸⁵ A few lawyers have achieved prominence as specialists in pharmaceutical and other health-related cases, having acquired experience in representing individual clients and associations in cases such as Mediator. Their situation is somewhat similar to that of American entrepreneurial lawyers, such as Speiser and Stern in the 1960s and 1970s. Nevertheless, they cannot be said to constitute anything like a present day American-style mass tort bar, due to their inability to bring grouped cases, which remain a monopoly of approved associations, and the strong resistance within the broader legal profession and public to any such import. See Laure Mentzel, Maître Coubris, *la bête noire des labos*, LE MONDE (Feb. 1, 2013), https://www.lemonde.fr/sante/article/2013/02/01/maitre-coubris-la-bete-noire-des-labos_1825362_1651302.html.

¹⁸⁶ See Anne Jouan, *Le laboratoire Servier dans la tourmente judiciaire*, LE FIGARO (June 4, 2010, 10:20 AM) <https://www.lefigaro.fr/actualite-france/2010/06/04/01016-20100604ARTFIG00629-le-laboratoire-servier-dans-la-tourmente-judiciaire.php> [hereinafter Jouan, *tourmente judiciaire*].

a person alleged to have died from Mediator use.¹⁸⁷ The choice of the direct citation was motivated by the desire of the complainant's lawyers to move quickly and limit the scope of their complaint to infractions directly related to the harm suffered by patients. Direct citation also permits individuals to directly open a criminal case without the need to wait for the conclusions of an *instruction*.

Soon afterwards, the Nanterre district prosecutor decided to transfer the case for *instruction* to the specialized health unit of the Paris prosecutorial office.¹⁸⁸ As a result, prosecutors brought two independent criminal cases alleging different but overlapping criminal infractions. These cases were against the same and different individual and corporate defendants, and they were brought under two different criminal procedures with very different evidentiary requirements by two different legal actors—one private and the other public. In addition, the various parties within the two procedures (e.g., individual patients, associations representing consumers, social insurance funds) found their interests and legal strategies diverging.¹⁸⁹

The complexity of this situation furnished ample opportunities for Servier's experienced team of criminal defense lawyers to use legal challenges aimed at dismissing or delaying the actions. For example, the case raised two questions of constitutional priority (*Question de priorité constitutionnelle*) ("QPC"), a relatively recent innovation in French law that requires judges to suspend proceedings if a constitutional question is legitimately at issue.¹⁹⁰ The district court judge accepted the legitimacy of

¹⁸⁷ See Simone Piel & Pascale Robert-Diard, *Le procès du Mediator renvoyé en 2014*, LE MONDE (May 31, 2013), https://www.lemonde.fr/sante/article/2013/05/31/le-proces-du-mediator-est-dans-l-impasse-apres-deux-semaines-de-debats-a-nanterre_3421579_1651302.html.

¹⁸⁸ *Les Failles*, *supra* note 160.

¹⁸⁹ Simon Piel, *L'imbroglia juridique du premier procès du Mediator*, LE MONDE (May 21, 2013), https://www.lemonde.fr/sante/article/2013/05/20/l-imbroglia-juridique-du-premier-proces-du-mediator_3380832_1651302.html.

¹⁹⁰ French political theory, echoing the French Revolution's revulsion towards judicial power, traditionally opposed constitutional judicial review, and its embrace and use by the U.S. Supreme Court was decried as undemocratic. Opponents of constitutional judicial review, or for that matter any proposal that could be characterized as an American legal import, effectively used the sobriquet "*Gouvernement des Juges*" (a Government of Judges) as an argument against adoption. Limited constitutional review was introduced in 1958 with the creation of the *conseil constitutionnel* (translated literally as "The Constitutional Council," notably not termed then nor now a "Court"). Very few cases were filed until a reform in 1974 permitted groups of sixty parliamentarians, and thus the opposition, to seize the court.

the two questions, which were related to issues caused by the existence of the parallel proceedings.¹⁹¹ The proceedings were therefore suspended, resulting in a six-month delay, in order for the French Supreme Court to decide that the constitutional priority questions did not warrant transmission to the *Conseil Constitutionnel*.¹⁹²

The Nanterre direct complaint action dragged on and eventually fizzled out. The Paris *instruction* appeared to be over by April 2014 but was re-opened the Paris appellate court invalidated a portion in November 2015.¹⁹³ On May 24, 2017, the Paris prosecutorial office (*parquet*) requested the Paris criminal court open the trial of Laboratories Servier and several individual defendants. The Mediator criminal trial finally commenced on September 23, 2019, almost nine years after the filing of the direct criminal complaint in Nanterre.

Six months of hearings were planned in this massive trial, which was originally scheduled to end in April 2020. The trial has since been suspended due to COVID-19. It is conditionally scheduled to resume, subject to further delays caused by the virus, in early June with a probable end date in November 2020.

Through a law modifying the French Constitution—Article 61.1 of July 23, 2008—which entered into effect on March 1, 2010, the power to seize the *conseil constitutionnel* was extended to individuals. See DE GUILLENCHMIDT, *supra* note 97, at 418–20, 427. The response to this major departure from French political theory and legal culture has been positive, judging from its use (844 cases as of March 6, 2020). For commentary, see, e.g., Didier Maus, *La question prioritaire de constitutionnalité: dix ans après, enfin une réforme réussie*, OPINION INTERNATIONALE, (Mar. 16, 2020), https://www.opinion-internationale.com/2020/03/16/la-question-prioritaire-de-constitutionnalite-dix-ans-apres-enfin-une-reforme-reussie_71847.html. The *conseil constitutionnel*'s procedure for judicial review is complicated compared to those established in other European countries in that it requires the filtering of all requests through the supreme courts for ordinary (*Cour de Cassation*) or administrative (*Conseil d'Etat*) matters, as appropriate. See LAURENCE GAY, PIERRE BON & THIERRY DI MANNO, LA QPC VUE DU DROIT COMPARÉ. LE CONTRÔLE DE CONSTITUTIONNALITÉ SUR RENVOI DU JUGE ORDINAIRE EN FRANCE, ESPAGNE ET ITALIE, CNRS UNITÉ MIXTE DE RECHERCHES 7318 DROIT PUBLIC COMPARÉ – DROIT INTERNATIONAL ET DROIT EUROPÉEN 2, 5–7 (2013).

¹⁹¹ See Emeline Cazi, *Mediator: Servier comparait pour “tromperie”*, LE MONDE (May 14, 2012, 10 :52 AM), https://www.lemonde.fr/sante/article/2012/05/14/mediator-servier-comparait-pour-tromperie_1700669_1651302.html.

¹⁹² See *Mediator: la Cour de Cassation rejette la QPC de Servier*, LIBÉRATION (Aug. 24, 2012, 2:30 PM), https://www.liberation.fr/societe/2012/08/24/mediator-la-cour-de-cassation-rejette-la-qpc-de-servier_841624.

¹⁹³ See *Les Failles*, *supra* note 160, at 42–43.

One hundred and ten hearings and over a hundred and twenty witnesses were originally anticipated. Over two thousand five hundred *partie civile* complainants represented by over three hundred and fifty lawyers were joined to the prosecution. Charges of aggravated fraud (*tromperie aggravée*), involuntary homicide and injuries, and influence peddling (*trafic d'influence*) were brought against seven individuals (five indictées, notably Dr. Jacques Servier—who died prior to trial), and eleven corporate defendants (including the pharmaceutical regulatory office for criminal negligence for failing to suspend the authorization to market Mediator).¹⁹⁴

The trial is being reported on heavily by the media, and courtroom facilities large enough for five hundred members of the public have been provided. Commentary by politicians, the press, and victims agree that this trial may be France's last chance to prove that justice can triumph in complicated mass tort cases.¹⁹⁵

b. Civil Actions, While Much Delayed, Broke New Ground, but the Amounts Recovered Remain Modest

An examination of the progress of Mediator civil actions through the French legal system brings to light major differences with the treatment of similar mass tort cases, notably Vioxx, in the United States.

¹⁹⁴ See Chloé Pilorget-Rezzouk, *Procès du Mediator: la Justice oblige de pousser les murs*, LIBERATION (Sept. 20, 2019), https://www.liberation.fr/france/2019/09/20/proces-du-mediator-la-justice-obligee-de-pousser-les-murs_1752694; R. Bx., *Coronavirus : le procès du scandale du Mediator renvoyé en juin*, LE PARISIEN (Mar. 16, 2020), <http://www.leparisien.fr/societe/sante/coronavirus-le-proces-du-scandale-du-mediator-renvoye-en-juin-16-03-2020-8281332.php>; Ned Stafford, *Obituary of Jacques Servier*, 348 BRIT. MED. J. 3298, 3298 (2014).

