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A LEGEND IN HIS OWN TIME, AND A FIXER FOR MASS TORT LITIGATION

RICHARD MARCUS*

I

INTRODUCTION

Francis McGovern was teaching at Hastings when he died. When I learned the shocking news of his death, I immediately wrote to our Chancellor about him:

Francis McGovern was a legend. He deserved to be. He was a legend with judges. He was a legend with lawyers. He was even a legend with law professors.

As one who has been deeply involved in American complex litigation for nearly 40 years, I can say that Francis got there first and made more of a difference than anyone else in the American legal academy.

Francis could take an academic perspective. He was, for example, the person who invented the idea of “mature mass tort litigation” that has become so central to so much of the contemporary American legal scene.¹

But far beyond that, he could dig in, get his hands dirty, and make a positive contribution to resolving these impossible-to-resolve cases. That’s certainly why judges will mourn his passing, for he could work magic to untangle the gordian knots they encountered too often.

But lawyers will probably miss him even more, since they were the ones entangled even more than the judges in the gordian knots Francis could unravel.

For the folks (like me) on the sidelines in academia, the loss is of a different sort, but a similar dimension. Francis was one (perhaps the only one) academic who could actually play a productive role with the judges and the lawyers, but who also spoke our language and knew about the scholarly things we hold dear.

He will be missed.²

This immediate reaction may strike some as over the top, but I hope this Article can justify it. Some may think Ken Feinberg could claim primacy as a mass tort resolution master,³ and surely Feinberg has earned his eminence. And he is hardly alone. Over recent decades, a highly talented group of at least several

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1. See Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 949 (1995) (“Francis McGovern introduced the ‘maturity’ concept into the mass tort lexicon in the late 1980s.”).

2. E-mail from author to David Faigman, John F. Digardi Distinguished Professor of L., U.C. Hastings Coll. of the L. (Feb. 15, 2020) (on file with author).

3. See, e.g., Elizabeth Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 862 n.70 (2017) (referring to the “‘Ken Feinberg-ization’ of class action practice [that] has become routine”); Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165, 1176 n.37 (2020) (“Ken Feinberg may have had special iconic status as a ‘super neutral’ of sorts”).

dozen neutrals has come to prominence due to their critical role in resolution of class-action and multidistrict (MDL) litigation.⁴ Like Feinberg, almost all of the others came to eminence from the practice world. Indeed, there reportedly exists a “vast settlement support network”⁵ that has facilitated the resolution of most (if not all) of the most prominent mass tort cases. So Francis might be considered one among many, though perhaps a preeminent one. Speaking from an academic perch, I find it astonishing that he achieved this eminence despite coming out of the academy. Even more astonishing is the fact that, while shouldering the huge demands of his role as a facilitator in mass tort cases, he remained one of the most prominent and internationally respected scholars in the field. *That* is why Francis stands out even from these talented others.⁶

To my mind, what both Francis McGovern and Ken Feinberg (and the dozens of others who have gained prominence in this field) brought to the solution of mass tort litigation might be likened to the title character in Bernard Malamud’s 1966 book *The Fixer*.⁷ For some that may have unsavory overtones (The fix is in), but for me it serves a hugely important role in this context (We urgently need somebody to fix this problem). Without people able to confect the fixes on which it depends, mass tort litigation might simply be impossible, or at least it would be much less effective and a lot more difficult.

In a sense, then, the question I seek to present is whether to desire or deplore fixers on the mass tort scene. For some in the academy, the fixers in mass tort litigation are almost anathema, the latest baggage of managerial judging, which began to emerge nearly a half century ago, and the Alternative Dispute Resolution (ADR) movement, which emerged in the 1980s. There are many forceful reasons to take this position. Indeed, some who have objected to judicial procedures to deal with mass torts have gone so far as to invoke Aristotle.⁸

Applauding the fixers involves throwing in one’s lot with the pragmatists rather than the idealists in connection with mass tort litigation in particular and

4. The recent article by Professor Burch identifies some three dozen of the most significant “judicial adjuncts” in MDL litigation. See Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129 (2021).

5. See *id.* at 2135.

6. For a similar recognition of Francis’s eminence as a scholar as well as a facilitator (and his exceptional personal ethos), see Elizabeth Cabraser & Robert Klonoff, *Francis McGovern: The Consummate Facilitator, Teacher, and Scholar*, 84 LAW & CONTEMP. PROBS., no. 2, 2021, at 1. I also note that I had the privilege (though I did not know it then) to be in the audience when Francis made his last academic presentation—at an important conference on tort law at Southwestern Law School in Los Angeles on February 7, 2020. Then, as in dozens of other presentations I have seen him give, he was polished, persuasive, and responsive.

7. See BERNARD MALAMUD, *THE FIXER* (1966). The fixer in the book is a Jew in eastern Europe who is so talented as a fixer that his employer (not knowing he is a Jew) insists that he reside at his place of work to oversee things there. Because Jews were forbidden to live in this part of town, the fixer is picked up, and he is then accused of the sort of crime involving Christian children alleged in the *Protocols of the Elders of Zion* to have been committed by Jews.

8. See Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 71 n.36 (invoking Aristotle’s *Nichomachean Ethics* in support of opposition to consolidated trials in mass tort cases to determine issues of general causation).

complex litigation more generally. So, I think that it's worthwhile to use this opportunity to sketch the developments that contributed to the unique role Francis played. His remarkable talents were a central reason for his success, but various forces created the conditions that called forth his talents. The following will be impressionistic, because it canvasses events that have by now produced an immense volume of scholarship, but it seems to me to explain why fixers have become so essential to mass tort litigation.

II

HOW THINGS WERE

Inevitably, people are tempted to think of the past as a simpler, perhaps halcyon, time in contrast to the frenzied complex present. So it is with tort litigation.

The image is of a time when lawsuits were routinely one-on-one contests litigated through jury trial in local communities. Professor Chayes summoned up this image in his seminal 1976 article introducing the notion of public law litigation, typified by the school desegregation and prison conditions litigation of the 1970s, which was qualitatively different from what went before:

(1) The lawsuit is *bipolar*. Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.

(2) Litigation is *retrospective*. The controversy is about an identified set of completed events; whether they occurred, and if so, with what consequences for the legal relations of the parties.

(3) *Right and remedy are interdependent*. The scope of relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty — in contract by giving plaintiff the money he would have had absent the breach; in tort by paying the value of the damage caused.

(4) The lawsuit is a *self-contained* episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionally the return of at think or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court's involvement.

(5) The process is *party-initiated* and *party-controlled*. The case is organized and the issues defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party.⁹

According to Chayes, that shift meant that the judge became the central actor in litigation. Whether things were usually as simple in the halcyon past conjured up by Chayes is debatable. A few years later, Professors Eisenberg and Yeazell challenged Chayes' version of the litigation scene that existed before World War

9. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–83 (1976).

II.¹⁰ But Chayes' descriptive account captured many of the stresses about institutional reform litigation that captured the imagination of a generation of procedure scholars.¹¹

There is little doubt that, at least into the first half of the 20th century, much litigation did look like what Chayes described. Consider, for example, Prof. Feldman's description of trials handled by future Supreme Court Justice Robert Jackson before he entered the Roosevelt Administration in 1934:

With the financial stakes typically tiny, the cases Jackson took early in his career were as much theater as they were law. The local community treated a day's worth of trials as entertainment. Court was not held before a judge, but in front of a justice of the peace who was not a lawyer. Trials took place not in a regular courtroom, but wherever there was space to gather; in a school, a church, or the dance hall of a Masonic Temple.¹²

Some prewar litigation may have displayed some of the features that Chayes described, but in an era of occasional billion-dollar verdicts it is worth noting that the manageable routine litigation of that era probably resembled what Chayes described, and that tort litigation of the era was typified by relatively modest recoveries. To take a prominent example, the plaintiff in *Erie Railroad Co. v. Tompkins*¹³ obtained a verdict of \$30,000 after he was thrown under defendant's train, which ran over his right arm, severing it.¹⁴ And even then, his lawyers had to hide him away to keep him from accepting a low settlement as the case moved toward the Supreme Court.¹⁵ Tort litigation was hardly a central concern. Much of current litigation may still resemble Professor Chayes' description.¹⁶

And there was much to be said in favor of that method of resolving cases. As Professors Burbank and Subrin urged in 2011, American tort law depended on such community input:

[M]any legal norms need community input for the decisions applying them to be accepted by that community. Issues such as negligence, intentional discrimination, material breach of contract, and unfair competition are not facts capable of scientific demonstration. Nor are these issues pure questions of law. Rather, they are concepts mixing elements of fact and law that become legitimate behavioral norms when the

10. See Theodore Eisenberg & Stephen Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (arguing that there were parallels to the public law models of litigation Chayes described as new that had existed long before).

