COMPENSATION FOR MASS PRIVATE DELICTS: EVOLVING ROLES OF ADMINISTRATIVE, CRIMINAL, AND TORT LAW

*Jack B. Weinstein**

In this essay, the Honorable Judge Weinstein explores the "evolving role of administrative, criminal and tort law in compensating victims and deterring mass delicts." This essay, originally delivered as part of the Paul M. Van Arsdell Lecture, at the University of Illinois College of Law, begins by discussing the evolution of these three models in compensating victims of mass torts, and how recent developments have led these three models to overlap. Administrative law is primarily designed to prevent mass torts through regulation. Changes in discovery rules, as well as long-arm statutes, among other factors, have begun to favor "those seeking private remedies in the courts." The evolution of criminal law beyond the protection of the public can be seen through the increased use of fines and forfeitures in criminal proceedings, although this trend has the effect of reducing the amount available to pay victims restitution. In part III, Judge Weinstein provides recent examples of this trend towards overlap in federal district court as well as in administrative law. Parts IV and V describe the effects that increased use of criminal and administrative law in compensating victims of mass delicts, the trend towards limiting recovery in tort law, and the costs and benefits of these developments. He concludes by positing that tort law still plays a vital role in compensating victims of mass delicts. Finally, in part IV, Judge Weinstein suggests that tort law could be better integrated into the three model system, and how such an integrated administrative-criminal-tort system could help reduce duplicative litigation.

* *Senior Judge, Eastern District of New York.*

Thanks are due to Adam Zimmerman, Esq., Gregory S. Chernack, Esq., Edwin J. Wesely, Esq., Professor Norman Abrams, and Professor Victor J. Stone, for their assistance with this paper. Many others with specialized knowledge made helpful comments, some of which are referred to in the footnotes that follow.

I. INTRODUCTION

Four main divisions of the law are utilized in compelling compensation from, and in sometimes deterring, those whose delicts cause harm to masses of people: (1) criminal; (2) administrative; (3) civil, particularly tort; and (4) arbitration and mediation.[1] What the roles of these divisions should be; how, if at all, they should be integrated; what are the dangers and advantages of these branches working together and separately; and what are the paths of the future remain somewhat unclear. Already there is substantial evidence of a series of developing related tendencies that may call for greater cooperation among those responsible for each in compensating individuals. I will emphasize mass torts, but much of what I will say applies to individual cases.

This paper begins an exploration of the evolving role of administrative, criminal, and tort law in compensating victims and deterring mass delicts.[2] The fourth leg of arbitration and mediation (or alternate dispute resolution)—where most important disputes are now being decided—is beyond the scope of this article.[3] Part II traces the evolution of the three models and illustrates how their roles in compensating individuals have

1. Various devices are designed to keep cases out of the courts. An example is the "lemon laws" designed to give purchasers of automobiles and other machinery a right to exchange defective purchases, *see, e.g.*, Sarah Hale, *Mechanics Fuming Over Veto*, NEWSDAY, Feb. 25, 2000, at A5 (discussing veto of bill to permit return to manufacturers of defective emission-testing equipment similar to automobile lemon law) and of New York's extensive mediation services, *see* Deborah Hensler, *A Research Agenda: What We Need to Know About Court Connected ADR*, A.B.A. DISP. RESOL. MAG., Fall 1999, at 15; Samuel Estreicher & Kenneth J. Turnbull, *Class Actions and Arbitration*, 233 N.Y. L.J. 3 (2000); David Gladwell, *Modern Litigation Culture, the First Six Months of the Civil Justice Reforms in England and Wales*, 19 CIV. JUST. Q. 9 (2000); Relevant Civil Procedure Rules Adopted by British Judiciary, April 26, 1999 (Rule 1.4(2) (courts can encourage alternate dispute resolution where appropriate)); Sol Schreiber & Laura Weisenbach, *In re* Estate of Ferdinand E. Marcos Human Rights Litigation*: The Personal Account of the Role of the Special Master*, 31 LOY. L. REV. 475 (1998); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. DISP. RESOL. 241 (1996) [hereinafter Weinstein, *Benefits & Risks*]; Jack B. Weinstein, Preliminary Thoughts on Alternate Dispute Resolution (Apr. 2000) [hereinafter Weinstein, Preliminary Thoughts] (International Law Conference, Nicosia, Cyprus) (unpublished) (on file with the *University of Illinois Law Review*) and citations therein. Even the university disciplinary system may be used to keep grievances and financial claims out of the courts. *See* Letter from Professor Norman Abrams, to author (Oct. 9, 2000) (on file with the *University of Illinois Law Review*).