¹⁹⁵ See Press Release, *Victime du mediator: Enfin une date pour le procès au pénal des Laboratoires SERVIER!*, ASS'N DES VICTIMS DE MEDIATOR (AVIM) [MEDIATOR VICTIMS ASSOCIATION] (Feb. 5, 2019), http://www.victimes-isomeride.asso.fr/mediator_date_proces_penal_laboratoires_servier.html; see also Cazi, *Mediator en procès*, *supra* note 90; Henri Seckel, « Combien avez-vous été rémunéré par Servier ? » : au procès du Mediator, le défilé des consultants du laboratoire, LE MONDE (Nov. 2, 2019, 6:07 AM), https://www.lemonde.fr/societe/article/2019/11/02/combien-avez-vous-ete-remunere-par-servier-au-proces-du-mediator-le-defile-des-consultants-du-laboratoire_6017782_3224.html; Henri Seckel, « Ce médicament n'a strictement aucun intérêt » : au procès du Mediator, la tornade Gilles Bardelay, LE MONDE (Oct. 29, 2019, 4:19 PM), https://www.lemonde.fr/police-justice/article/2019/10/29/ce-medicament-n-a-strictement-aucun-interet-au-proces-du-mediator-la-tornade-gilles-bardelay_6017335_1653578.html; Pascale Robert-Diard, *Procès du Mediator : « Georges, il faut retirer ton signalement ! »*, LE MONDE (Oct. 16, 2019, 6:02 AM), https://www.lemonde.fr/societe/article/2019/10/16/proces-du-mediator-georges-il-faut-retirer-ton-signalement_6015664_3224.html.

First, unlike the confusing situation in the criminal cases discussed above, forum selection in civil proceedings is a simple matter and the law is clear. Plaintiffs will almost always be required to file suit in the district court (TGI of Nanterre) where the defendant company (Servier) is headquartered. French lawyers need not concern themselves with complicated questions of federalism, or constitutional due process jurisdictional issues, like their American counterparts.

Second, French and U.S. evidence gathering mechanisms differ in fundamental ways. For example, parties may request the appointment of neutral experts as did the plaintiffs in the first Mediator civil case filed in Nanterre court,¹⁹⁶ discussed in 4(a) above. Discovery in civil cases is very limited.¹⁹⁷ Consequently, plaintiff civil litigation costs are significantly lower than those in the United States.¹⁹⁸ Nevertheless, French lawyers tend to prefer criminal over civil proceedings in mass tort cases because of the access the complainants are granted to the detailed and comprehensive “instruction file” prepared by the investigating magistrate.¹⁹⁹

Third, the absence of a legal framework for mass torts,²⁰⁰ or established informal structuring and co-operation practices developed by

¹⁹⁶ *Les Failles*, *supra* note 160; Jouan, *Tourmente judiciaire*, *supra* note 186.

¹⁹⁷ See Vivian Grosswald Curran, *Symposium: Trends In Federal Civil Discovery: U.S. Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis*, 51 AKRON L. REV. 857, 864–66 (2017) (emphasizing that U.S. pretrial discovery offends deeply-held French notions of privacy and is inconsistent with judge-led French evidence gathering).

¹⁹⁸ See DAVIS, JUSTICE, *supra* note 87, at 150.

¹⁹⁹ For example, a treasure trove of compromising internal documents—e.g., memoranda proving that Servier intended from the outset to market Mediator as a weight-reduction appetite suppressant—were discovered in a police search of Servier’s headquarters. See Marie-Christine Tabet, *Mediator, les essais secrets sur l’homme*, LE JOURNAL DU DIMANCHE (Mar. 31, 2012), <https://www.lejdd.fr/Societe/Justice/Mediator-les-essais-secrets-sur-l-homme-499045-3222587>.

²⁰⁰ However, the Health Law of July 2016’s creation of a specific class action procedure in medical cases may signal an important change. This procedure was for the first time to supplement earlier criminal and civil suits filed against Sanofi, France’s largest pharmaceutical company, in relation to Dépakine, an anti-epileptic drug given to pregnant women that is alleged to have caused malformations in newborns. See François Béguin & Emeline Cazi, *Dépakine: Sanofi visé par la première action de groupe en matière de santé*, LE MONDE (Dec. 13, 2016), https://www.lemonde.fr/sante/article/2016/12/13/la-depakine-cible-de-la-premiere-action-de-groupe-en-matiere-de-sante_5048007_1651302.html. Plaintiffs initially won a €3 million judgment against Sanofi. See Eric Favereau, *Dépakine: Sanofi condamné pour la première fois*, LIBÉRATION (Dec. 11, 2017), https://www.liberation.fr/france/2017/12/11/depakine-sanofi-condamne-pour-la-premiere-fois_1615859. The plaintiffs, and future opportunities for recoveries, suffered a serious setback, however, with the *Cour de Cassation*’s reversal of the award. See *Dépakine: l’indemnisation d’une famille par Sanofi cassée par la justice*, LE MONDE (Nov. 27, 2019),

entrepreneurial lawyers for aggregated litigation, reinforces the fragmented nature of civil law litigation. Progress of civil lawsuits against Mediator has been slow. Over five years elapsed between the filing of the first civil suit in June 2010 and the October 2015 decision of the trial court that held Servier liable in tort for the injuries caused by Mediator.²⁰¹ This decision was upheld by the Versailles appellate court in April 2016 and by the *Cour de Cassation* on September 20, 2017.²⁰² In related proceedings, one chamber (first) of the *Cour de Cassation* initially rejected²⁰³ an innovative mechanism in French law requiring Servier to advance plaintiffs' legal expenses. A different chamber (second) of the *Cour* later rendered a decision upholding this mechanism.²⁰⁴ The confusion and delay caused by these contradictory decisions,²⁰⁵ which caused substantial delay for victims seeking judicial resolution of their disputes, has contributed to the sentiment that the court

https://www.lemonde.fr/societe/article/2019/11/27/depakine-l-indemnisation-d-une-famille-par-sanofi-cassee-par-la-justice_6020788_3224.html.

²⁰¹ See Eric Favereau, *Mediator: Servier condamné pour la première fois au civil*, LIBÉRATION (Oct. 22, 2015), https://www.liberation.fr/france/2015/10/22/affaire-mediator-servier-condamne-pour-la-premiere-fois-au-civil_1408103.

²⁰² For coverage of the Versailles Court of Appeal, see Emeline Cazi, *Mediator: la responsabilité civile de Servier confirmée en appel*, LE MONDE (Apr. 15, 2016), https://www.lemonde.fr/police-justice/article/2016/04/15/mediator-la-responsabilite-de-servier-confirmee-en-appel_4902789_1653578.html; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 20, 2017, Bull. Civ. I, No. 16-19643 (Fr.).

²⁰³ Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Jan. 29, 2015, Bull. civ. I, No. 13-24691 (Fr.); see Squire Patton Boggs, *Un « happy ending à la saga » de la provision ad litem*, LA REVUE (Apr. 17, 2015), https://larevue.squirepattonboggs.com/%E2%80%8Bun-happy-ending-a-la-saga-de-la-provision-ad-litem_a2565.html (commenting favorably on this decision).

²⁰⁴ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 25, 2016, Bull. civ. II, No. 49 (Fr.) (permitting the establishment of a provisional fund in cases where an *expertise* has clearly established causation to the court); see Sophie Hocquet-Berg, *La voie est (entr')ouverte pour les provisions ad litem en faveur des victimes du Mediator!*, REVUE GÉNÉRALE DU DROIT (Feb. 25, 2016), <https://www.revuegeneraledudroit.eu/blog/2016/03/25/la-voie-est-entrouverte-pour-les-provisions-ad-litem-en-faveur-des-victimes-du-mediator/> (attempting to reconcile the contradictions between the earlier decision of the second civil chamber rejecting the concept of a fee advance and that of the first chamber which accepted it by noting that in the latter case the judge-appointed expert had issued his report prior to the request for the advance).

²⁰⁵ The conflict between the two chambers of the *Cour* in the *Provisions ad litem* decisions illustrates a distinctive feature of French law. The *Cour* is divided into six specialized separate chambers: (1st) contracts, (2nd) torts, (3rd) family, (4th) commercial, (5th) social, and (6th) criminal. A petition (*pourvoi*) contesting appellate court decisions is assigned to one of the chambers. That chamber's decision is then remanded to a different appellate court than the one from which the *pourvoi* originated. On occasion, as in Mediator, different chambers may render contradictory decisions. This aspect of French legal procedure stems from the absence of a concept of definitive binding precedent in French law, a feature consistent with the French Revolution's strong distrust of judicial power. See BELL, BOYRON & WHITTAKER, *supra* note 59, at 29–30, 46–48.

system has been deficient in rendering compensatory and social justice in the Mediator case.²⁰⁶

Nonetheless, the Mediator scandal has significantly contributed to the development of French mass tort case law. First, the district court of Nanterre recognized the possibility for longtime Mediator users who had not yet suffered heart valve damage to sue for the mental distress caused by their legitimate anxiety in line with the case law developed in the Alstom asbestos cases.²⁰⁷ Second, the first chamber of the *Cour*, in its decision of November 22, 2017, rejected three Servier arguments aimed at reversing lower court decisions holding it liable for the defects associated with the commercialization of Mediator.²⁰⁸ The *Cour* held that the ongoing criminal action did not suspend (and thereby delay) the civil proceedings—the decision to suspend residing within the discretion of the lower court.²⁰⁹ It also did not permit Servier to avoid liability by using the common defense that the state of scientific knowledge at the time of the marketing of the product was insufficient to permit it to discern the risk. Lastly, the court

²⁰⁶ See Anne-Laure Barret, *Gérard Bapt: Le droit français est inadapté pour les victimes des médicaments*, JOURNAL DU DIMANCHE (Mar. 10, 2013), <https://www.lejdd.fr/Chroniques/Invite-du-JDD/Gerard-Bapt-Le-droit-francais-est-inadapte-pour-les-victimes-des-medicaments-595616>; Irène Frachon, Video, *Mediator: nous attendons ce proces depuis des annees*, FIGARO LIVE (Sep. 23, 2019), <http://video.lefigaro.fr/figaro/video/mediator-nous-attendons-ce-proces-depuis-des-annees-souligne-irene-frachon/6088720384001/> (Dr. Irene Frachon decried the intolerable unending delays in the legal proceedings as a denial of justice for the victims and noted that although *instruction* ended in 2014 and trial was slated for 2015, the actual trial was delayed six years due to Servier's denials and legal maneuvering).