11. For discussion of the impact of the article, see Richard Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J. L. REFORM 647 (1988).

12. NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 45 (2010).

13. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 70 (1938).

14. Irving Younger, *What Happened in Erie*, 56 TEX. L. REV. 1011, 1021 (1978).

15. See *id.* at 1021–22 (describing how one of the plaintiff lawyers got Tompkins to stay with him in Baldwin, New York, after learning that the railroad had offered to settle the case with Tompkins for \$7,500, which Tompkins regarded as an enormous sum).

16. Indeed, a Pew Foundation study in 2020 found that state court litigation has increasingly featured claims by corporate creditors against individual debtors, who are usually not represented by counsel. See PEW FOUND., *HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS* 13 (May 6, 2020). Whatever else one may say about such litigation, it surely does is at least as simple as the model Prof. Chayes described.

citizenry at large, acting through jury representatives, decides what the community deems acceptable.¹⁷

Burbank and Subrin were reacting to the ongoing decline in the frequency of trial—particularly jury trial—in the era of managerial judging.¹⁸ Indeed, one might argue that the jury trial was in significant measure a constraint on the powers of the judge.¹⁹ For the present topic, however, the more pertinent shift identified by Chayes was the challenging nature of decrees in public law litigation designed to correct systemic abuses, often in governmental institutions such as schools or prisons. To give effect to constitutional or statutory commands, judges had to design and implement decrees that were not dictated by law but devised for the pending case. To perform this difficult task, they had to enlist “outside help—masters, amici, experts, panels, advisory committees” that could design and implement these structural decrees.²⁰ Furthermore, “[t]hese outside sources commonly found themselves exercising mediating and even adjudication functions among the parties.” One could say that this experience planted the seed for the later involvement of Francis McGovern and Ken Feinberg in mass tort litigation. Understanding why this happened depends on appreciating trends in tort law and in procedure.

III

THE PRESENT MASS TORT REALITY

The simple past described by Professor Chayes is long gone, at least for headline-grabbing tort litigation. To see that, one need look no farther than recent headlines. Of course, not all cases make the headlines; as Professors Halton and McCann wrote in 2004, the “holler of the dollar” gets newspaper attention for the exceptional cases, not the average ones.²¹

But Halton and McCann were talking about *million*-dollar verdicts. The present mass tort reality involves amounts that are *so* large that it’s not surprising that they get headline space. To take one striking recent example, consider Bayer’s mid-2020 agreement to pay some \$10 billion to settle a large quantity of

17. Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011).

18. For discussion, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in State and Federal Courts*, 1 J. EMPIRICAL LEGAL STUD. 439 (2004), and the other articles in this first issue of this journal.

19. See Steven Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. L. REV. 190, 207–08 (1990) (arguing that the jury “serves as a check upon the judge’s power in each case”) (quoting Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58 (1977)).

20. Chayes, *supra* note 9, at 1300–01.

21. See WILLIAM HALTON & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 167 (2004) (explaining that “multimillion-dollar winners of state lotteries are covered far more than those who win only thousands,” and that big-money awards similarly enable the press to present court cases in dramatic form).

Roundup litigation, which garnered headlines in the *New York Times*,²² the *Wall Street Journal*,²³ and the *Washington Post*.²⁴ And even that deal left some 30,000 additional claims unresolved.²⁵ Nonetheless, Bayer shares rose more than 7% on announcement of the potential settlement.²⁶ To deal with those additional (unresolved) claims, Bayer sought to use a class-action settlement, but the San Francisco federal judge presiding over the MDL litigation involving Roundup raised questions that prompted the parties to seek to retool the deal.²⁷ News of the judge's uneasiness with the proposed class-action deal caused a decline of more than 5% in Bayer stock.²⁸

The Roundup MDL is hardly the only high-profile mass tort litigation. Probably the biggest one is the National Prescription Opiate MDL pending before Judge Polster in federal court in Cleveland. The figures bandied about regarding that litigation are astronomical, as might be expected. One defendant, whose CEO said that “We don’t have that much money,” settled for \$250 million over ten years and an additional promise to provide its (other) drugs free to those in need of the medication.²⁹ The *Wall Street Journal* reported: “That framework

22. Patricia Cohen, *Roundup’s Maker Agrees to Pay More Than \$10 Billion to Settle Thousands of Claims that the Weedkiller Causes Cancer*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/24/business/roundup-settlement-lawsuits.html> [https://perma.cc/7X77-SRL8].

23. Ruth Bender, Laura Kusisto & Sara Randazzo, *Bayer to Pay Up to \$10.9 Billion to Settle Lawsuits Over Roundup Weedkiller*, WALL ST. J. (June 24, 2020), <https://www.wsj.com/articles/bayer-reaches-10-5-billion-settlement-over-weedkiller-roundup-11593017309> [https://perma.cc/6WX5-WJRW].

24. *Bayer Paying Up to \$10.9B to Settle Monsanto Weedkiller Case*, ASSOCIATED PRESS, June 24, 2020, <https://apnews.com/article/a12603a80c8238d1f7af3705cfec610a> [https://perma.cc/23NA-EPPV].

25. See Jef Feeley, Tim Loh & Tim Bross, *Bayer Isn’t Out of the Roundup Woods as 30,000 Claims Remain*, BLOOMBERG (June 24, 2020), <https://www.bloomberg.com/news/articles/2020-06-25/bayer-isnt-out-of-the-woods-on-roundup-as-30-000-claims-remain> [https://perma.cc/6BS3-XXFX].

26. See Jef Feeley & Tim Loh, *Bayer Shares Jump on Report of Potential Roundup Settlement*, BLOOMBERG, (June 23, 2020), <https://www.bloomberg.com/news/articles/2020-06-23/bayer-shares-jump-in-frankfurt-on-report-of-roundup-settlement> [https://perma.cc/H6G2-9ZHE]. This rise in stock price in the wake of an announced settlement was not unique. Indeed, in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court confronted a Rule 23(b)(1) “limited fund” settlement in which it noted the seeming effect on Fibreboard’s stock price of the district court’s approval of the settlement. To show the limited fund, Fibreboard offered evidence from an investment banker that it has a new worth of \$235 million. But after the district court approved the class action settlement, there was a “surge” in Fibreboard’s stock price, and it was acquired for \$515 million plus \$85 million in assumed debt—a total of roughly \$600 million. See *id.* at 850 n.28.

27. See Jef Feeley, *Bayer to Alter Plan for Handling Future Roundup Cancer Suits*, BLOOMBERG (July 8, 2020), <https://news.bloomberglaw.com/product-liability-and-toxics-law/bayer-to-retool-plan-for-resolving-future-roundup-cancer-suits> [https://perma.cc/8GWW-9X6Y].

28. See *id.* For another recent example, see Jennifer Maloney, *Juul Valuation Cut Over 70% From Its Peak, to \$10 Billion*, WALL ST. J., Oct. 30, 2020, at B3. The article offers the following explanation: “Once one of the country’s most highly valued startups, Juul has been pummeled over the past two years by regulatory crackdowns, lawsuits and investigations into whether it marketed vaping products to teens.” *Id.* One feature of those troubles is *In re Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation*, MDL no. 2913 (N.D. Cal.).