For a chart suggesting the relatively small proportion of possible compensation cases that go through the civil court system to trial, see Jack B. Weinstein, *The Restatement of Torts and the Courts*, 54 VAND. L. REV. 1439, 1445 (2001) [hereinafter Weinstein, *Restatement*].

2. This development is not new. From the earliest days of the modern derivative suit and class action, a strong relationship between the plaintiffs' bar and the government developed through the receipt from the latter of information about acts of putative defendants that might provide a basis for private mass actions. In the thirties and since, for example, much of the private securities litigation depended upon reports required by the S.E.C. and investigations by it, Congress and the Department of Justice, and prosecutions based on violations of federal and state securities acts. *E.g.*, DAVID RATNER & THOMAS LEE HAZEN, SECURITIES REGULATION 12 (5th ed. 1966).

3. For my views of Alternate Dispute Resolution, see, e.g., Weinstein, *Benefits and Risks*, *supra* note 1; Weinstein, Preliminary Thoughts, *supra* note 1; see also, e.g., Emmanuel Gaillard, *The New ADR Rules of the International Chamber of Commerce*, N.Y. L.J., Oct. 10, 2001, at 3 (ICC Court of Arbitration expansion as "the world's pre-eminent arbitration institution"). As applied to employer-employee disputes, ADR may be substantially tilting the law away from protections of workers.

begun to overlap. Part III provides examples of these trends in federal district court and administrative law. Part IV highlights how increased use of compensation in criminal and administrative law has been accompanied by curbs to limit recovery in the tort system. Part V describes the costs and benefits of these developments—concluding that tort law still plays a vital role in ensuring a more "democratic" method of compensation. Part VI suggests how tort law can be better integrated into this multi-armed system to ensure more effective remedies for mass delicts.

The overlapping of these enforcement arms raises questions about what their special roles ought to be, individually and cooperatively. We can think of an integrated approach as a "French model"[4] because it mimics some aspects of the continental system by fusing administrative, criminal, and tort proceedings into a single or related actions.

In the criminal law there has been an expansion of, for example, fraud actions, racketeer influenced (RICO) actions,[5] increased environmental and consumer protection prosecutions,[6] and criminal enforcement

4. *E.g.*, F. H. LAWSON ET AL., AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 200 (3d ed. 1967)

> If criminal proceedings have been initiated, the victim may elect to work out his civil remedies in a separate civil action before the civil courts, or to intervene as civil party in the criminal proceedings. In the former case the civil action must be stayed while the penal action is being prosecuted, with a view to preventing contradictory findings of fact. In the latter case the penal and civil actions are considered simultaneously by the criminal court, which may both punish the wrongdoer in accordance with the criminal law and indemnify the victim in accordance with the civil law. A person who has suffered loss as a result of the criminal act of another has nearly always a civil remedy, because fault is necessarily present. Before intervening in penal proceedings, however, the victim must consider the prospects of success in the penal action, since, if the case is one within the competence of the *tribunal de police* or the *tribunal correctionnel*, civil damages will not be awarded unless the penal action succeeds. If it fails, for example because the prosecution has not proved *mens rea*, civil damages will not be awarded and a fresh civil action would have to follow. It is otherwise in cases coming before the *cour d'assises*, where, if negligence is proved, civil damages may be awarded in the absence of proof of *mens rea*.

Id. (footnotes omitted) (emphasis in original). Stanley S. Arkin, *Commencement of Criminal Actions—A More Global View*, N.Y. L.J., Oct. 12, 2000, at 3 ("In France, any person or legal entity that claims to have been harmed by a violation of law may bring a civil action to obtain damages. . . . A claimed victim also has the right, pursuant to the Criminal Code, to bring or participate in, a public criminal action."). Some American states permit private persons to start a criminal action. The federal statutes require the prosecution to commence a criminal action.

5. 18 U.S.C.A. §§ 1961–1968 (West Supp. 2000). The RICO statute creates a private cause of action based on the criminal violation. A civil suit by the government can provide a wide range of remedies including injunction and disgorgement of profits. The stigma of being labeled a "racketeer" should not induce settlement of the civil and criminal actions. *E.g.*, Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316 (E.D.N.Y. 2000); Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 74 F. Supp. 2d 221 (E.D.N.Y. 1999); Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139 (E.D.N.Y. 1999); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345 (E.D.N.Y. 2000); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560 (E.D.N.Y. 1999); Simon v. Philip Morris, Inc., 86 F. Supp. 2d 95 (E.D.N.Y. 2000); United States v. Philip Morris, Inc., 116 F. Supp. 2d 131, 155 (D.D.C. 2000) (dismissing some causes of action but retaining RICO–based causes).