²⁰⁷ See Sophie Hocquet-Berg, *Le préjudice d'anxiété des patients exposés au Médiator*, REVUE GÉNÉRALE DU DROIT (Jan. 28, 2016), <https://www.revuegeneraledudroit.eu/blog/2016/04/13/le-prejudice-danxiete-des-patients-exposes-au-mediator/>; Élodie Guilbaud, *Nouvelles avancées dans le contentieux Médiator*, LE PETIT JURISTE (Feb. 14, 2016), <https://www.lepetitjuriste.fr/nouvelles-avancees-dans-le-contentieux-mediator/> (analyzing decisions of the Nanterre court in light of the Alstom asbestos cases and concluding that the caselaw in favor of anxiety suits, while strengthened, is still far from clear). A recent *Cour* decision has now strengthened the caselaw, favoring plaintiffs' suits for anxiety in asbestos matters. Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., Apr. 5, 2019, No. 18-17442 (Fr.), available at https://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/643_5_41955.html. (including press release).

²⁰⁸ See Sophie Hocquet-Berg, *Réparation intégrale du préjudice dans l'affaire du Mediator sans réduction possible à raison des prédispositions de la victime*, REVUE GÉNÉRALE DU DROIT (Feb. 20, 2018), <https://www.revuegeneraledudroit.eu/blog/2018/02/20/reparation-integrale-du-prejudice-dans-laffaire-du-mediator-sans-reduction-possible-a-raison-des-predispositions-de-la-victime/> (analyzing *Cour* decisions 16-23804 and 16-24719 of November 22, 2017).

²⁰⁹ *Id.*

struck down the appellate court's reduction of damages that were due to victims' pathological predisposition towards heart valve injury.²¹⁰

The amount of damages recovered in Mediator litigation has increased but remains extremely modest compared to comparable mass tort cases in the United States, such as Vioxx.²¹¹

c. *Administrative Law—The Existence of Parallel Independent Court Systems is a Source of Confusion and Delay in Complex Mass Tort Cases*

France's administrative court system presents several advantages over U.S. administrative law practice. These include the French system's long-established tradition of independence, its role as a protector of civil liberties, as well as the forum it offers citizens to contest government action by invoking the general principle of legality. In addition, the clear categorization and separate treatment of public and private legal questions consistent with Roman tradition and French revolutionary political ideals facilitates efficiency.

However, the Mediator experience demonstrates that these benefits may not apply to all mass tort victims, whose claims for redress may be delayed by the submission of similar issues to two sets of courts or jeopardized by the risk of inconsistent decisions. Given the large role played by the French state in the approval of and social security reimbursement for medicines such as Mediator, the potential for victim compensation claims and intra-governmental disputes after scandal erupts was great and, in fact, occurred. Internal documents of the regulatory agencies, including opinions of the legal counsel's office of the Ministry of Health obtained during the *instruction* of the criminal trial, indicate an early concern over possible

²¹⁰ *Id.* (for both risk discernment and predisposition arguments).

²¹¹ For example, in the first civil case in which Servier was held liable (as discussed above), the sixty-eight-year-old plaintiff suffered a relatively minor case of heart valve damage, which nevertheless rendered her fragile, but received only €9,750, reduced to €7,650 on appeal. See Anne Jouan, *Mediator: Servier condamné pour la première fois en appel*, LE FIGARO, (Apr. 14, 2016), <https://www.lefigaro.fr/actualite-france/2016/04/14/01016-20160414ARTFIG00179-mediator-servier-condamne-pour-la-premiere-fois-en-appel.php> [hereinafter Jouan, *Servier condamné*]. Recent decisions are more generous. See Fred Tanneau, *Mediator: Servier devra indemniser une plaignante "à 100%"*, L'EXPRESS (Feb. 15, 2019), https://www.lexpress.fr/actualite/societe/justice/mediator-servier-devra-indemniser-une-plaignante-a-100_2062400.html.

individual and governmental criminal and administrative liability in the scandal.²¹² Issues analyzed by the documents included whether, and in what manner, liability might be imposed and how the state might be entirely, or partially, exonerated given the extent of Servier's culpability.²¹³

Not surprisingly, both state agencies and Servier introduced administrative lawsuits on these issues, which contributed to the long delays and general confusion of Mediator dispute resolution.²¹⁴ For example, the subjects of decisions within the administrative court system from July 2014 to November 2016 covered questions of whether Servier liability might offset liability by the the French state (and vice-versa) and whether damages for mental distress from anxiety were recoverable.²¹⁵

The *Conseil d'Etat* decided these administrative law issues in a major decision.²¹⁶ The court ruled that the negligence of the regulatory agencies in first approving and then extending Servier's authorization to market Mediator could render the French state liable—thus permitting victims to bring suits for indemnification in the administrative courts.²¹⁷ Contrary to the decision of the Paris Administrative Court of Appeal (*Cour d'Appel Administrative*), the *Conseil d'Etat* potentially limited the claimants recovery by holding that the nature of Servier's wrongful actions fully, or partially, exonerated the state from liability, before remanding the case to the Paris appellate court.²¹⁸

²¹² Aurelia Gervais, *Responsabilité de l'Etat dans l'affaire du Mediator*, LEGALNEWS (Nov. 14, 2016), http://legalnews.fr/index.php?option=com_content&id=327763.

²¹³ See Anne Jouan, *Quand le Mediator affolait l'Etat*, LE FIGARO SANTÉ, (Mar. 3, 2017), <https://sante.lefigaro.fr/article/quand-le-mediator-affolait-l-etat/>.

²¹⁴ Gervais, *supra* note 212.

²¹⁵ Tribunaux administratifs de Paris [TA] [Administrative Court of Paris], July 3, 2014, No. 1312466; Cour administrative d'appel de Paris [Paris court of administrative court of appeal], July 31, 2015, No. 14-PA04082; Conseil d'Etat [CE] [administrative court], Nov. 9, 2016, No. 393108.

²¹⁶ See Press Release, *Responsabilité de l'Etat dans l'affaire du Mediator* [*State Responsibility in the Mediator Case*], CONSEIL D'ETAT (Nov. 9, 2016), <https://www.conseil-etat.fr/actualites/actualites/responsabilite-de-l-etat-dans-l-affaire-du-mediator>. [hereinafter *CONSEIL D'ETAT Mediator Decision*].

²¹⁷ *Id.*; See Jean-Phillippe Orlandini, *Pas de responsabilité exclusive de l'Etat dans l'affaire du Médiateur*, JOURNAL DU DROIT ADMINISTRATIF (Nov. 9, 2016), <http://www.journal-du-droit-administratif.fr/?p=1137>.

²¹⁸ CONSEIL D'ETAT, *Mediator Decision*, *supra* note 216; Orlandini, *supra* note 217.

The *Conseil d'Etat* also recognized that Mediator users who had suffered mental distress from anxiety about their future health could sue the state.²¹⁹ The *Cour de Cassation* also had previously recognized anxiety as a ground for suit against companies, but with stricter requirements to establish liability for anxiety.²²⁰ The inconsistent state liability decisions within the administrative court system and differences between the parallel ordinary and administrative court systems, with respect to the requirements for recovering under an anxiety theory, illustrate structural flaws in mass tort dispute resolution in France.

5. *Lessons Learned and Points for Further Reflection*

a. *Present State of French Mass Tort Dispute Resolution*

The Mediator scandal illustrates many essential characteristics of French culture and distinctive features of its legal system that explain the present state of mass tort dispute resolution in France. These must be taken into account in analyzing opportunities for change. This case study has demonstrated:

- First, the critical role of the French State in structuring society and serving as a vehicle for assuring compensatory and social justice. French citizens today continue to look to the state first for relief in mass torts. Societal change, however, has made them less willing (despite a satisfactory state

²¹⁹ CONSEIL D'ETAT, *Mediator Decision*, *supra* note 216; Orlandini, *supra* note 217.