29. See Charley Grant, *Teva’s Benign Opioid Settlement Isn’t in the Bag Yet*, WALL ST. J. (July 26, 2020), <https://www.wsj.com/articles/tevas-benign-opioid-settlement-isnt-in-the-bag-yet-11595772000> [https://perma.cc/G2GW-EHU6].

has made shareholders happy and shares are up about 50% since.”³⁰ Another opioid maker threatened to file a bankruptcy petition, while others had already sought such protection.³¹

Meanwhile, another outburst of litigation about talc has garnered considerable attention, particularly for suits filed in state court in St. Louis. In late June, *Bloomberg Legal News* reported that one jury verdict in a talc case was cut in half to \$2.1 billion, with the \$500 million award for actual damages sustained, but the original \$4 billion in punitive damages was reduced to \$1.6 billion.³²

Tort litigation did not involve billions during the era Professor Chayes described.³³ Indeed, it may be that the first billion dollar verdict to gain national attention was a verdict of \$1.8 billion (after trebling) in an antitrust suit by MCI against AT&T.³⁴ In the suit brought by Pennzoil against Texaco in 1984, accusing Texaco of wrongfully interfering with its contract to acquire the Getty Oil Co., Pennzoil won a verdict for more than \$7.5 billion in compensatory damages and \$3 billion in punitive damages. Texaco went to federal court, claiming that the Texas requirement that it post bond to appeal violated due process because there was no way it could obtain a bond of that dimension. The Supreme Court eventually ruled that a federal court could not interfere in this state-court matter.³⁵ Although Texaco did manage to appeal in state court, all it obtained was a reduction of the punitive damages to \$1 billion, and it then sought bankruptcy protection. Pennzoil later settled for \$3 billion.³⁶

Neither *MCI v. AT&T* nor *Pennzoil v. Texaco* was a mass tort case; there was essentially one plaintiff and one defendant. One might say that, in that sense, it almost resembled Professor Chayes’ traditional one-on-one lawsuit. But mass torts began to emerge in the 1960s. Perhaps the first mass tort litigation of the current sort was the MER/29 litigation, involving 1,500 plaintiffs who sued a drug maker, claiming that they had been injured by the drug.³⁷ At a conference in 1994, Professor Schuck referred to “twenty-five years’ experience of mass tort

30. *See id.*

31. *See* Alexander Gladstone & Dave Sebastian, *Mallinckrodt May File for Bankruptcy, Undercutting Opioid Settlement*, WALL ST. J. (Aug. 4, 2020), <https://www.wsj.com/articles/tevas-benign-opioid-settlement-isnt-in-the-bag-yet-11595772000> [<https://perma.cc/E2KU-KH8J>] (reporting that Mallinckrodt was discussing a bankruptcy filing even though “[a]voiding a bankruptcy filing by Mallinckrodt was an important feature” of the proposed deal, and that Purdue Pharma LP and Insys Therapeutics, Inc. had already sought Ch. 11 protection).

32. Jef Feeley, *Johnson & Johnson Talc Verdict Cut in Half to \$2.1 Billion by State Court*, BLOOMBERG (June 23, 2020), <https://www.bloomberg.com/news/articles/2020-06-23/court-cuts-4-7-billion-j-j-talc-verdict-to-2-1-billion> [<https://perma.cc/3XEN-627J>].

33. *See supra* text accompanying note 13.

34. *See* MCI Commc’ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983).

35. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

36. *See* Tamar Lewin, *Pennzoil-Texaco Fight Raised Key Questions*, N.Y. TIMES (Dec. 19, 1987), <https://www.nytimes.com/1987/12/19/business/pennzoil-texaco-fight-raised-key-questions.html> [<https://perma.cc/7V79-3JXG>].

37. *See* Paul Rheingold, *The MER/29 Story — An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968) (describing the evolution of the litigation).

litigation,” reaching back to the 1960s.³⁸ The biggest mass tort litigation of that era was asbestos litigation, which had begun to pick up speed in the 1970s.³⁹ And the bombshell that got sudden attention to that mass tort litigation was the decision by Johns-Manville, thought to be a highly successful company, to file a Chapter 11 bankruptcy petition in 1982 due to asbestos liability exposure.⁴⁰ Two years later, Professor Mark Roe published his highly influential piece *Bankruptcy and Mass Tort* in the *Columbia Law Review*.⁴¹

These vignettes are only a few that have made the press recently. Why did this upsurge happen? How did we move from the simple one-on-one lawsuit of the past to the mega-litigation of today? In 1981, Judge Spencer Williams of the United States District Court for the Northern District of California offered one explanation:

The latter half of the twentieth century has witnessed a virtual explosion in the frequency and number of lawsuits filed to redress injuries caused by a single product manufactured for use on a national level. Indeed, certain products have achieved such national notoriety due to their tremendous impact on the consuming public, that the mere mention of their names — Agent Orange, Asbestos, DES, MER/29, Dalkon Shield — conjures images of massive litigation, corporate stonewalling, and infrequent yet prevalent “big money” punitive damage awards.⁴²

And as globalization picked up speed, use on a national level did not fully capture the litigation potential, at least for American companies that could be sued in the United States by plaintiffs from around the world.⁴³

A second strand of explanation has to do with tort law, something of a revolution wrought by section 402A of the Restatement (Second) of Torts. The adoption of product liability tort theories produced, after 1960, what Professor Priest, writing in 1985, called “a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system.”⁴⁴ He traced this revolution to the academic tort work beginning in the 1930s that proceeded from

38. Peter Schuck, *supra* note 1, at 941. This paper was originally presented at a Cornell Law School conference in October 1994. See Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 CORNELL L. REV. 811, 811 (1995).

39. See PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1984) (chronicling the rise of asbestos litigation).

40. See Mark Kunkler, *The Manville Corporation Bankruptcy: An Abuse of the Judicial Process?*, 11 PEPP. L. REV. 151, 153 (1983) (examining the use of federal bankruptcy by the Manville Corporation to seek refuge from product liability claims).

41. See Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984).

42. *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 892 (N.D. Cal. 1981).

43. True, *forum non conveniens* might be advanced as a ground to get these non-American plaintiffs relegated to the courts of their home countries, but often that effort was not successful. Personal jurisdiction limitations might present insurmountable obstacles for non-Americans to sue non-American companies in the United States, however. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017) (holding that even though California plaintiffs could sue Bristol-Myers in California, other plaintiffs from other states could not because specific jurisdiction did not exist to support their suits in California).

44. George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461 (1985).

“a single coherent conception . . . business enterprises ought to be responsible for losses resulting from products they introduce into commerce.”⁴⁵ This doctrinal development “generates complicated legal and economic issues—of industrywide apportionment of liability, probabilistic causation, and retroactive liability—that would have appeared bizarre to a lawyer dealing with defective products in the 1950s.”⁴⁶

At almost the same time Professor Priest was lamenting the turn in modern tort law, Professor Rosenberg was building on Professor Chayes’ public law vision of litigation in general to propose a public law approach to mass tort litigation, designed to ease the burden of proving causation by employing a class action method.⁴⁷ Although it can’t be said that this approach has swept the field as section 402A did, one might say that it has given birth to the notion of a medical monitoring claim designed to guard against harms resulting from exposure to toxic substances.⁴⁸ Coupled with the growing national (and now global) market for products, by the early 1990s these forces had, in Professor Issacharoff’s words, “placed the courts under siege.”⁴⁹

It should not be surprising that this burst of activity produced curricular consequences. Since the 1980s, law school courses in mass torts have flowered. Indeed, that is what Francis McGovern was teaching at Hastings when he died. But their importance in the marketplace far outstrips their academic profile. There is even a business headquartered in Florida entitled “Mass Torts Made Perfect, LLC.”⁵⁰ That is not principally a story of interest to torts scholars, however. As Professor Siciliano put it in the 1990s, “mass torts present few interesting or novel questions of [tort] doctrine or substance.”⁵¹ Similarly, his colleague Professor Henderson said that “the alleged ‘crisis’ that purports to justify extraordinary procedural innovations in mass tort involve not the nature of the underlying claims, but their number.”⁵² So we must turn to procedure rather than tort to appreciate the developments in which Francis played such a prominent role.

45. *Id.* at 463.

46. *Id.* at 462.

47. See David Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 851 (1984) (arguing that the class actions method would maximize social welfare and protect individual entitlements for mass exposure cases).

48. See generally Kenneth Abraham, *Liability for Medical Monitoring and the Problem of Limits*, 88 VA. L. REV. 1975 (2002).

49. Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 REV. LITIG. 463, 493 (1991).

50. MASS TORTS MADE PERFECT, <https://mtmp.com>.

51. John A. Siciliano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 991 (1995).

52. James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1018 (1995).

IV

THE SHIFTING PROCEDURAL LANDSCAPE

Whatever the prevailing reality before World War II, the emerging actuality by the late 1940s was that what we would now call complex litigation was taking center stage in litigation in the American federal courts. By the late 1940s, the federal courts embarked on a study of protracted litigation that led to publication of a 1951 study known as the Prettyman Report.⁵³ This report was followed by various conferences and, in 1960, the publication by the Federal Judicial Center of the *Handbook for Complex Litigation*,⁵⁴ forerunner of the *Manual for Complex Litigation*, now in its fourth edition.⁵⁵

But as we have seen already, that protracted litigation in the 1950s and 1960s was very different from what we would now call mass tort litigation. Very often it involved governmental action against large-scale commercial actors. Indeed, the antitrust litigation of the 1960s and 1970s came to emphasize “coattail” litigation by private plaintiffs following governmental actions, often employing the class-action device to add magnitude to their litigation efforts.⁵⁶ After the Supreme Court recognized an implied private right of action for securities fraud,⁵⁷ the securities fraud class action came into its own, partly energized by the 1966 amendments to Rule 23.

During this period of time, mass tort litigation was not at the forefront, and procedural innovation did not seem critical to it. To take an early example of such litigation, consider the MER/29 pharmaceutical litigation of the 1960s. That litigation began as some 1500 individual damage claims against the manufacturer of the drug. But the defendant tried to persuade the Co-Ordinating Committee for Multiple Litigation (appointed by Chief Justice Warren to cope with the 2,000 plus antitrust suits arising out of a price-fixing conspiracy regarding heavy electrical equipment) to take over this outburst of litigation as well.⁵⁸ Failing that, the lawyers relied on what one of them described as a “free enterprise” system to coordinate discovery efforts even though the defendant would not permit joint trials.⁵⁹

53. See *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62 (1951).

54. See *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960).

55. See FED. JUD. CTR., *MANUAL FOR COMPLEX LITIGATION*, FOURTH (2004), <https://www.uscourts.gov/sites/default/files/mcl4.pdf> [<https://perma.cc/HQ3Q-AJVX>].

56. See Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000) (examining whether coattail class actions are a good model for the resolution of claims of widespread harm).

57. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

58. See Rheingold, *supra* note 37, at 126.

59. See *id.* at 131. Rheingold’s description of the relative power of plaintiffs and defendants in mass tort litigation half a century ago continues to ring bells:

The defendant in any mass disaster litigation is inherently well organized to deal with multiple litigation. It can coordinate its activities and to an extent even control the course of litigation. . . . Merrell [the defendant] was represented at a national level both by Richardson-

Thus, an early effort to use a new tool of procedure—the MDL Panel—to deal with tort litigation was deflected. But as I have noted recently, in the decades since, “fairly often torts and civil procedure seem to be joined at the hip.”⁶⁰ That symbiotic relationship came to fairly full flower during the half century after the MER/29 litigation wound down in the late 1960s.

Even before the current era of mass tort litigation, the specter of mass torts was already casting a long shadow over the redrafting of Rule 23, which led to the 1966 amendments that introduced the “modern class action.”⁶¹ The prime vehicle for the modern class action was the Rule 23(b)(3) common questions class. Within the Advisory Committee on Civil Rules, there was vehement disagreement during the 1960s about whether mass torts could fit the class-action mold.⁶² The framers of the amended rule included in the Committee Note a warning that mass accident cases would normally not be suitable to class-action treatment.⁶³

That early warning occurred against a background assumption that class actions—even attempted mass tort class actions—would ordinarily be litigated to judgment. But rather quickly the emerging reality of the new world of class action practice was settlement, not trial. The original modern class action rule did take note of settlement as a possibility but said nothing more than that a class action could be settled only with the court’s approval. The paucity of guidance in the rule strongly suggests that the framers did not consider this prospect very important, a suggestion supported by the paucity of guidance in the Committee Note on how the court-approval provision should be interpreted.⁶⁴ From the beginning, then, the class action left judges without mooring on what often—perhaps most of the time—became the most important question: Would this settlement be approved?

Merrell house counsel and by a Wall Street firm acting as “national counsel” in both criminal and civil litigation.

Id. at 124.

60. Richard Marcus, *Brave New World: Technology and Tort Practice*, 49 SWN. L. REV. 455 (2021).

61. See John C. Coffee, Jr., “Loser Pays”: *The Latest Installment in the Battle-Scarred, Cliff-Hanging Survival of the Rule 10b-5 Class Action*, 65 S.M.U. L. REV. 689, 689–90 (2015) (noting that Rule 10b-5 “did not truly become important until the modern class action was authorized by the revisions to Rule 23 of the Federal Rules of Civil Procedure in 1966”). The Supreme Court so recognized in *Epic Systems, Inc. v. Lewis*, 138 S.Ct. 1612, 1624 (2018): “Federal Rule of Civil Procedure 23 didn’t create the modern class action until 1966.”

62. See John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking?*, 24 MISS. COL. L. REV. 323, 334–36 (2005) (detailing these debates, particularly between the Reporter, Professor Benjamin Kaplan, and John Frank, a member of the Advisory Committee).

63. See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (“A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”).

64. The court-approval provision was in FED. R. CIV. P. 23(e). The entirety of the Committee Note guidance was: “Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.” FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

The judges awoke to this problem rather quickly. Thus, by 1971 the Third Circuit was alert to the risk that, before official appointment as representative of the class, the putative class counsel could be put under “strong pressure to conform to the defendant’s wishes . . . because . . . a negotiating defendant may not like his ‘attitude’ and may try to reach settlement with another member of the class.”⁶⁵ But defendants seeking to settle class actions to put an end to the litigation on terms acceptable to them would hardly concede that the case was a proper class action for full-fledged litigation and trial to achieve a settlement, and run the risk that the judge would reject the deal and set a trial date. Instead, they regularly proposed pre-certification settlements, with notice to class members that they could object or opt out of the deal. As the Seventh Circuit noted in 1987, “when notice of the class action is . . . sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a fait accompli.”⁶⁶

Gradually, then, the courts themselves developed methods for doing a better job of evaluating settlements. They developed a standard—“fair, reasonable, and adequate”—to determine whether to approve settlements. At least some circuits regarded the judge as a fiduciary for the class members in evaluating these settlement proposals that both sides endorsed as a good deal.⁶⁷ The various circuits developed distinctive lists of factors judges had to address in making this fiduciary determination. Eventually, the “fair, reasonable and adequate” standard was added to Rule 23 in 2003,⁶⁸ and in 2018 the rule’s direction regarding settlement review were fortified.⁶⁹

Around the same time, judges began to appreciate that the class action device might enable judges to cure some problems with tort law. Even before Professor Rosenberg offered a public law vision of class actions to solve the causation problem with toxic tort claims, Judge Williams (quoted above about the stimulus for the mega-litigation mass tort reality that began hitting the courts in the 1980s⁷⁰) tried to use Rule 23 to deal with Dalkon Shield litigation.⁷¹ In a preemptive strike against unwise state tort law that could permit punitive damage recoveries from A.H. Robins to create the “unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse will be deprived of a practical means of redress,”⁷² he directed the parties to brief the possibility

65. *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971).

66. *Mars Steel Corp. v. Cont’l Ill. Nat. Bank*, 834 F.2d 677, 680–81 (7th Cir. 1987).

67. *See, e.g., Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (“We and other courts have gone so far as to term the district judge in the settlement phase a fiduciary to the class”).

68. *See* FED. R. CIV. P. 23(e) (2003 amendments).

69. *See* FED. R. CIV. P. 23(e); *see also* Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903 (2018) (discussing the history of class action reform).

70. *See supra* text accompanying note 42.

71. For a more extensive discussion, *see* Richard Marcus, *They Can’t Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 859–66 (1995) (considering whether Rule 23 can be used to effectuate tort reform).