6. *E.g.*, 18 U.S.C. § 3063 (1994) (criminal powers of Environmental Protection Agency); 15 U.S.C. § 1644 (1994) (consumer credit); 18 U.S.C. § 1365 (1994 & Supp. IV 1998) (tampering with consumer products).

of orders requiring support for children[7]—many of which might have been brought as private tort actions. Much of this substantive expansion has taken place at the federal level. It has required increased resources for the federal courts and federal enforcement agencies. Attempts to move cases from the criminal courts to civil courts and administrative agencies have not been particularly successful partly because criminal law expansion and incarceration has been embraced by politics.[8] Some advances in decriminalization by the creation of drug courts have been valuable. In the area of consumer fraud, a shift from criminal to private civil prosecutions has been marked.[9]

The criminal law has, however, begun to focus more closely on the interests of victims.[10] It now provides them with a right to be heard at sentencing.[11] Strong provisions require restitution for monetary losses.[12]

7. *E.g.*, Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1994 & Supp. IV 1998); Catherine Wimberly, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single Mother Families*, 53 STAN. L. REV. 729 (2000) (describing relation of criminal law and private litigation in enforcing child support orders).

8. *See* NORMAN ABRAMS, ADMINISTRATIVE PROCESS ALTERNATIVES TO THE CRIMINAL PROCESS 3–10 (1979).

9. *See, e.g.*, Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., No. 98 CV 3287 (E.D.N.Y. Oct. 4, 2001) (Memorandum and Order).

10. *E.g.*, 18 U.S.C. § 2264 (1994) (domestic violence); *id.* § 2264 (stalking); 18 U.S.C.A. § 3555 (West Supp. 2000) (notice to victims).

11. 18 U.S.C. § 3510 (1994 & Supp. IV 1998).

12. *E.g.*, *id.* § 3556 (order of restitution); *id.* § 3662 (order of restitution); *id.* § 3663a (mandatory restitution to victims of certain crimes); *id.* § 3664 (procedure for issuance and enforcement of order of restitution); 11 U.S.C. § 523 (nondischargeability in bankruptcy); 21 U.S.C. § 853(q) (Supp. II 1996) (cleanup costs associated with methamphetamine manufacturing); 42 U.S.C. § 1316 (1994) (public assistance); 42 U.S.C. § 2210 nt (radiation exposure compensation); U.S. SENTENCING GUIDELINES MANUAL §§ 5E1.1, 8B.1.1. Total restitution ordered in fiscal year 1999 was $1,827,516,440. *See* Memorandum from Sentencing Commission to the author (Oct. 11, 2000) (on file with author).

Restitution is payable before a fine. U.S. SENTENCING GUIDELINES MANUAL § 5E1.1(c). If there is no identifiable victim, the court may order "community restitution." *Id*. § 5E1.1(d). It may include services and be payable over time. *Id*. § 5E1.1(e)–(f). The remedy is particularly useful against organizations where incarceration is not possible. *See id.* § 8B1.1; United States v. All Star Indus., 962 F.2d 465 (5th Cir. 1992) (corporation ordered to pay restitution for losses that occurred more than five years before return of indictment).

An order of restitution is a lien in favor of the United States on all property and rights to property of the person fined as if it were liability for unpaid taxes. *See generally* 18 U.S.C.A. § 3613(c) (West Supp. 2000). The lien arises on the entry of judgment and continues until satisfied, remitted or set aside, or for twenty years plus the period of incarceration or upon the death of the defendant. *See id.* § 3613(b); *see also* OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2000).

While the terms are sometimes used in this paper interchangeably, "restitution" is designed to cover the losses of a victim, and goes to the victim, while "disgorgement" is intended to take back gains obtained by the perpetrator in violation of law rather than reimbursing the victim for loss. Forfeitures attendant upon criminal acts such as drug trafficking are partly a matter of disgorgement, but primarily one of the punishments through loss of assets such as vehicles that were used in transportation. *See* 21 U.S.C. § 881 (1994) (for features in drug cases). In a sense, such forfeitures are a form of "restitution" to the public at large for the general ravages of drugs. This complex area is beyond the scope of this paper.