²²⁰ The Cour de cassation first recognized in 2010 the right of individuals to recover for anxiety in asbestos cases. Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 11, 2010, Bull. civ. V, No. 24 (Fr.); *see also* Court de cassation [Cass.] [supreme court for judicial matters] soc., Dec. 4, 2012, Bull. civ. V, No. 294 (Fr.). This recognition was later extended to cancer inducing drugs—diethylstilbestrol (“DES”). Cour de Cassation [Cass.] [supreme court for judicial matters] 2e civ., July 2, 2014, No. 206 (Fr.). Lower courts applied the Cour de Cassation’s caselaw to Mediator cases starting in 2016. Tribunaux de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, Jan. 28, 2016, No. 16 (Fr.). *See La préjudice d’anxiété reconnu en France pour la première fois dans l’affaire du Mediator*, JONES DAY (Feb. 2016), <https://www.jonesday.com/fr/insights/2016/02/le-prjudice-danxit-reconnu-en-france-pour-la-premiere-fois-dans-laffaire-du-mediator>. *See generally* Marius Cardinal, *Le préjudice d’anxiété né de l’usage d’un produit de santé défectueux*, UNIVERSITÉ DE RENNES, Oct. 28, 2016. For analyses of civil and administrative case law, *see, respectively*, M. Bary, *Vers la consécration du préjudice d’angoisse face aux risques hypothétiques par la responsabilité civile?*, REVUE JURIDIQUE DE L’OUEST, 2014, at 93, and Christine Paillard-Cormier, *La réparation du préjudice d’angoisse face aux risques hypothétiques par le juge administratif*, REVUE JURIDIQUE DE L’OUEST 115 (2014).

healthcare and compensatory funds safety net) to accept the inevitability of harm to their persons caused by the wrongful and possibly criminal acts of national champions.

- Second, French culture, including the basic ethos of the legal profession, remains hostile to the substitution of this pre-eminent role of the state, and the resulting political pressure by private action led by entrepreneurial lawyers. The use of public interest associations as the entry point into the court system reflects this preference.
- Third, criminal trials are increasingly viewed as the focal point for achieving compensatory as well as social justice given the “discovery” benefits of the *partie civile* mechanism.
- Fourth, conflicts of jurisdiction and inconsistent decisions between parallel court systems in mass tort cases exacerbate the delays and complications already commonly found in the court system.

b. Suggested Reforms and Issues for Further Reflection and Comparative Law Study

Consequently, the following suggestions derived from the Mediator case study’s findings should be analyzed from a comparative law perspective:

- First, designing a mass tort dispute resolution forum that could serve as a central focal point to ensure coherence between the parallel French court systems and reduce delay, confusion, and the consequent loss of credibility of the justice system for the citizenry. While the establishment of a U.S.-style MDL forum would not be workable, a legal structure responsible for the early channeling of cases could be envisaged.
- Second, evaluating the experience with the specialized class action for health (including harmful drugs) established by the 2016 Health

Law (*Loi Santé*). This law extended and adapted the general framework for group actions established by the Hamon Law (limited to consumer actions) to deal with the specificity of compensating victims or their heirs who had suffered physical injury or death from the secondary effects of pharmaceuticals. The Health Law's innovations include potentially lengthening the statute of limitations for opting into a class from six months to five years, establishing optional mediation procedures, and extending the benefits of the law retroactively to victims whose symptoms only manifested years after taking the drugs. In addition, a far greater number of associations (486) have been authorized by the State to bring actions on behalf of pharmaceutical victims than in the consumer field (fifteen).²²¹ The first, and only to date, experience of the *Loi Santé*—the Sanofi Deparkine case—has been mixed, with weaknesses found in the Mediator scandal (notably delays in the courts and in compensating victims).²²² Nevertheless, and somewhat paradoxically, in view of France's strong historical hostility to class actions, the eventual success of this specialized mass torts class action *à la française* may be furthered by elements of French practice that are lacking or undeveloped in the United States. For example, the risk of a Jones Manville bankruptcy crisis is negligible given the French practice of providing state-backed financing for compensatory funds. In

²²¹ Loi Hamon, *supra* note 2.

²²² See Eric Favereau, *Dépakine: Sanofi condamné pour la première fois*, LIBÉRATION (Dec. 11, 2017), https://www.liberation.fr/france/2017/12/11/depakine-sanofi-condamne-pour-la-premiere-fois_1615859. The plaintiffs, and future opportunities for recoveries, suffered a serious setback, however, with the *Cour*'s reversal of the award. See *Dépakine: l'indemnisation d'une famille par Sanofi cassée par la justice*, LE MONDE (Nov. 27, 2019), https://www.lemonde.fr/societe/article/2019/11/27/depakine-l-indemnisation-d-une-famille-par-sanofi-cassee-par-la-justice_6020788_3224.html.

addition, France is fertile soil for public interest actions led by associations

- Third, removing the prohibition on the filing of lawyer-led collective actions and the allowance of economic incentive fee arrangements, subject to abuse curbing restrictions.

B. *The Vioxx Scandal*

1. *Merck and Co.—Origins and Culture*

Merck & Co. (“Merck”) has a long and celebrated history, beginning in the German town of Darmstadt in 1688 when Friedrich Jacob Merck purchased a pharmacy. Emmanuel Merck began manufacturing drugs in 1827. The Merck of today traces its root to 1891 when a U.S. office of the original German Merck company was opened. The U.S. entity was nationalized upon the United States’ entry into WWI in 1917. The German and U.S. companies have remained entirely distinct.²²³ Merck is based in New Jersey and is one of the largest pharmaceutical companies in the world with over \$40 billion in sales and employing 69,000 employees worldwide.²²⁴

Until the mid 1990s, Merck had a stellar reputation in the pharmaceutical industry for scientific research, safety, and profitability, selecting its CEO from among its best researchers.²²⁵ In the 1990s it found itself, as other industry leaders had, confronting price pressures from the advent of managed care and generic drug competition. Merck attempted to adapt to these changes by selecting Ray Gilmartin as their new CEO in 1995. Ray Gilmartin was a cost-cutting businessman and engineer who emphasized marketing rather than research.²²⁶ By this time, the priority of

²²³ See FRAN HAWTHORNE, *THE MERCK DRUGGERNAUT: THE INSIDE STORY OF A PHARAMCEUTICAL GIANT* 19–23 (2003).

²²⁴ U.S. SEC. AND EXCH. COMM’N, *MERCK & Co, INC., FORM 10-K (2019)*, available at [https://s21.q4cdn.com/488056881/files/doc_financials/2018/Q4/2018-Form-10-K-\(without-Exhibits\)_FINAL_022719.pdf](https://s21.q4cdn.com/488056881/files/doc_financials/2018/Q4/2018-Form-10-K-(without-Exhibits)_FINAL_022719.pdf).

²²⁵ See PRAKASH, *supra* note 153, at 133; HAWTHORNE, *supra* note 223, at 23–48.

²²⁶ PRAKASH, *supra* note 153, at 134–38; HAWTHORNE, *supra* note 223, at 38. Hawthorne lauds the Merck of old as “the biggest, most successful drug company in the world,” always a “little better than the rest,” and “more scientifically pure” than the others. *Id.* at xii–xiii. Hawthorne believed Merck would retain its “stellar reputation” in spite of growing financial difficulties between 1990 and 2001. *Id.* at xii–xiii. She

U.S. pharmaceutical marketers had become direct marketing of blockbuster drugs by TV advertising.²²⁷ It was within this context, coupled with the increasingly fierce competition from competitors, that Merck launched Vioxx in 1999.²²⁸

2. *Vioxx—Approval Process-Similarities with Mediator, Pharmacological Nature, and Undesirable Side Effects*

Vioxx was approved by the Food and Drug Administration (“FDA”) on May 20, 1999.²²⁹ Similar to Servier’s omissions to the French authorities, Merck failed to disclose to the FDA the very real risk that Vioxx would cause cardiovascular harm.²³⁰ Merck research scientists, aware of this undesirable side effect, took care to set up post approval clinical trials so that cardiovascular incidents would be diminished in the Vioxx group, and the risk of side effects would be placed in the best possible light. Merck marketers persuaded researchers to avoid conducting studies that might harm their marketing efforts. As Servier had done, Merck attempted to influence outside researchers.²³¹

Vioxx is the tradename for Rofecoxib, an anti-inflammatory prescription drug used in the treatment of acute pain, osteo-arthritic and menstrual symptoms, and rheumatism.²³² Vioxx’s main selling point was

would not be alone in her praise of the “old” Merck and disappointment with the new. See Harlan Krumholz, *What Have We Learnt from Vioxx?*, 334 BRIT. MED. J., 120, 122 (2007). This theme of a dichotomy between the old and new Merck (“family-run,” “run by scientists,” versus Ray Gilmartin’s “profit-first,” “business-first” company) was effectively used by the Vioxx plaintiffs’ trial attorney, Mark Lanier, in his opening statement. See discussion *infra* Section III.C.3. See also Michael E. Tigar, *The Vioxx Litigation: Two Case Studies*, TRIAL STORIES 406–07 (Michael E. Tigar & Angela J. Davis eds., Foundation Press 2008).

²²⁷ See Corey Schaecher, “Ask Your Doctor If This Product is Right For You”: *Perez v. Wyeth Laboratories, Inc., Direct-to-Consumer Advertising and the Future of the Learned Intermediary Doctrine in the Face of the Flood of Vioxx Claims*, 26 ST. LOUIS U. PUB. L. REV. 421, 428 (2007)[hereafter Schaecher]. Rogaine, used to treat baldness, was the first drug to be advertised on television following the repeal of prohibition on commercial free speech in the 1980s. There was no such parallel development in France. In 1997, the FDA further relaxed its pharmaceutical advertising rules, setting off an explosion of direct television marketing.