72. *In re N. Dist. of Cal. “Dalkon Shield” IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 893 (N.D. Cal. 1981).

of class certification of all punitive damages claims on a limited fund principle.⁷³ He granted class certification, but the Ninth Circuit reversed.⁷⁴

Though Dalkon Shield surely presented major mass tort challenges, it was dwarfed by “the elephantine mass of asbestos cases.”⁷⁵ The pressure of these cases was sufficient to cause the Judicial Panel on Multidistrict Litigation, after refusing five times to centralize them, to order their centralization in 1991.⁷⁶ In this extraordinary order, it also proposed consideration of a variety of methods of dealing with this mass of litigation—a single national class action trial, limited fund class certifications, or a global settlement.⁷⁷ It expressed the hope that centralization “will, in fact, lead to sizeable reductions in transaction costs (and especially in attorneys’ fees),” and “emphasize[d] our intention to do everything within our power to provide such assistance [as developing a nationwide roster of federal judges to try asbestos cases] to this docket.”⁷⁸

In the wake of the Panel’s order, the transferee court appointed steering committees on both the plaintiff and defendant side. After much negotiation—partly facilitated by meetings at the Federal Judicial Center⁷⁹—the parties reached an innovative solution using the opt-out provisions of Rule 23(b)(3). All people exposed in the workplace to asbestos who had not yet sued would be bound (unless they opted out) by a detailed agreed compensation schedule, and their claims would be handled through that mechanism. The settlement agreement was about 100 pages long and spelled out very specific criteria for compensation at various levels, but also said that claims would be evaluated

73. See FED. R. CIV. P. 23(b)(1)(B).

74. *In re N. Dist. of Cal. “Dalkon Shield” IUD Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982).

75. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

76. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 415–18 (J.P.M.L. 1991).

77. See *id.* at 422.

78. *Id.* at 423.

79. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 264 (E.D. Pa. 1994). The district court’s eventual findings and conclusions in support of approving the settlement fill ninety-three pages in the *Federal Rules Decisions*. The opinion emphasizes the amount of judicial effort involved:

[T]he fairness hearing was extensive and protracted, involving the testimony of some twenty-nine witnesses (live or by deposition) during 18 hearing days over a period of over five weeks. The Court heard testimony from participants in the settlement negotiations, several representative plaintiffs, two high-ranking officers of CCR [the defense organization that pooled the defense for a number of defendants in asbestos litigation], medical experts, and representative asbestos plaintiffs’ attorneys. Numerous exhibits were submitted. The substance of the testimony covered, among other things, the decades-long history of asbestos litigation in the United States; the details of handling of asbestos litigation in the current tort system; the negotiation and operation of the proposed settlement and various objections to certain of its provisions; the competence and adequacy of Class Counsel; the medical conditions caused by exposure to asbestos and the reasonableness of the medical criteria set forth in the settlement; the ability of the CCR defendants to meet their financial obligations under the Stipulation through insurance proceeds or otherwise; and the negotiation and operation of settlements between Class Counsel and the CCR defendants to settle in the present tort system the inventory of pending claims of clients represented by Class Counsel and their affiliated law firms.

Id. at 260. This catalog of the efforts involved gives some suggestion of the value of assistance from reliable fixers.

according to “traditional tort principles” within the range of compensation amounts specified in the settlement agreement.⁸⁰ These amounts reportedly corresponded to actual settlement figures of cases already settled by the defendants.

The problem for the judge was to evaluate this proposal. Operating before the 2003 and 2018 amendments to Rule 23(e), which provided guidance for judges presented with class-action settlement proposals,⁸¹ the judge convened a fairness hearing that lasted weeks and included testimony by many witnesses, most of them experts of one stripe or another, including a report from a law professor acting as a special master to report on whether the payment grid in the settlement document corresponded to actual payments in past litigation. As was often the case, this settlement proposal raised the vexing question how a court could evaluate a settlement before it had decided to grant class certification and deputized class counsel to act on behalf of the class. Indeed, in this case the proposed settlement was a “prepak”—the parties had arranged it even before filing the proposed class action, and jointly presented it to the court that very day. As we shall see, that is a situation in which the fixers become central.

One solution to this sort of problem would be to forbid consideration of any class-wide settlement until the class had first been certified under the standards of Rule 23. The Third Circuit seemed to embrace that view in 1995.⁸² That might well even the playing field and overcome the problem that lawyers not authorized to go to trial for the class could not negotiate a good deal.⁸³ The district court had already approved the asbestos class action settlement before the Third Circuit’s 1995 decision categorically disallowing settlement class certification on grounds that would not support litigation class certification. The Third Circuit reversed that approval, partly on the basis of its 1995 ruling that a proposed settlement did not affect the certification decision.⁸⁴ The Supreme Court granted certiorari and, in 1997, rejected this settlement certification in *Amchem Products, Inc. v. Windsor*.⁸⁵

The Court recognized in *Amchem* that the “settlement only” class had become a “stock device.”⁸⁶ Rejecting the Third Circuit’s prohibition of settlement certification in the gentlest possible way,⁸⁷ the Court nevertheless affirmed its

80. Marcus, *supra* note 71, at 866–68.

81. See *supra* notes 68–69 and accompanying text.

82. See *In re Gen. Motors Pick-Up Truck Fuel Tank Prod. Liab. Lit.*, 55 F.3d 768, 778 (3d Cir. 1995) (holding that the standards for class certification in the “settlement class” context are the same as in the “litigation class” context).

83. See *supra* note 65 and accompanying text.

84. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996) (“the rule in this circuit is that settlement class certification is not permissible unless the case” would have been triable as a class action).

85. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997).

86. *Id.* at 618.

87. See *id.* at 619 (“We agree with petitioners [seeking to uphold the settlement] to this limited extent: settlement is relevant to a class certification. The Third Circuit’s opinion bears modification in that respect.”).

judgment that approval of this settlement was improper. Even in the settlement context, class actions had to satisfy Rules 23(a) and (b); being found fair, adequate, and reasonable as required by Rule 23(e) did not suffice.⁸⁸ Despite its great detail, the settlement failed adequately to take account of the divergent circumstances of the members of this huge class—differences which precluded providing the same deal for all of them.⁸⁹ Moreover, the tort reform impulse behind some efforts to settle class actions sought more than the class-action rule could do:

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load [the proponents of the settlement] and the district court heaped upon it.⁹⁰

Rule 23 might have been amended to provide some additional support for settlement class actions, but that did not happen.⁹¹ Settlement class certifications did not end either, and courts continue to consider them in mass tort as well as other sorts of class actions. Some academics continue to campaign instead for a flat rejection of the settlement class action, something like what the Third Circuit's ruling endorsed.⁹² That also did not happen.

But the larger momentum of mass tort litigation has shifted to the MDL arena. From the mass tort perspective, MDL had been something of a sleeper, to

88. *See id.* at 620–21 (“Rule 23(e) on settlement of class actions . . . was designed to function as an additional requirement, not a superseding direction.”). Indeed, some of the rule’s requirements, particularly guarding against conflicts of interest within the class, “demand undiluted, even heightened, attention in the settlement context.” *Id.* at 620.

89. The Court stated: “Recoveries under the laws of different States spanned a wide range. Objectors assert, for example, that 15% of current mesothelioma claims arise in California, where the statewide average recovery is \$419,674 — or more than 209% above the \$200,000 maximum specified in the settlement for mesothelioma claims not typed ‘extraordinary.’” *Id.* at 610 n.14.

90. *Id.* at 628–29; *see also id.* at 603 (describing the settlement agreement as “[a]n exhaustive document exceeding 100 pages [which] presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements”).

As the Third Circuit recognized in 1986, the unevenness of outcomes through the courts made such an administrative approach inviting;

Results of jury verdicts are capricious and uncertain. Sick people and people who died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars. The asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure.

In re Sch. Asbestos Litig., 789 F.2d 996, 1001 (3d Cir. 1986) (quoting the lament of a Philadelphia state court judge).