For a discussion of the technical procedural problems in providing restitution under the Sentencing Guidelines, see W. Royal Furgeson Jr. et al., *The Perplexing Problem with Criminal Monetary Penalties in Federal Courts*, 19 REV. LITIG. 167 (2000).

In the administrative area, we have created powerful agencies such as the Securities and Exchange Commission (SEC),[13] the Food and Drug Administration (FDA),[14] the Environmental Protection Agency (EPA),[15]

13. 15 U.S.C. § 78(c) (1994).

14. 21 U.S.C. § 321 (1994 & Supp. IV 1998).

15. 42 U.S.C.A. § 7607 (West Supp. 2000) (administrative provisions and air pollution); Letter from Eric Schaeffer, Director, Office of Regulatory Enforcement of EPA, to author (Oct. 2, 2000) (on file with author). Mr. Schaeffer, illustrating the complexity of administrative restitution and disgorgement policies, wrote:

. . . .

Brief Overview of EPA's "Restitution-Related" Enforcement Authorities:

Most of the federal environmental laws authorize EPA to initiate a range of enforcement responses to environmental noncompliance. These responses include criminal, civil judicial, and civil administrative actions. In an average year, EPA initiates approximately ten times the number of administrative enforcement actions as it does judicial actions. Criminal or civil judicial actions are typically brought to address intentional egregious, or exceptionally complicated actions, or where significant injunctive relief is needed. With rare exceptions, EPA seeks to recover any economic benefit of noncompliance (EBN) realized as a result of the violations in all enforcement actions.

EPA recoups government costs for hazardous substance clean-ups through administrative or judicial cost recovery actions under its Comprehensive Environmental Response Act (CERCLA or Superfund) and Oil Pollution Act (OPA) authorities. We can also order Potentially Responsible Parties (PRPs) to conduct the required clean-up themselves. CERCLA and the OPA further provide for authorized "Natural Resource Trustees" to conduct natural resource damages (NRD) assessments as a means of evaluating the need for restoring the public's natural resources following releases of hazardous substances into the environment. While EPA is not a Natural Resource Trustee, we coordinate with the Trustees in the context of NRD assessments, investigations, and planning for response actions.

Recovery of Economic Benefit of Noncompliance in EPA Enforcement Actions:

The recapture of a violator's EBN is the cornerstone of EPA's civil penalty program to deter and address violations of environmental law. It is assumed that most regulated entities will comply with the law when the costs of noncompliance exceed the benefits. Penalties that recoup the EBN realized by the violators serve to "level the playing field" and ensure that no company obtains a competitive edge from its noncompliance.

Many of the environmental statutes administered by EPA explicitly require federal courts, in judicial cases, and the EPA Administrator or her delegatees, in administrative actions, to consider a violator's EBN in imposing civil penalties. Examples include the Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Clean Air Act (CAA) and the [Emergency] Planning and Community Right-to-Know Act (EPCRA). While EBN is not specifically identified as a penalty factor in other statutes, e.g., the Resource Conversation and Recovery Act (RCRA), the Toxic Substances Control Act (TSCA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), in practice, both federal judges and EPA's Administrative Law Judges (ALJs) routinely consider the EBN to the violator in assessing appropriate penalties. This amount serves as a "floor" to which a "gravity" penalty component reflecting the seriousness and/or willfulness of the violation is added to ensure an adequate deterrent impact.

EPA Penalty Policies and Guidelines:

As discussed above, most of the federal environmental laws provide for a range of possible enforcement responses and provide EPA with the discretion to select the most effective enforcement response for each given instance of noncompliance. EPA issues Enforcement Response Policies (ERPs) to guide decision as to whether to seek penalties in specific cases and, if so, the appropriate forum in which to seek them, i.e., in the U.S. Courts, or before EPA's ALJs. We have also issued many civil penalty policies to ensure that adequate and consistent penalties are calculated for comparable violations. Some of these policies establish general guidelines on how to calculate civil penalties, while others are statute-specific penalty policies for individual media programs. EPA may seek stakeholder input when developing these policies, particularly from our State partners who typically serve as co-regulators under the environmental laws.