²²⁸ PRAKASH, *supra* note 153, at 138–39.

²²⁹ See W. John Thomas, *The Vioxx Story: Would It Have Ended Differently in the European Union?*, 32 AM. SOC’Y OF L., MED. & ETHICS 365, 365 (2006).

²³⁰ PRAKASH, *supra* note 153, at 70; DOJ *Vioxx Illegal Marketing*, *supra* note 152.

²³¹ See Thomas, *supra* note 229, at 368–70.

²³² Topol, *supra* note 151, at 1707–09.

that, unlike Cox 1 pain inhibiting drugs—which significantly increased the risk of gastro-intestinal ulcers and bleeding—it was a Cox 2 inhibitor, which did not cause this side effect.²³³

However, Merck's post-approval VIGOR study showed a significant increase in the risk of heart attack and stroke from Vioxx use.²³⁴ Merck continued to aggressively market Vioxx, outspending all of its rivals and increasing sales by 360%.²³⁵ In April 2002, the FDA required Merck to include cardiovascular warnings in Vioxx packaging.²³⁶ Vioxx proved to be a massive blockbuster with sales topping \$2.5 billion in 2003 and 105 million prescriptions filled for 20 million patients between May 1999 and September 2004.²³⁷

3. *Vioxx's Withdrawal and Ensuing Litigation*

Merck's second study, APPROVe, was designed to expand the scope of the FDA's marketing authorization to include polyp prevention.²³⁸ It confirmed the VIGOR study's finding of a significant increase in cardiovascular problems.²³⁹ Consequently, Merck voluntarily (as had Servier with Ponderal and Isomeride) withdrew Vioxx from the market on September 30, 2004.²⁴⁰

America's mass tort bar, populated by entrepreneurial lawyers, did not waste time in leading the rush to the courthouse. Hundreds of cases were filed within weeks of the withdrawal. A total of 27,000 claims were filed by the end of 2006, making Vioxx one of the most "popular" mass tort cases in U.S. history.²⁴¹

²³³ PRAKASH, *supra* note 153, at 70.

²³⁴ *Id.* at 79.

²³⁵ Schaecher, *supra* note 227, at 453; *see also* Andrea M. Greene, *Pharmaceutical Manufacturers' Liability for Direct Marketing and Over-Promotion of Prescription Drugs to Product Users*, 26 AM. J. TRIAL ADVOC. 661, 675 (2003) (noting that Vioxx was the most heavily advertised drug during the year 2000 and that Merck provided physicians with an enormous quantity of free samples).

²³⁶ Schaecher, *supra* note 227, at 452.

²³⁷ *See* Schaecher, *supra* note 227, at 453.

²³⁸ PRAKASH, *supra* note 153, at 82.

²³⁹ *Id.* at 82–83.

²⁴⁰ *Id.* at 83; Schaecher, *supra* note 227, at 451–52.

²⁴¹ PRAKASH, *supra* note 153, at 24.

Merck, like Servier, adopted a “fight to the finish” stance, forcefully denying responsibility for Vioxx induced heart attacks and strokes. Merck created a legal fund and reserves to cover its legal defense expenses totaling approximately \$1.5 billion in anticipation of this fight.²⁴² Lawyers quickly took up the challenge to fight and twenty jury trials were held in 2005, 2006, and early 2007. Merck fared well in the majority of the trials: winning ten, losing five, with the rest resulting in hung juries or mistrials.²⁴³

Nevertheless, the losses were felt deeply at Merck headquarters as they foreshadowed an uncontrollable and uncertain future—a deadly mixture for the management of a multinational company that lacked the luxury of ignoring the other challenges inherent in an extremely competitive environment. Several unfavorable large jury awards in 2001 created great concern at Merck. These included a \$51 million judgment in the federal district court in New Orleans, \$13.5 million in a New Jersey state court, and two highly publicized Texas state court verdicts of \$252 million and \$32 million.²⁴⁴

The latter Texas case, *Ernst v. Merck & Co., Inc.*,²⁴⁵ was the first case tried and it set the tone for emotional media coverage of the Vioxx scandal with the plaintiff eliciting much sympathy during an apparently harsh and sarcastic cross-examination. The \$229 million punitive damages award showed that the jury wished to send a message of outrage, as urged by the plaintiff’s lawyer Mark Lanier. Lanier was well steeped in the local tradition of folksy Texas entrepreneurial lawyers who have been the bane of many large corporations.²⁴⁶

²⁴² See *id.* at 24–25.

²⁴³ See Johnson, *supra* note 151, at 1042.

²⁴⁴ *Id.* at 1084. The award for punitive damages out of the total \$252 million greatly exceeded the Texas law cap and was later reduced on appeal. The entire judgment was later vacated by the appellate court.

²⁴⁵ See Tigar, *supra* note 226, at 403–44 (providing a fascinating account of this trial, including excerpts from witness testimony that demonstrate the critical role played by entrepreneurial trial lawyers).

²⁴⁶ *Id.*; see also Alex Berenson, *\$253 Million Awarded as Merck Loses First Vioxx Suit*, N.Y. TIMES (Aug. 2005), <https://www.nytimes.com/2005/08/20/business/worldbusiness/253-million-awarded-as-merck-loses-first-vioxx-suit.html>; Chris Bowe, *Merck Prepares for Long Fight Over Vioxx*, FIN. TIMES (Aug. 23, 2005), <https://www.ft.com/content/784725b2-1400-11da-af53-00000e2511c8>; Alex Berenson, *Testimony at Vioxx Trial Turns Emotional*, N.Y. TIMES (Aug. 3, 2005), <https://www.nytimes.com/2005/08/04/business/testimony-at-vioxx-trial-turns-emotional.html>; Alex Berenson, *Widow of Vioxx Patient is Pressed by Merck*

The enormous number of Vioxx cases dictated that most would be aggregated. Consolidation into a single MDL in federal court was not possible. The majority of cases had been filed in Merck's home state of New Jersey, consequently eliminating the possibility of removal to a federal court under diversity of citizenship rules.²⁴⁷ Rule 23 class action certification was also denied in the Vioxx cases, illustrating the narrowing and effective elimination of mass tort class actions since *Amchen*.²⁴⁸

The New Jersey cases were aggregated before Superior Court Judge Carol E. Higbee.²⁴⁹ The second largest number of cases were consolidated in a federal MDL in New Orleans before Judge Eldon E. Fallon.²⁵⁰ The two judges cooperated in an informal manner and exchanged views on how best to handle trials on their dockets.²⁵¹ To facilitate settlement, the two judges proposed trying a small number of representative or "bellwether" trials, which the parties accepted after much strategic reflection.²⁵² This bellwether

Lawyer, N.Y. TIMES (Aug. 4, 2005), <https://www.nytimes.com/2005/08/05/business/widow-of-vioxx-patient-is-pressed-by-merck-lawyers.html>. The influence trial lawyers have on the outcome of jury verdicts cannot be overstated. Merck's lawyers in *Ernst v. Merck* were experienced, competent litigators from a large, Texas-based firm with an excellent reputation and enormous resources at their disposal. However, they proved to be no match for Mark Lanier, a charismatic Houston trial lawyer and part-time preacher who was able to frame the trial narrative from the outset and persuade the jury that the "new" Merck was an irresponsible corporate behemoth that had lost its moral compass and turned "into an ATM machine." Lanier, notably for this Article, artfully appealed to the jurors' sense of duty, using his preacher background to weave together their patriotic and religious "calling." Only the jury, the last hope for American democracy, can deliver compensatory and social justice. "Nobody has this power. A judge can't do it. Politicians can't do it. Nobody else can do it." *Vioxx Litigation*, *supra* note 198, at 404–07. By comparison, in France, which has many eloquent but few "folksy" trial lawyers, no such appeals would be made, as cases (including the ongoing massive Mediator case) are tried before judges and politicians are expected to lead the battle for satisfactory compensation of mass tort victims. Lanier is broadly representative of the American entrepreneurial lawyers discussed above and particularly of the small group of highly successful mass-tort, Texas-based plaintiff lawyers, including the even more "folksy" Joe Jamail, who is best known for his incredible success persuading a Texas jury to award over \$10.5 billion in the Pennzoil contract interference case. *See generally* Robert Lloyd, *Pennzoil v. Texas*, in TRIAL STORIES 204–82 (Michael E. Tigar & Angela J. Davis eds., Foundation Press 2008).

²⁴⁷ PRAKASH, *supra* note 153, at 28–29. The inability to consolidate all cases in a federal MDL highlights the continued potency of American federalism. *See also* Johnson, *supra* note 151, at 1069–78 (provides a summary and critical analysis of the "federalism dilemma" in mass tort litigation).

²⁴⁸ *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006) (denying certification).

²⁴⁹ PRAKASH, *supra* note 153, at 28–29.

²⁵⁰ *Id.* at 29.

²⁵¹ *Id.* at 29, 280.