91. In 1996, in the wake of the Third Circuit’s categorical ruling against settlement class certification, the Advisory Committee on Civil Rules published a proposal to adopt a Rule 23(b)(4), dealing with certification solely for settlement. *See Proposed Amendment to the Federal Rules*, 167 F.R.D. 523, 559 (1996). After the *Amchem* decision, this amendment was not pursued. Instead, in 2003 and 2018, Rule 23(e) was amended to deal with the procedures to be used in reviewing proposed class-action settlements.

92. *See* Howard Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 988 (2014) (“It is time to abandon the settlement class action.”).

use Professor Resnik's word from 1991.⁹³ For the first few decades of its existence after the MDL statute was adopted in 1968, its high profile cases were securities fraud and antitrust actions, often including class actions. Perhaps people should have been focused on mass torts during that period also. As Professor Resnik noted in 1995, "in the first six years of the MDL, about a quarter of the MDL litigations centralized were mass torts. In the following ten years, about a third of the classes certified were mass torts."⁹⁴ In the wake of *Amchem*, the emergence of mass tort MDL proceedings was said to have occurred because mass tort class certification had become more difficult to obtain.⁹⁵

For some time, this evolution of MDL was seen by many to be an offshoot of the original conception—perhaps even a deviation. The initial informal success that led to the passage of the MDL Act, for example, had been in the *Electrical Equipment* cases, and it had grown somewhat prominent in antitrust and securities litigation—often class actions had not been so prominent in mass tort litigation.⁹⁶ Moreover, though the possibility that the class action could be used for mass torts excited fierce debates in the drafting of the 1966 amendment to Rule 23,⁹⁷ the adoption of the MDL statute seemed to involve no contemplation of the use of that statute for similar purposes.⁹⁸ The upsurge of MDL mass tort litigation seemed almost to be an invention of creative plaintiff lawyers and transferee judges.

Professor Bradt's recent work shows that this perception was wrong, at least in terms of the actual expectations of the judicial drafters of the statute.⁹⁹ Despite their low profile, the drafters had high aspirations: "The drafters believed that their creation would reshape federal litigation and become the primary mechanism for processing the wave of nationwide mass-tort litigation they predicted was headed the federal courts' way."¹⁰⁰ Moreover, even though the judicial management movement was only beginning to sprout, "these judges believed deeply that control of these cases could not be left in the hands of the parties or their attorneys—or even in the hands of federal judges scattered

93. Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. Summer 1991, at 5, 47.

94. Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 928–29 (1995). This article emerged from a 1994 symposium about the lower court ruling that the Supreme Court addressed in 1997 in *Amchem*.

95. See generally Edward Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TULANE L. REV. 2205, 2206–07 (2008) (asserting that "increasingly stringent requirements for class certification" had made MDL transfer and consolidation "an attractive procedural mechanism for dealing with this problem").

96. For a general overview, see Richard Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TULANE L. REV. 2245 (2008).

97. See *supra* notes 62–63 and accompanying text.

98. See Linda Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013) (referring to the relative inconspicuousness of MDL litigation).

99. See Andrew Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017) (arguing the drafters intended this use for MDL).

100. *Id.* at 839.

throughout the country committed to what the judges considered outmoded norms of party control of the litigation process.”¹⁰¹

V

THE EMERGENCE OF THE FIXERS

The case management movement of the 1960s and 1970s, and the learning of the public law experience of the 1970s, coupled with the rising popularity of ADR efforts in the 1980s, contributed to the need for judicial support from fixers like Francis McGovern. Initially, the mass tort class action prompted a reassessment of the individualistic cast of American litigation. As the Fifth Circuit said in upholding certification of an asbestos class action in 1986 (citing academic work by Francis McGovern), “the current volume of litigation and more frequent mass disasters” meant that “courts are now being forced to rethink the alternatives and priorities of litigation management,” and forecast that “we may be forced to abandon repetitive hearings and arguments for each claimant’s attorney.”¹⁰² This attitude sounds exactly like the attitude of the framers of the MDL statute two decades before.¹⁰³

So if one puts together the procedural innovations made available by the 1966 amendment of Rule 23 and the adoption of the MDL statute, one is left with mass tort litigation that results in deals arguably brokered by judges, or at least deals that judges are required to approve to make them binding. In class actions, the judges have a responsibility under Rule 23(e) to confirm that the deals are fair, reasonable, and adequate. In MDL litigation, it is widely acknowledged that transferee judges regard global settlements as a prime goal, and the need to remand at the end of the pretrial phase as something of a failure.¹⁰⁴ As Professor Hensler said in 1989, “[i]n the past half-dozen years, we have seen a revolution in thinking about mass toxic torts.”¹⁰⁵ That was when the class action was the predominant method; the expansion of MDL might be said to have magnified this process.

In class actions, at least, judges had formal power to review and evaluate proposed settlements. The judges’ problem, however, is that they are ill equipped to ensure that these are good deals. They might rely on class members to object, and thereby create the customary adversarial atmosphere for a judicial decision. But particularly when the individual stakes are limited, objectors can’t be relied

101. *Id.* at 834.

102. *Jenkins v. Raymark Indus.*, 782 F.3d 468, 473 (5th Cir. 1986).

103. *See supra* notes 100–101 and accompanying text.

104. *See, e.g., DeLaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147, 152 (D. Mass. 2006) (“It is almost a point of honor among transferee judges . . . that cases so transferred shall be settled rather than sent back to their home courts for trial.”); *see also* Abbe Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1673 (2017) (quoting a judge as saying: “It’s the culture of transferee courts. You have failed if you transfer it back.”).

105. Deborah Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 89 (1989).

upon. Indeed, when objector status was recognized in the rules in 2003¹⁰⁶ and the Supreme Court held that class members who objected could appeal approval of the settlement,¹⁰⁷ the way was open for unscrupulous objectors to exploit their ability to delay final approval of a settlement and extract a payoff to withdraw objections or appeals.¹⁰⁸

If the class members themselves could not be relied upon, and the parties were united in support of the settlement, where was a judge to look? And if settlement was a desirable outcome, how could the judge (perhaps acting as a fiduciary to the class¹⁰⁹) advance toward that goal? The experience Professor Chayes described in the mid 1970s suggested a solution—deploying fixers to explore and develop settlement proposals.¹¹⁰ Perhaps the first prominent example of that sort of effort was in the Agent Orange class action, in which Judge Weinstein appointed special masters (including Ken Feinberg) to engage in shuttle diplomacy about a possible settlement.¹¹¹ If that was the beginning, that model has grown enormously. As Professor Burch recently noted, in the MDL setting special masters have become “an entire industry that thrives upon mass-tort settlements.”¹¹²

Mass tort litigation is increasingly dependent upon MDL centralization. As Dean Klonoff has observed, “the entire success or failure of an entire category of litigation may turn on whether the cases are centralized in an MDL.”¹¹³ Professor Noll proposes that “MDL is not simply a super-sized version of the litigation that

106. See Fed. R. Civ. P. 23(e)(5) (“Any class member may object to the proposal if it requires court approval.”).

107. See *Devlin v. Scardaletti*, 536 U.S. 1, 10 (2002) (holding “class members [are] allowed to appeal the approval of a settlement when they have objected at the fairness hearing”).

108. In the 2018 amendments to Rule 23(e)(5), an effort was made to prevent or curtail this activity by forbidding such payoffs unless the district court that approved the settlement also approved the payoff.

109. See *supra* note 67 and accompanying text.

110. See *supra* note 20 and accompanying text.

111. For a thorough examination of this settlement promotion effort, see PETER SCHUCK, *AGENT ORANGE ON TRIAL* (1986). For an examination of the lessons for procedure from that book, see Richard Marcus, *Apocalypse Now?*, 85 MICH. L. REV. 1267 (1987).

Interestingly, Judge Weinstein had prior experience with a special master in the sort of litigation that Professor Chayes was describing in his 1976 article at the very time Chayes was writing his article. In 1972, students at a public Coney Island junior high school sued to desegregate the school. After a long trial, Judge Weinstein held that illegal discrimination had occurred. But the academic segregation appeared closely tied to residential segregation. So, the judge appointed his former Columbia Law School colleague Professor Curtis Berger, a specialist in urban housing matters, to be a special master investigating ways to counter the residential segregation. See Curtis Berger, *Away From the Courthouse and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). Berger submitted a report, but the judge did not adopt the master plan he proposed, leaving him “initially angry and resentful.” *Id.* at 733. Later, his attitude subsided, in part because he realized that implementing his plan would have required that someone “monitor every detail of the plan’s execution,” an undertaking that “would have meant a five-year involvement by the court and its delegate in every aspect of a massive real estate development.” *Id.* at 735. At least this experience, then, would not have made the judge enthusiastic about employing special masters in the way Chayes described.