EPA ensures that administratively imposed penalties and settlements of civil penalty actions are consistent with our policies. Where compelling equitable circumstances make the application of a particular policy inappropriate or unfair, however, EPA will depart from the policy in an effort to match the penalty to the facts of the case. This approach reflects the status of our penalty policies as non-binding guidance rather than formal rules. For the same reason, the Agency's

the Consumer Safety Products Commission (CPSC),[16] the Occupational Safety and Health Administration (OSHA),[17] the Equal Opportunity Employment Commission (EEOC),[18] and the Department of Transportation (DOT).[19] In contrast, the powers of the now-defunct Interstate Commerce Commission (ICC) were limited primarily to controlling contractual relationships between shippers and carriers,[20] but included some aspects of safe operation of railroads and trucks. The new agencies utilize orders for recalls of dangerous products, and seek to deter by fines, injunctions, and orders for disgorgement and restitution.[21] Detailed product safety regulations are now a chief method of protecting the public directly by controlling risks.[22]

The protective blanket of administrative agencies currently covers the entire population in its day-to-day activities. These administrative agencies increasingly use disgorgement, mediation, settlement, and other techniques to compel malefactors to provide compensation to individuals who have been harmed.[23] Criminal and civil suits may be used by these agencies in conjunction with the more usual administrative proceedings.[24]

Consolidated Rules of Practice for administrative actions (40 CFR Part 22; http://www.epa.gov/oalj/crop.pdf) requires EPA's ALJs to "consider" our penalty policies, but they do not bind them. *See* 40 CFR § 22.27(b).

When EPA identifies cases that are appropriate for civil judicial or criminal enforcement, we refer them to the U.S. Department of Justice (DOJ) and/or the appropriate United States Attorneys for filing in the U.S. District Courts. In most judicial cases, the DOJ or U.S. Attorneys will typically request the statutory maximum penalty in the complaint, but may consult the applicable EPA penalty policies for guidance in the context of settlement negotiations.

16. 15 U.S.C. § 2053; *see also Note on Legislation, CPSC Seeks Introduction of Legislation Calling for Study of Enforcement Changes*, 28 Prod. Safety & Liab. Rep. (BNA) 930 (Oct 9, 2000).

17. 29 U.S.C. §§ 651–678.

18. 42 U.S.C. § 2000e-4.

19. 49 U.S.C. § 102; 49 U.S.C. § 30127 (air bags).

20. *See* 49 U.S.C. § 307 (transfer of ICC jurisdiction to Department of Transportation).

21. While criminal law actions seem quite distinct from administrative law in this way, the former has many of the characteristics of the latter in its administration. For one thing, the Department of Justice uses internal rule making to control prosecutors and provides some rudimentary guidelines to U.S. Attorneys on restitution. *See generally* Norman Abrams, *Exploring Limits on the Use of Administrative Agencies in the Felony Criminal Process*, 33 ISR. L. REV. 539 (1999).

22. *See* AM. LAW INST., 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 83 (1991).

23. The expansion of the federal criminal law and administrative remedies tends to shift power to Washington, D.C., and away from state regulation of tort law. This development is contrary to the tendency by the conservative members of the Supreme Court to shore up states' rights at the expense of the federal government and its laws through broader interpretations of the Ninth Amendment (rights retained by the people), Tenth Amendment (powers not delegated reserved), and the Eleventh Amendment (no federal judicial power permitting certain suits against the states) as well as limits on Section 5 of the Fourteenth Amendment (power of Congress to enforce the substantive terms of the Amendment). *E.g.*, United States v. Morrison, 529 U.S. 598 (2000) (striking down Violence Against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that ADEA could not abrogate states' Eleventh Amendment immunity); Alden v. Maine, 527 U.S. 706 (1999) (Congress cannot subject state to suit in state court without its consent); Printz v. United States, 521 U.S. 898 (1997); Mitchell S. Lustig, *Rehnquist Court Redefines the Commerce Clause*, N.Y. L.J., Mar. 28, 2000, at 3.

24. *See* United States v. Winkler, 817 F. Supp. 1530, 1537 (D. Kan. 1993) (restitution amount in criminal case set at sum determined in civil suit by the Federal Deposit Insurance Corporation; the amount of restitution was to be credited to the civil judgment).

Parens patriae suits by state attorneys general,[25] as in the recent tobacco cases, can be categorized as within this administrative zone.[26] Some are based on tort theory and employ private counsel to conduct litigation.