²⁵² *Id.* at 30–31.

trial process, by providing information to the lawyers on the likely outcomes of future cases, had considerable influence in driving the parties to settle.²⁵³

Judges Higbee and Fallon, joined by Judge Victoria Chaney (California) and Judge Randy Wilson (Texas) had jurisdiction over 95% of the Vioxx cases, and they cooperated to push the parties to settle.²⁵⁴ After eleven months of negotiations, the parties agreed to settle for \$4.85 billion, which was publicly announced on November 9, 2007.²⁵⁵ The agreement was subject to several innovative and controversial requirements imposed by Merck. Plaintiff lawyers had to obtain the consent of eighty-five percent of their clients to opt-in to the claim's procedure.²⁵⁶ Lawyers enrolling any of their clients in the settlement had to recommend settlement to all of their clients or withdraw their legal representation. This "all or nothing" requirement raised serious ethical issues and censure from at least one state bar.²⁵⁷ Plaintiff lawyers easily succeeded in meeting Merck's threshold, enlisting ninety-four percent of the eligible claimants in the program.²⁵⁸ Over \$4.35 billion was distributed to 32,886 claimants.²⁵⁹ Average payments appear to have ranged between \$100,000 and \$200,000, less attorneys' fees ranging from thirty-three to forty percent.²⁶⁰

4. *The Dominant Role of Entrepreneurial Lawyers*

The search for individual compensatory and social justice in Vioxx took place exclusively within the confines of the U.S. legal system and was dominated by the actions of entrepreneurial lawyers. The literature on Vioxx

²⁵³ *Id.* at 28–31, 280. For a critical analysis of the value of bellwether trials in inducing settlement using Vioxx as a case study, see Sekula, *supra* note 135. The information gleaned from the bellwether trials enabled Merck to negotiate detailed compensation grids useful in determining individual settlements. See Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 143 (2012).

²⁵⁴ PRAKASH, *supra* note 153, at 28–31, 280.

²⁵⁵ *Id.* at 279–80.

²⁵⁶ Grabill, *supra* note 253, at 143.

²⁵⁷ *Id.* at 143–44; see also Smith-Drelich, *supra* note 1, at 46–54 (recommending solutions to ethical issues raised by the Vioxx settlement).

²⁵⁸ Fred Charatan, *94% of Patients Suing Merck Over Rofecoxib Agree to Company's Offer*, 336 BRIT. MED. J. 575, 580–81 (2008).

²⁵⁹ See Becker et al., *How Not to Manage a Common Benefit Fund: Allocating Attorneys' Fees in Vioxx Litigation*, 9 DREXEL L. REV. 1, 7 (2016).

²⁶⁰ See McClellan, *supra* note 248, at 509.

tends to focus on questions of case aggregation methods, trial strategy, lawyer ethics, and the proper role judges should play in settlement issues.²⁶¹

Little, if any, effort was expended by victims, associations, “civil society,” or legal professionals to pressure politicians, regulatory agencies, or social insurance funds to assist in the resolution of disputes, the funding of compensation, or the taking of corrective measures to prevent future scandals.²⁶²

The Vioxx case demonstrates that the preeminent role assigned to private actors within the U.S. legal system to resolve mass tort issues is a distinctive and increasingly entrenched feature of American political and legal culture. The reliance on courts, and in particular the jury, to solve matters of importance to society that are generally treated by other institutions in countries, such as France, is not a new development in American history. However, the rise and dominance of entrepreneurial lawyering in mass torts has considerably accentuated the tendency to use private legal arrangements, to the exclusion of all other means, in the search for justice.

The differences between French mass tort cases and Vioxx is striking. First, the Vioxx victims were effectively “voiceless”²⁶³ and, except as a prop

²⁶¹ See, e.g., Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 *FORDHAM L. REV.* 1943 (2017); D. Theodore Rave, *Closure Procedure in a MDL Settlement*, 85 *FORDHAM L. REV.* 2175 (2017); Sekula, *supra* note 135; Grabill, *supra* note 253; Smith-Drelich, *supra* note 1, at 32–50; McCellan, *supra* note 248, at 525–37.

²⁶² The reliance on lawyers and litigation mechanisms to fashion U.S. mass tort dispute resolution leaves little room for proposals outside of this framework. U.S. practitioners and academics broadly fall into two categories: private market litigation- and public interest-oriented. See Schuck, *supra* note 66, at 941–88. Proponents of both, however, share a focus on the role of lawyers, whether entrepreneurial or public interest and legal process to the exclusion of other possibilities. For example, market: John C. Coffee, Jr., *Class Action, Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 *COLUM. L. REV.* 370, 371, 422–28 (2000); and public interest: Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 *BOS. U. L. REV.* 87, 146 (2011) (preferring private attorneys’ general to agency action).

²⁶³ French journalistic and legal critical commentary on the Mediator saga, as previously in the contaminated blood saga, see Feldman *supra* note 42, at 690–99, focused broadly on the failures of health authorities to protect the victims and the inadequacies of French legal procedures which delayed their obtaining compensatory, corrective and social justice. The “voice” of the whistleblower, Irene Franchon may have been needed to uncover the scandal in the face of dissimulation, secrecy, and conflicts of interests. However, once public opinion was mobilized, victims, while disheartened at times, were not viewed to be “voiceless” in the American sense of the term. Victims had recourse to compensation funds and civil, administrative, and criminal courts as individuals or by joining suits brought by non-lawyer led

in a few bellwether jury trials, did not play a direct role in settlement negotiations or at trial. Second, unlike the mining community victims held together by Gerard Stern in the Buffalo Creek disaster or by the Mont Blanc Tunnel Victim association in that case, no sense of family solidarity is apparent. Third, the determination of the level of legal fees and their allotment among law firms was a central focus of the case.²⁶⁴

In contrast, a sense of internal solidarity and a real effort by associations to provide victims with a voice in the proceedings appears to exist in Mediator. The acceptance of the “all or nothing” condition used by the Vioxx’s plaintiff lawyers epitomizes the replacement of the principal attorney-client relationship by an entrepreneur/consumer model.²⁶⁵

The fees earned by plaintiffs in Vioxx have been estimated to total almost \$2 billion and included a common benefit fee of over \$315 million, the allocation of which was a subject of intense dispute and protracted litigation between the participating law firms.²⁶⁶ Despite the high level of fees (or perhaps due to them), most commentators, including economists, contend that the settlement was favorable to Merck and shortchanged Vioxx victims.²⁶⁷ The centrality of entrepreneurial lawyers in structuring U.S. mass

associations. French law under the “*nul ne plaide par procureur*” principle (see Magnier, *supra* note 18) at 119–20 guaranteed their individual voice. On the contrary, the issue of client “voice” has generated considerable scholarly attention since the “all or nothing” Vioxx settlement procedure, which suggests a real malaise with this issue. See Smith-Drelich, *supra* note 1 at 39–42; Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 283, 294, 301–03, 312–18 (2011) (“‘Settle or you’re fired!’ is hardly abiding by the client’s decision”); Burch, *Litigating Together*, *supra* note 262, at 88–89, 97–99; see also, Coffee, *supra* note 262, at 376, 406–11 (for a pre-Vioxx perspective on the client “voice” issue, suggesting that permitting late “exits” from the class would offer the best “voice” for plaintiffs).

²⁶⁴ See Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. OF LEGAL ETHICS 68 (2013); see also Becker et al., *Attorneys’ Fees in Vioxx*, *supra* note 259, at 25–41.

²⁶⁵ See McClellan, *supra* note 248, at 511 (“from zealous advocates to pragmatic entrepreneurs”). This paradigm change has created ethical conflict of interest issues. See PRAKASH, *supra* note 153, at 281–82.

²⁶⁶ See Becker et al., *Attorneys’ Fees in Vioxx*, *supra* note 259, at 7.

²⁶⁷ STEVEN GARBER, *ECONOMIC EFFECTS OF PRODUCT LIABILITY AND OTHER LITIGATION INVOLVING THE SAFETY AND EFFECTIVENESS OF PHARMACEUTICALS*, 32–35, 42–45 (2013) (ebook); Kurt W. Rothhoff, *Product Liability Litigation: An Issue of Merck and Lawsuits Over Vioxx*, 20 APPLIED FIN. ECON. 18, 19–20 (2010) (concluding that the settlement by Merck of its Vioxx lawsuits for \$4.85 billion validates Merck’s decision, in purely financial terms, to wait until 2004, instead of withdrawing Vioxx in 2000); see McClellan, *supra* note 145, at 510–11 (McClellan notes that Merck’s “try every case” strategy was successful in securing a tremendous victory for Merck. He contends that the Vioxx settlement is therefore

tort dispute resolution is exemplified by leading commentators' attention to the role of lawyers and their fee arrangements in proposals for reform. For example, Richard Nagareda, in addressing the problem of "temporal dispersal"²⁶⁸ or how to compensate existing claimants, bind prospective ones, and extinguish defendants' tort liability,²⁶⁹ focused on developing new contingency fee arrangements (leveraged proposals)²⁷⁰ suited for this purpose. Nagareda's analytical framework recognizes the crucial role played by entrepreneurial peacemaking lawyers in changing the paradigm for mass tort dispute resolution from a litigation to an administrative model.²⁷¹ For example, in settlement agreements, U.S. lawyers create compensation grids, similar to government administered programs, in what is essentially private law reform.²⁷² This process raises fundamental governance and ethical issues, which Nagareda,²⁷³ Erichson/Zipursky,²⁷⁴ Burch,²⁷⁵ Issacharoff,²⁷⁶ and other scholars²⁷⁷ have addressed.

inconsistent with the goals of corrective and social justice and sends the message that plaintiffs' lawyers cannot produce just compensation in cases where a large number of persons are harmed by a drug). See also PRAKASH, *supra* note 153, at 282, 286 (citing victim plaintiffs expressing bitterness at outcome); Johnson, *supra* note 151, at 1089.