112. Burch & Williams, *supra* note 4, at 2224.

113. Robert Klonoff, *The Judicial Panel on Multidistrict Litigation: The Virtues of Unfettered Discretion*, 89 UMKC L. REV. (forthcoming 2021) (manuscript at 4).

takes place every day in federal court, but a form of public administration that blends tools of ordinary litigation with tools of institutional design more commonly found in programs such as Social Security.”¹¹⁴ This sounds strikingly like what Professor Kaplan (author of the 1966 Rule 23 amendments) said more than 50 years ago about class actions. He observed that “[t]here are some who are repelled by these massive, complex, unconventional lawsuits because they call for so much judicial initiative and management.”¹¹⁵ The critics then argued that “it all belongs not to the courts but to administrative agencies.”¹¹⁶ As Professor Noll suggests, perhaps MDL is the 21st century vehicle for judicial agency action.

But judges are not administrative agencies, and they don’t have staffs of experts and assistants to implement administrative policy. In place of that, judges in institutional reform litigation of necessity had to rely on outside assistance. So also, in mass tort litigation—both MDL and class action cases—judges have followed the lead of Judge Weinstein in the Agent Orange litigation and enlisted outside support. Indeed, one can even see it as a return to an early American model. Professor Kessler’s recent book traces the evolution of evidence gathering in the New York courts in the first half of the 19th century, finding that initially they aspired (on the model of the Courts of Equity in England) to control that process, but that toward mid-century the lawyers were able to take over in part because the judges simply did not have the personnel to do the evidence-gathering.¹¹⁷ The limits on judicial capacity (as described by Professor Chayes¹¹⁸) may be the most important considerations.

While recognizing that such outsiders were “once the workhorses for managing institutional reform outside the court context,”¹¹⁹ Professor Burch criticizes this reliance on outsiders in mass tort litigation. To a significant extent, her criticisms build on the critique Professor Resnik offered regarding managerial judging in 1982.¹²⁰ There are valid concerns about the role of these recruits (or volunteers, one might better say, for they often are very well paid).¹²¹

Professor Burch’s recent article effectively raises these concerns, largely along the lines that were first raised when judicial management became widespread in the 1980s.¹²² For one thing, there is a risk of creating a

114. David Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 407 (2019).

115. Benjamin Kaplan, *A Prefatory Note*, 10 BOS. COL. IND. & COM. L. REV. 497, 500 (1969).

116. *Id.*

117. See AMALIA KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL CULTURE, 1800–1877* 86–107 (2017) (describing the shift in the New York Court of Chancery from reliance on testimony taken by court masters to live testimony taken by adversarial lawyers).

118. See *supra* note 20 and accompanying text.

119. Burch & Williams, *supra* note 4, at 2139.

120. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

121. For a very thoughtful examination on this subject from the mid-1980s, see Wayne Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. CHI. L. REV. 394 (1986).

122. See Burch & Williams, *supra* note 4, at 2140-41.

“bureaucratic judiciary.”¹²³ Of course, to the extent mass tort litigation should be regarded as more akin to bureaucratic engagement than ordinary adjudication,¹²⁴ that may miss the mark in Professor Noll’s view. Additionally, these tailored procedures have been challenged as ad hoc, and therefore a deviation from the commitment of the Federal Rules to trans-substantive procedure—another hobby horse since the 1980s.¹²⁵ At least with regard to MDL mass tort litigation, Professor Noll has responded that ad hoc procedure is central to the design of section 1407 and MDL’s ability to resolve complex litigation.¹²⁶

All in all, the current debate therefore prompts a distinct sense of *déjà vu* for those who have been observing the academic scene over the past few decades. There can be no denying that the concerns raised are genuine. Just as worries about using Rule 23 as a tool to modify or side-step otherwise applicable tort law is a genuine concern,¹²⁷ so also is it somewhat unnerving to contemplate recruits from the private sector designing substitutes for tort law rules. That sense of alarm can rise, compared to arrangements overseen by Article III judges, because the elite cadre of people like Francis McGovern who are at the forefront of this activity might desire to please the hiring lawyers in hopes of getting further assignments.¹²⁸ Even with judges, there are legitimate concerns about incurring judicial displeasure.¹²⁹

The response to these overall concerns about managerial judging has been pragmatic, not theoretical. Thus, responding to Professor Resnik in the 1980s, Chief Judge Peckham of the Northern District of California, a prime advocate of case management, argued “that our adversarial system has run amok and that the movement toward judicial oversight represents an effort to preserve the best qualities of that system.”¹³⁰ That pragmatic orientation also explains the judiciary’s receptivity to highly qualified judicial adjuncts like Francis McGovern. As the Committee Note to the 2018 amendments to Rule 23(e) observes concerning the judge’s responsibility to determine whether a proposed class-action settlement was negotiated in a proper manner, “the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the

123. See Resnik, *supra* note 120, at 437; see also Owen Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983).

124. See *supra* text accompanying note 114.

125. For discussion, see Richard Marcus, *Of Babies and Bathwater: The Prospects of Procedural Progress*, 59 BROOK. L. REV. 761, 776–79 (1993) (discussing “The Trans-substantivity Tangle”).

126. See Noll, *supra* n.114, at 409; see also Pamela Bookman & David Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017) (offering additional thoughts about ad hoc procedure).

127. See *supra* text accompanying notes 71–73; 91.

128. See Burch & Williams, *supra* note 4, at 2145–46.

129. See Resnik, *supra* note 120, at 425 (referring to the risk “litigants who incur the [managerial] judge’s displeasure may suffer judicial hostility or even vengeance with little hope of relief”).

130. Robert Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 265 (1985); see also Richard Marcus, *The New Role of American Judges: Reining in the American Litigator*, 27 HASTINGS INT’L & COMP. L. REV. 3 (2003) (noting the role of judges in the adversarial system).

class interests.”¹³¹ It is not surprising that, confronted with such tasks as evaluating the fairness of class action (or MDL) settlements, judges would appreciate the involvement of “super neutrals.”¹³²

If the involvement of fixers like Francis McGovern would reassure judges, why would the parties favor involving them (often at significant expense)? One piece of evidence of lawyers’ support for involvement is the 2019 adoption by the ABA of a resolution providing guidelines urging that appointment of special masters become “an accepted part of judicial administration in complex litigation.”¹³³ A thoughtful recent article by Professor Baker sheds light on this impulse and underscores the pragmatic considerations that may be central to it. Addressing mass tort settlements of inventory claims (bundles of claims represented by the same lawyer or law firm) for a lump sum amount, she focuses on why involving special masters is often a feature of the allocation of settlement funds among claimants.

Professor Baker’s initial perplexity was about the disappearing defendant feature of such inventory settlements—the defendant drops out of the picture once the deal is struck and eschews any interest in the allocation of the overall settlement proceeds among the plaintiff firm’s clients. That’s understandable in the sense that the defendant mainly wants to put the litigation in the rear view mirror.¹³⁴ But the defendant may affirmatively *want* the allocation to be done by somebody other than the plaintiff lawyer.¹³⁵ In part, that may reassure the settling defendant that if something goes awry in the administration of the fund it will not be sued or the claimants will seek to have it set aside.¹³⁶ Moreover, since the claimants normally may refuse to participate in the settlement, the defendant may hope the involvement of a master will deter “opt outs.”¹³⁷

Professor Baker also examines why plaintiff counsel would welcome the involvement of a special master to determine settlement allocation. One reason is that counsel may believe that the involvement of a master protects them from liability for the allocation.¹³⁸ Another is that if the lump sum settlement involves clients represented by different lawyers or law firms, having a special master

131. FED. R. CIV. P. 23(e) 2018 amendments Committee Note.

132. See Baker, *supra* note 3, at 1165 n.37.

133. See Am. B. Ass’n, *Resolutions with Reports to the House of Delegates*, Res. 100 (Jan. 2019).

134. “[T]he defendant has no reason to care about the allocation of the total settlement fund among the covered claimants. Its sole concern is to obtain as much closure as possible without in effect funding a continuing war against itself.” Baker, *supra* note 3, at 1167. What’s more, getting into the allocation of the settlement funds would require extra work, as “defendant would need to review and analyze the relevant medical records and proof of use for each of the covered claimants in order to apply the allocation formula to the facts of each claimant’s claim.” *Id.*

135. “Sometimes the defendant will require a provision in the settlement agreement mandating that plaintiffs’ counsel retain an allocation special master.” *Id.* at 1173.