In the civil area, there has been a vast expansion in the use of remedies to deal with privately induced environmental problems and those caused by pharmaceutical, chemical, and other industries.[27] The class action is the most dramatic of these devices because it permits the aggregation of large numbers of claims that otherwise would not have been prosecuted; most of those who have been injured are not required to take any remedial action on their own behalf. Other less obvious forms serve the same purpose: for example, advertising and contacts with unions have enabled some lawyers to obtain tens of thousands of clients, permitting them to bring consolidated civil actions, or settle without trials on a matrix basis huge numbers of claims in such matters as asbestos, breast implants, and diethylstilbestrol (DES).[28] The individual entrepreneurship of lawyers who have become rich and powerful as a result of these massive litigations has excited the approbation of some and created

25. The New York Attorney General also frequently handles "cases in which the issues of restitution and disgorgement figure prominently in the relief." His authority to do so in a parens patriae capacity flows from New York's Executive Law:

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply in the name of the people of the state of New York, to the supreme court of the state of New York . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, *directing restitution and damages* and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of [Penal Law § 440 or General Business Law § 130] . . . and the court may award the relief applied for or so much thereof as it may deem proper . . . ."

N.Y. EXEC. LAW § 63(12) (1993) (emphasis added); Letter from Attorney General of New York, to author (Sept. 12, 2000) (on file with author).

26. *See* Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Partiae Suit and Intervention*, 74 TUL. L. REV. 1919, 1921 (2000). City Corporation Counsel have brought suits against such industries as the gun and paint (lead) industries. *Id.*; *see also* David J. Kaufman, *Franchise Scam Halted by Attorney General's Office*, N.Y. L.J., Aug. 24, 2000, at 3.

27. *See generally* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995) [hereinafter WEINSTEIN, INDIVIDUAL JUSTICE]; Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World, Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145 (2001) [hereinafter Weinstein, *Mass Tort*] (examining jurisdiction and conflict of law issues in mass torts); Jack B. Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833, 834 (1997); Jack B. Weinstein, *Compensating Large Numbers of People For Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 166 (2001) [hereinafter Weinstein, *Compensating*] (discussing various approaches to compensation); Weinstein, *Restatement*, *supra* note 1 (exploring impact of the Restatement in the Courts); *see also* Howard M. Erickson, *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, 41 (2000) (combining public and private lawyering enhances deterrence).

28. It has been suggested that the emphasis on aggregate settlements to dispose of these cases—often without individual client input—should be discouraged by ethical rules. *See* Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 153–55 (1999). I cannot agree that the ethical dangers (which can be guarded against) outweigh the advantages in providing remedies to those wronged.

antipathy in others. Despite the increased litigation, the number of cases tried before juries has been steadily decreasing in the federal courts.[29]

Even the federal government strongly relies on private attorneys in prosecutions of federal government claims through increased emphasis on "whistle blower" qui tam actions. [30] Such suits can be categorized as private civil litigations although the Attorney General can take charge of them. Another alternative to class actions allows private plaintiffs to rely on an unlawful practice as a basis for injunctive and restitutionary relief even when those bringing suit have not themselves been injured.[31]

The result of these developments is that we now have three separate but overlapping branches of law (four, if we include alternate dispute resolution) attempting to perform similar functions: the compensation of victims and deterrence of future bad acts. In some ways this development is a return to an earlier time, in the long-ago past of criminal and tort law. As Holmes pointed out, early tort law was "directed only to intentional wrongs," and these actions "had a criminal as well as a civil aspect [in that they] had the double object of satisfying the private party for his loss, and the king for the breach of peace."[32]

29. *See* Letter of Administrative Office of United States Courts, to Chief Justice 3–5 (Sept. 27, 2000). In 1980 the proportion of federal civil cases terminated by trial was nine percent, but it had declined to about three percent by 1999; total jury trials decreased by nineteen percent between 1982 and 1999. In 1992 the proportion of criminal cases terminated by trial was twenty-two percent; in 1999 it was eleven percent. *Id.* Even eleven percent seems high. In my court it is far lower and, of course, this figure does not take into account the large number of cases in which prosecution is declined.

30. The technique goes back to Civil War fraud prosecutions, recently encouraged by statutory amendment. *E.g.*, Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000), *rev'g*, United States ex rel. Stevens v. Vt. Agency of Natural Res., 162 F.3d 195, 208 (2d Cir. 1998) (Weinstein, J., dissenting); Kurt Eichenwald, *Big Hospital Manager to Pay a Fraud Settlement of $95 Million*, N.Y. TIMES, Oct 3, 2000, at A21 (practice a subject of widespread criminal and civil investigations of hospital industry; suits were "filed under the federal whistle-blower laws.").