²⁶⁸ Victim injuries in most mass torts do not occur or are not discovered at the same time. Information on the harmful secondary effects of drugs, for example, is obtained over time. Early discovered victims initiate lawsuits which alert others who may have also suffered and then seek redress. Plaintiffs' and defendants' lawyers will at some point seek settlement to compensate present and future claimants whose injuries may not have yet manifested themselves. This time lag, or "temporary dispersal" is the source of much uncertainty and conflict of interests among plaintiffs' lawyers. See NAGAREDA, *supra* note 74, at xv, 24 (temporary dispersal requires considerable trade-offs between present and future claimants); Anthony J. Sebok, *What do we talk about when we talk about Mass Torts?*, 106 MICH. L. REV. 1213, 1216–19 (2008).

²⁶⁹ See David Marcus, *Some Realism about Mass Torts*, 75 U. CHI. L. REV. 1949, 1950 (2008) [hereinafter Marcus, *Some Realism*].

²⁷⁰ Under Nagareda's "leveraging proposal," the contingency fees received by plaintiffs' lawyers under early claimant settlements would be placed in escrow to ensure that later, similarly situated claimants would receive no less favorable settlements. See NAGAREDA, *supra* note 74, at 219–68; Marcus, *Some Realism*, *supra* note 269, at 1951, 1967–73; Sebok, *supra* note 268, at 1213, 1220–25.

²⁷¹ NAGAREDA, *supra* note 74, at viii, 101, 220–35. In likening settlement practice in mass tort litigation to administration, Nagareda warns against the tendency to separate law reform through public institutions and by private settlement in litigation. He urges a reconciliation of their methods and views the involvement of public institutions in private mass tort settlements as perfuming the positive function of both empowering and disciplining creative peacemaking lawyers. See Marcus, *Some Realism*, *supra* note 269, at 1968–73.

²⁷² See NAGAREDA, *supra* note 74, at 57–70; Marcus, *Some Realism*, *supra* note 269, at 1951, 1957.

²⁷³ On governance issues, see generally RICHARD NAGAREDA, *supra* note 74.

²⁷⁴ On ethical issues, see Erichson & Zipursky, *supra* note 263, at 279–92, 316–18; see also Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 1025 (2010).

²⁷⁵ On governance and ethical issues, see Burch, *Litigating Together*, *supra* note 262, at 97–99, 125–27; *Lawyers Not Plaintiffs*, *supra* note 132.

Lawyers in the Vioxx cases (both plaintiffs' and defendants') were innovative in their successful use of bellwether trials²⁷⁸ and the creation of an opt-in model²⁷⁹ for settlement. In doing so, the Vioxx cases, consistent with American legal culture and the role of enterprising lawyers,²⁸⁰ introduced mechanisms such as compensation grids and judicial supervision of settlement fund distribution and lawyer fee allocation.²⁸¹ These mechanisms justify Vioxx's status as a milestone in the structuring of mass tort disputes. The development of these mechanisms in the private contractual setting in Vioxx stands in stark contrast to French practice, which primary relies on public social insurance to compensate victims and a very modest role for lawyers.

5. *Criminal Proceedings, Public Civil Recoveries, and Shareholder Suits*

On April 19, 2012, U.S. District Court Judge Patti Saris in Boston sentenced Merck, pursuant to a criminal plea agreement with the Department of Justice ("DOJ"), to pay almost \$322 million in criminal fines.²⁸² Merck had earlier agreed to plead to a civil penalty of over \$628 million to be distributed to the federal government and participating states to indemnify Medicaid for increased costs caused by Merck's illegal promotion of Vioxx.²⁸³ Merck pled guilty to allegations that it had made misstatements concerning Vioxx's safety and misbranding of off-label use in the treatment of rheumatoid arthritis prior to FDA approval.²⁸⁴ The payment of almost a billion dollars in fines in this joint federal–state action is representative of a growing trend, first seen in the tobacco industry cases.²⁸⁵ which is consistent

²⁷⁶ On governance issues, see Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 859–60, 864–74 (2017); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3165–68, 3181–91 (2013).

²⁷⁷ On Governance and Ethical issues, see Smith-Drelich, *supra* note 1, at 32–55; Ratner, *supra* note 264, at 59, 73–86. See generally McClellan *supra* note 156, at 530–34.

²⁷⁸ See Rheingold, *supra* note 7 at 629–32.

²⁷⁹ See Grabill, *supra* note 253, at 153–59.

²⁸⁰ *Id.* at 146 (noting that the Vioxx agreement's judicial oversight provision was "crafted cooperatively by counsel" and not by the supervising judges). The constructive role played by Vioxx judges in facilitation of the settlement and its oversight derives, in contrast to civil law practice, from their previous experience as lawyers.

²⁸¹ *Id.* at 161–82.

²⁸² DOJ Merck Illegal Marketing, *supra* note 151.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ See NAGAREDA, *supra* note 74, at 188–90, 197–99.

with the American tradition of public pursuit of corrective and social justice through mass tort litigation.

In 2016, Merck also concluded a court approved class action settlement of securities fraud claims arising out of the Vioxx case in which it agreed to pay over \$1 billion (\$830 million to the claimants and \$232 million in attorneys' fees and expenses), illustrating the continued vitality in the United States of private litigation mechanisms designed to rectify market distortions.²⁸⁶

6. *Vioxx Claims in France*

In 2000, Merck was authorized by French regulatory authorities to market Vioxx in France.²⁸⁷ A look at the fate suffered by French Vioxx claimants is therefore useful in comparing the relative effectiveness of French and U.S. pharmaceutical mass tort dispute resolution.

Vioxx was marketed in France for over four years, from April 2000 until the end of September 2004.²⁸⁸ A group of several thousand French Vioxx victims attempted to join the federal MDL handled by Judge Fallon in New Orleans, with the help of The Association for the Assistance of Victims of Medical Accidents (*l'Association d'aide aux victimes des accidents des médicaments*) ("Aaavam").²⁸⁹ To the joy of Merck's attorneys, however, the action was dismissed in 2006 when the judge agreed that France was the proper venue for the those actions.²⁹⁰

Four years later, in 2010, twenty-nine French Vioxx claimants filed a civil action in the Paris TGI against Merck.²⁹¹ The court immediately appointed two neutral experts to render an *expertise*.²⁹² The experts concluded that neither Merck nor French regulatory authorities were liable because no proof existed that Merck had falsified or withheld information in

²⁸⁶ See *In re Merck & Co.*, MDL No. 1658 (SRC), 2016 WL 11575090, at *6 (D. N.J. June 28, 2016).

²⁸⁷ EFFETS SECONDAIRES, *supra* note 2, at 42.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 42–43.

²⁹⁰ *Id.* at 42.

²⁹¹ *Id.* at 43.

²⁹² *Id.*

its request for authorization.²⁹³ Based on this finding, these cases were also dismissed.²⁹⁴

This dismissal, however, raised questions about the impartiality of one of the experts, Professor Bernard Rouveix, due to his close links to (and well compensated consultant work for) pharmaceutical companies, notably Servier.²⁹⁵ Consequently, the Paris prosecutorial office filed a request to delist the professor as a court approved neutral expert.²⁹⁶ While this request in the Vioxx case was rejected by the Paris court of Appeals in 2013,²⁹⁷ Professor Rouveix was indicted for corruption in the Mediator criminal proceeding.²⁹⁸

The French Vioxx experience raises serious doubts about the effectiveness of existing French dispute resolution mechanisms in securing compensatory and social justice in the pharmaceutical mass tort area. Consequently, the outcome of the ongoing Mediator criminal trial will be crucial in evaluating whether the present system is capable of performing this role.

7. *Lessons Learned from Vioxx and Suggestions for Further Reflection and Comparative Law Study*

a. *Vioxx Confirms the Distinctive Feature of U.S. Mass Tort Dispute Resolution*

Vioxx demonstrates the following distinctive features of mass tort dispute resolution in the United States:

- First, Americans do not instinctively look to the State for relief in mass tort cases. Rather, the rejection of the usefulness of regulatory and social insurance responses to the issues of compensatory,

²⁹³ *Id.* at 44.

²⁹⁴ *Id.* at 43.

²⁹⁵ *Id.* at 44–51.

²⁹⁶ *Id.* at 46.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 48–52; see also Chloé Hecketsweiler, *Les pratiques du laboratoire pharmaceutique Merck en accusation*, LE MONDE (Feb. 4, 2014), https://www.lemonde.fr/economie/article/2014/02/04/un-ancien-de-merck-denonce-les-pratiques-du-laboratoire_4359560_3234.html.

corrective, and social justice has become more pronounced. The promotion of private, market-driven solutions based on ideology and economic theory has increased since the effective abandonment of class actions in mass torts since the mid 1990s.