136. *Id.* at 1174–75.

137. See *id.* at 1173 (“It is also possible that the defendant believes that the plaintiffs each will consider their settlement offers to be more ‘legitimate’ in some way, or more ‘fair,’ if they’re determined by a special master rather than by plaintiffs’ counsel”); see also *id.* at 1175–76.

138. See *id.* at 1177–78. As Professor Baker says, this attitude seems to be wrong on the law.

involved can effectively avoid conflict between the firms or their clients.¹³⁹ Additionally, in crass terms, counsel may be able to offload the task of working up the information on each claimant needed to apply the agreed formula.¹⁴⁰

And the court can play a role in making this arrangement work by appointing the special master:

The benefits to the individual claimants, the defendants, and plaintiffs' counsel of the special master being formally appointed by a court are an enhanced version of the same benefits that each receives when a special master allocates the settlement fund but is not formally appointed by a court. That is, to the extent a lump-sum settlement fund allocation determined by a special master is viewed by the claimants as more "legitimate" and more "fair" than an allocation determined by plaintiffs' counsel, the claimants sense of the legitimacy and fairness of the allocation may be enhanced even further when the special master has been appointed by the court.¹⁴¹

All of this—like the managerial judging movement more generally—is intensely pragmatic rather than focused on first principles. In varying ways, that's been the nature of the debate about managerial judging for the last several decades. This Article is no place to try to resolve that debate. But if one gives weight to the pragmatic reasons for involving court adjuncts, it becomes apparent why Francis McGovern will be missed.

Even for academics, Professor McGovern offered special qualities. To demonstrate that, one need look no further than his article for the Yale Law School conference on judicial case management in 1985.¹⁴² This article built on his already substantial experience as a special master in complex litigation as part of what he conceived as "the first of a planned series of article designed to expand the analytic literature describing new case management techniques."¹⁴³ Along the way he exhibits a familiarity with a breathtaking range of scholarship, including works by Ronald Dworkin, Marc Galanter, Lon Fuller, Richard Abel, Richard Posner, Jerry Mashaw, and many others.¹⁴⁴ He recognizes that "procedures are rarely value-neutral, whether or not we believe that they should be."¹⁴⁵ He cautions that "overallegiance to traditional methods of dispute resolution can create substantial barriers to effective resolution of complex disputes,"¹⁴⁶ ending with a clarion call:

I argue that efforts to improve dispute resolution practices . . . should be supported. Flexibility should be given to decisionmakers who, looking at a lawsuit *ex ante*, determine

139. *See id.* at 1179 ("[T]he special master may be uniquely useful in expeditiously reconciling disagreements among the various plaintiffs' firms regarding which claim characteristics will be given how much weight in the categorization and valuation process.").

140. *See id.* at 1179–80.

141. *Id.* at 1181.

142. *See* Francis McGovern, *Toward a Functional Approach to Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986).

143. *Id.* at 441. Unfortunately, it does not appear that McGovern entirely realized this goal. For example, he cites an unpublished manuscript entitled "Measuring Procedural Change (1986)" that was seemingly never published. *See id.* at 452 n.48.

144. *See id.* at 440–56.

145. *Id.* at 450.

146. *Id.* at 491.

that reasonable men would agree that the net benefits from an alternative approach exceed those of the existing system. Armed with principles, methodology, exuberant skepticism, and an openness to public scrutiny, the movement toward managerial judging and alternative dispute resolution can assist our transition into the next era of the administration of justice.¹⁴⁷

Even those academics suspicious of more active judicial management should support McGovern's goal. That academic reaction explains to me why the academics mourn his passing.

VI

CONCLUSION—IN PRAISE OF PRAGMATISTS

Perhaps what the fixers manage to do for the judges and the lawyers should really be controlled and directed by legislators or other actors. To the extent the proceduralists end up being critical players in the mix, one might be tempted to agree with Jack Coffee: "Just as war is too important to be left to generals, civil procedure—with apologies to Clemanceau—is too important to be left to proceduralists."¹⁴⁸ Maybe one could add that mass tort litigation is too important to leave to the judges. After all, the inclination of contemporary civil procedure is toward judicial discretion.¹⁴⁹

But Francis McGovern would likely not sign onto this critique of the project to which he devoted a considerable portion of his life. Introducing a symposium issue in this publication over 30 years ago, he noted a need "to develop a cottage industry of experts."¹⁵⁰ As he noted a quarter century ago, we properly rely on "the amazingly adaptive and recuperative powers of the common-law tort system."¹⁵¹ That is where the fixers become critical. As Professor Rabin has noted, "the dominant tension in achieving a satisfactory resolution of mass tort cases has been—and continues to be—a tension between our continuing impulse to do *individual justice* and in a more modern compensation-driven conception of *collective justice*."¹⁵²

From this perspective, one may be inclined to agree with the rather rueful comment of Professor Issacharoff that when the Supreme Court in *Amchem* rejected the use of class action settlements to resolve the asbestos litigation

147. *Id.* at 492–93.

148. John Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 877 (1987).

149. See Richard Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003) (contrasting American procedural discretion with substantive discretion).

150. Francis McGovern, *Foreword* to 53 LAW & CONTEMP. PROBS., Autumn, 1990, at 1. In his biographical footnote, he noted that he had already served as "the special master who wrote the DDT allocation and distribution plan; one of three arbitrators who decided upon the implementing rules for the Manville Property damage claims resolution facility; an advisor to the bankruptcy court in the early stages of implementation of the Manville Personal Injury Settlement Trust; and the court-appointed expert who drafted the UNR and Amatex claims resolution facilities in their respective bankruptcy courts." *Id.* at n.*.

151. Francis McGovern, *Looking to the Future of Mass Torts*, 80 CORNELL L. REV. 1022, 1022 (1995).

152. Robert Rabin, *Continuing Tensions in the Resolution of Toxic Harm Cases*, 80 CORNELL L. REV. 1037, 1040 (1995).

morass, “the proceduralists won hands down.”¹⁵³ Turning to the rise of MDL mass tort litigation, consider Professor Gluck’s modulated approach:

[A]cademics who complain that MDLs diminish access to court should confront the argument that, without MDLs, there might be substantially less access. . . . [I]t is striking to see . . . even Judith Resnik, one of the foremost critics of nontraditional case management . . . recognizing the access-to-court benefits of the MDL.¹⁵⁴

As Professor Tidmarsh, has recently noted: “Multidistrict litigation resolves transferred cases at a fraction of the cost of individual litigation.”¹⁵⁵

But it is hard to believe that this can work without fixers like Francis McGovern, who was once dubbed “St. Francis of Asbestos.”¹⁵⁶ For the judges and the lawyers, he could make this process work. For the law professors, he could bring a nuanced eye to the multiple layers of theory and policy implicated. In many ways, he was unique. Though this Article does not probe deeply into the theoretical issues that deserve the sort of thorough inquiry not possible here, it does try to introduce the imperatives that made him such a critical player. We will all miss him.

153. Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1927 (2002); see also Deborah Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899 (2002) (raising questions about whether the Court’s decisions actually served the interests of most asbestos victims).

154. Gluck, *supra* note 104, at 1696.

155. Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 789 (2019).

156. The opening lines of this editorial were: “We’re not sure if trial lawyers have a patron saint. But no man has a better claim to the title than Duke University law professor Francis McGovern.” Editorial, *St. Francis of Asbestos*, WALL ST. J. (June 15, 2004), <https://www.wsj.com/articles/SB108725428858436927> [<https://perma.cc/SE4G-DS7B>].