The result of this development is related to the privatization issue. Government is increasingly relying on the private sector to carry on its governmental duties. *See* Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859 (2000). The examples range from privately operated schools and prisons to the use of private collection agencies and attorneys to collect loan debts. When I was County Attorney of Nassau County my legal staff did all the legal work of all county departments; now staff has been reduced and many of the more difficult litigations are handled by private litigators for a fee. As in the case of qui tam prosecutions, the line between public-governmental and private activities has been blurred. The government also uses private attorneys to collect debts. On the need for holding fees down in such matters, see Mark A. Behrens & Donald J. Kochan, *Let the Sunshine in: The Need for Open Competitive Bidding in Government Retention of Private Legal Services*, Prod. Safety & Liab. Rep. (BNA), at 915 (Oct. 2, 2000); *cf. In re* Auction Houses Antitrust Litigation, 196 F.R.D. 444 (S.D.N.Y. 2000) (auction to obtain less expensive representative of class, considerations pro and con and authorities).

31. *See* Brad Seligman, *The California Alternative to Class Action: The Unfair Competition Law*, CLASS ACTION LITIG. REP. 252 (2000); *see also* Bergeron v. Philip Morris, Inc., 100 F. Supp. 2d 164, 171–72 (E.D.N.Y. 2000) (describing the New York and Massachusetts consumer protection statutes).

32. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 39 (Dover Publ'ns 1991) (1881); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 374 (2d ed. 1936) ("The modern distinction between crime and tort is . . . one of those classifications which it is futile to press upon medieval law."). The question of what the basic rationale of the criminal law is may not be free from dispute. *E.g.*, George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275, 287 (1988).

The trend to compensate through governmental litigation marks a departure for the U.S. civil system. While primary reliance on the government to compensate victims has been a commonplace feature of the "top-down" justice systems in Europe, South America, and the Far East,[33] the U.S. system has traditionally followed a more "bottom-up" approach.[34] Individuals, through their private attorneys, defend or prosecute to enforce their own rights against corporations and other malefactors. Providing victims with the power to obtain redress for their own injuries reflects the attitude of American society that such a system is more democratic (more responsive to victims needs) and more efficient (more reliant upon market forces and private initiative to bring about more complete and effective remedies).

A striking example of this interplay followed the September 11, 2001, attack on the Pentagon and World Trade Center. In view of the resulting thousands of deaths and injuries and the likelihood of tens of thousands of suits in state and federal court with tens of billions of dollars in potential recoveries, Congress enacted the Air Transportation Safety and System Stabilization Act.[35] It provided for an administrative agency (overseen by a special master[36]) to hear claims against the airlines (and possibly others) and provide swift compensation.[37] An attempt was also made to consolidate all private actions in the U.S. District Court for the Southern District of New York with possibly some cooperation between the courts and the Special Master.[38] The concept of the Act ap-

33. *Cf.* Per Henrick Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805, 811 (1997) ("general courts have been afforded a restricted role as guarantors of the rights of private citizens"). *See generally* Papers and Oral Discussion of Conference on Comparative Procedure in Florence, Italy, 1997, *in* 45 AM. J. COMP. L. (1997) *and in* Weinstein, *Compensating*, *supra* note 27.

34. *See* Weinstein, *Compensating*, *supra* note 27 (international conference on comparative procedure, summer 2000).

35. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (updating 49 U.S.C. § 40101); *see also* 147 CONG. REC. E1764-01 (daily ed. Oct. 2, 2001) (explanation and criticism of the Act by Hon. Henry A. Waxman).

36. Air Transportation Safety and System Stabilization Act §§ 402(8), 404(a), Pub. L. No. 107-42, 115 Stat. 230, 237 (2001) (definition and duties of special master).

37. *Id.* § 403(b)(3) (decision within 120 days of filing of claim).