- Second, entrepreneurial lawyers dominate the mass tort dispute resolution process. The trend towards an almost exclusive private, contractually based approach to mass tort dispute resolution has been largely driven by the mass tort bar (in cooperation with defense counsel and judges), and any attempt to reform the system to implement public objectives will require the bar's assent.²⁹⁹
- Third, claim resolution by litigation, while subject to criticism over the fairness of the amounts received, was more efficient than it was in the Mediator case. However, the weaknesses of the French litigation system were mitigated by victims' easy access to a special compensation fund and comprehensive universal healthcare.
- Fourth, federalism remains a potent force in the U.S. legal system. It both constrains the efficient aggregation of mass torts and creates opportunities for realizing societal justice through the joinder of states in mass tort settlements and the initiation of cases by state attorney generals,³⁰⁰ which may be analogized to aspects of civil party joinder and initiation opportunities in France.

²⁹⁹ See Alexandra D. Lahav, *Mass Tort Class Actions-Past, Present, and Future*, 92 N.Y.U. L. REV. 998, 1015–16 (2017) (asserting that aggregate mass tort settlements developed by entrepreneurial lawyers and inventive judges can no longer be considered as being “in the shadow of the law” but the law itself). The concept of risk and statistical proof derived from the science of epidemiology needs to be integrated into tort doctrine through interaction with the bar if overdue tort reform in the mass tort field is to be achieved.

³⁰⁰ See Johnson, *supra* note 151, at 1059–63, 1094 (discussing Federalism tensions and raising the risk of independent state attorney general's actions creating federalism tensions).

- Fifth, the Vioxx and Mediator case studies demonstrate the dissimilarity of U.S. and French mass dispute resolution mechanisms in the relative importance given to civil and criminal proceedings³⁰¹ in the two countries.

Suggested reforms and issues for further reflection and comparative law study include:

- First, how to control lawyers and reduce the high legal costs inherent in U.S. mass tort dispute resolution? Lawyers play the leading role in structuring the now dominant Vioxx-type, opt-in settlement mechanism and their interests do not necessarily align with those of their clients or the objectives of corrective and social justice. Better client alignment and societal justice promotion will require both the enforcement of stricter professional ethical standards by state bars,³⁰² and greater judicial supervision.³⁰³ The extremely high cost of mass tort litigation caused by U.S. style discovery may be reduced by reinforcing the use of masters and introducing the less expensive French style evidentiary gathering mechanisms, such as *huissier constats* modified to fit American legal culture.³⁰⁴

³⁰¹ Tort and criminal law are far more strongly linked in France than in the United States. The boundary between the two is fluid. For example, a victim of a crime may seek compensation in either a civil court or as a *partie civile* in a criminal proceeding. See Parker, *supra* note 13, at 415–17. The greater emphasis placed on “cathartic,” social, and corrective justice of French criminal proceedings are aptly demonstrated in the enormous attention devoted to the ongoing Mediator criminal trial. Interestingly from a comparative law perspective, Nagareda strongly argued for using the criminal law to integrate moral and social justice considerations into mass tort resolution. He favored a greater convergence of tort and criminal law in cases of outrageous corporate conduct such as the tobacco industry in cigarette litigation, or one would imagine, the Mediator case. See, Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1123–27, 1175–83, 1192–97 (1998).

³⁰² See Smith-Drelich, *supra* note 1, at 46–56 (urging greater ethical supervision by state bars).

³⁰³ See Becker et. al., *supra* note 259, at 40-41; Sekula, *supra* note 135, at 890–94; Feinberg, *supra* note 70, at 2180.

³⁰⁴ See also Kessler, *supra* note 78, at 1265–72.

- Second, how might changes in the ways individuals are organized and represented in mass tort dispute resolution better attain corrective and social justice in the U.S. system? Present U.S. mass tort dispute resolution does not adequately respond to the need for individuals to feel that they have had their “day in court,” and for society to see that justice was served, guilty individuals and corporations were punished, and deterrence was promoted. The promotion of greater plaintiff cooperation through plaintiffs litigating together,³⁰⁵ may be a useful avenue by which to realize these goals.

These goals may be implemented by inspiring lawyers to organize mass tort victims into closely knit communities as accomplished by Gerard Stern in the Buffalo Creek disaster and Robert Bilott in the Dupont Teflon toxic chemical cases.³⁰⁶ In instances of outrageous corporate or individual conduct, criminal prosecution ought to be considered and the French civil party procedure³⁰⁷ adapted to provide a seat at the table for victims.

- Third, the use of alternatives to litigation, such as mediation and special compensation funds,³⁰⁸ should be increased and healthcare and social insurance schemes improved to reduce costs.³⁰⁹
- Last, the deeply ingrained historical and ideological opposition to regulatory action needs to be seriously questioned to facilitate prevention

³⁰⁵ See Burch, *supra* note 262, at 145–55 (urging the adoption of a new model of co-operation among mass tort sub-groups that integrates altruistic and community values by applying it to the Vioxx litigation).

³⁰⁶ See *supra* note 110 and accompanying text for Buffalo Creek and note 42 and accompanying text for Dupont Teflon toxic tort.

³⁰⁷ See Nagareda, *supra* note 301 and accompanying text.

³⁰⁸ See Abraham, *supra* note 109, at 885–89 (balancing strengths and weaknesses of compensation funds); Hensler & Peterson, *supra* note 73, at 1058 (questioning viability for lack of political feasibility and probable opposition from lawyers).

³⁰⁹ See Abraham, *supra* 109, at 898–900.

efforts, particularly in the marketing of pharmaceuticals.³¹⁰

IV. CONCLUSION

French and U.S. mass tort dispute resolution systems are products of the distinctive features of each country's political, social, and legal cultures. French citizens instinctively look to the state for compensatory, corrective, and social justice. To obtain justice, they first organize into associations to exert political pressure on governments and turn to the legal process as a last resort. Americans, on the other hand, are wary of perceived bureaucratic inefficiencies and the delay and corruptness of the political process,³¹¹ so they first look to the litigation process to obtain redress.

Entrepreneurial lawyers play the pre-eminent role in mass tort dispute resolution procedures in the United States. Any modification of the current privately arranged, Vioxx-inspired opt-in model will require the express or tacit consent of the specialized mass tort bar. In contrast, French mass tort dispute resolution mechanisms reflect widespread cultural hostility, including among the general legal profession, to the adoption of American-style entrepreneurial litigation.

Both U.S. federalism and France's parallel specialized court systems pose challenges to the efficiency of mass tort litigation in both systems. Both systems experience overload and unacceptable delay, which leads to the loss of credibility—as demonstrated by failures in both systems to deal with the asbestos crisis.

The Mediator and Vioxx cases confirm that the distinctive features of each system persist and that convergence in the mass tort dispute area has been limited. Opportunities to improve both systems through comparative study of law and practice do, however, exist.³¹²

³¹⁰ See Johnson, *supra* note 151, at 1040–41, 1095.

³¹¹ Schuck, *supra* note 66, at 978–79; see, e.g., Epstein, *supra* note 131.

³¹² See Kessler, *supra* note 78, at 1274 (urging that French and American mass tort dispute resolution could benefit from reciprocal mutual correction whereby each system seeks solutions to its own excesses through solutions found in the other system).

For example, the extremely long delay in setting up the ongoing Mediator criminal trial is not a fatality inherent in French legal procedure. The establishment of a forum tasked with channeling cases filed in different specialized courts inspired by the success of MDL in the United States ought to be examined to remedy this deficiency. Likewise, a comparison of the relative strengths and weaknesses of the French court-appointed *expertise* and U.S. expert witnesses would be useful in improving a critical element of pharmaceutical mass tort disputes.³¹³

The United States' complicated allocation of attorneys' fees is not an inalterable essential tenet of its legal system any more than the French's refusal to permit lawyers to adopt fee arrangements that would incentivize their greater participation in mass tort litigation.

Most importantly, and often lost in debates that center on litigation, is the fundamental issue of why neither system was able to prevent the mis-marketing of dangerous drugs in the first place. Comparative study may provide guidance on a way to reform these regulatory failures.

Comparative analysis must closely consider actual practice in the shadow of the law, as well as the cultural values underlying each country's system.³¹⁴ When these are taken into account comparative study can play an important role in law reform designed to obtain justice in mass tort dispute resolution.

³¹³ See Mullenix, *supra* note 70, at 31 (urging American legal professionals to study civil procedural mechanisms used in complex litigation in civil law countries, such as France).

³¹⁴ See Mauro Bussani & Marta Infantino, *Tort Law and Legal Cultures*, 63 AM. J. COMP. L. 77, 77–80 (2015); Gilles Cuniberti, *Enhancing Judicial Reputation Through Legal Transplants – Estoppel Travels to France*, 60 AM. J. COMP. L. 383, 384, (2012); Silvia Ferreri & Larry A. DiMatteo, *Terminology Matters: Dangers of Superficial Transplantation*, 37 B.U. INT'L L.J. 35, 36–37, 41–46, 49–57, 85–87 (2019); see also Deborah R. Hensler, *Introduction: The Global Landscape of Collective Litigation*, in CLASS ACTIONS IN CONTEXT 3–18, 387–409 (Deborah R. Hensler, Christopher Hodges, & Ianika Tzankova eds., 2016).