38. For a preliminary discussion of the Act, which must be modified because of technical problems beyond the scope of this article, see, for example, Norman B. Arnoff & Sue C. Jacobs, *Terrorism's Effects and Insurance Coverage*, N.Y. L.J., Oct. 9, 2001, at 3 (urging prompt mediation); James D. Tussing & Stewart B. Herman, *Government Acts to Bail Out U.S. Airlines*, N.Y. L.J., Oct. 4, 2001, at 3; Karen Friefeld, *Dilemma for Families: Quick Claims or Court?*, NEWSDAY, Oct. 4, 2001, at A30; Lizette Alvarez, *An Airline Bailout: Senate Backs $15 Billion for Industry and Sets Up Victims' Fund*, N.Y. TIMES, Sept. 22, 2001, at A1; Jim Dwyer & Diana B. Henriques, *Money for Families of Attack Victims Could Vary Widely*, N.Y. TIMES, Sept. 20, 2001, at A1; Jenna Greene, *Insurance Experts Say Some Disputes Are Likely*, NAT'L L.J., Sept. 24, 2001, at A11; Diana B. Henriques & David Barstow, *Fund for Victims' Families Already Proves Sore Point*, N.Y. TIMES, Oct. 1, 2001, at A1; Sarah Sparks & Milo Geyelin, *Experts Offer Ways to Manage Terror Lawsuits*, WALL ST. J., Sept. 25, 2001, at A10; Seth Stern, *Who Pays the Damages for Sept. 11?*, CHRISTIAN SCI. MONITOR, Sept. 27, 2001, at 4; Ruth Bryna Cohen, *Most Lawyers Agree with Moratorium on Filing over Terrorism*, LEGAL INTELLIGENCER, *at* http://www.law.com (last visited Sept. 19, 2001). Coordination of civil cases with criminal prosecutions may involve political consequences. *See* David Johnston & Benjamin Weiser, *Ashcroft Is*

pears to be based partly on a number of current federal administrative agencies.[39]

II. THE EVOLUTION OF "COMPENSATION"

In times past, with rudiments today, we essentially relied upon self-help to achieve compensation. This lawless procedure, with its inclination to invite new retaliations was slowly supplanted by religious and state regulation. These controls attempted to provide relief and protect the public with a more neutral process.

English and American models relied on growing governmental institutions such as professional police forces, criminal judicial systems, and prisons to punish and rehabilitate. In a recent development, criminal sentencing now emphasizes the rights of victims,[40] restitution,[41] and the seizing of assets through forfeiture,[42] as well as incarceration.

The basic goal of the criminal law is protection of the state and public rather than compensation of individuals. Heavy fines and forfeitures may in fact reduce the assets of defendants that are available to pay victims either through private litigation or restitution. Nevertheless, in criminal proceedings, the current tendency favors compensation through restitution of those injured by a crime.[43] A form of restitution without judicial intervention may take place even in the criminal investigative

Centralizing Control over the Prosecution and Prevention of Terrorism, N.Y. TIMES, Oct. 10, 2001, at B9 (shift of control from U.S. Attorney General in Southern District of New York to Washington, D.C.).

39. *See, e.g.*, JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 48–49 (1995) (discussing consolidation of suits arising from World Trade Center disaster of 1993); *id.* at 123, 308–10 (black lung, atomic energy, and children's vaccines).

40. Individual and, whenever possible, personal contact with victims is recommended. While the methods for implementing *AG Guidelines* provisions are relatively straightforward in cases where the number of victims is limited, they can present challenges as the number of victims grows into the hundreds and thousands. In carrying out their obligations under the *AG guidelines* in cases with large numbers of victims, responsible officials should use the means, given the circumstances, most likely to achieve actual contact with and notice to victims.

DEP'T OF JUSTICE DEPUTY ATT'Y GEN'S VICTIM'S RIGHTS WORKING GROUP, DEP'T OF JUSTICE, ATT'Y GEN GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 11 (2000); *see also, e.g.*, United States v. Blake, 89 F. Supp. 2d 328, 347–48 (E.D.N.Y. 2000); Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1984); Christopher R. Goddu, Comment, *Victims' "Rights" or a Fair Trial Wronged*, 41 BUFF. L. REV. 245 (1993); *cf.* Scott P. Boylan, *Coffee from a Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution*, 4 U.C. DAVIS J. INT'L L. & POLICY 103 (1998) (describing Russian system in which victims can actively participate at trial and on appeal).

41. *See* 18 U.S.C. § 3553(a)(7) (Supp. I 1995) (requiring court to consider "the need to provide restitution to any victims of the offense" in determining sentence); U.S. SENTENCING GUIDELINES MANUAL § 5E1.1 (1998). Producers and sellers of illegal drugs would be subject to civil suits from those they harm under legislation passed by the United States House on October 9, 2000. *See* N.Y. L.J., Oct. 11, 2000, at 1.

42. *E.g.*, 18 U.S.C. § 982 (1994).

43. *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5 E1.1 (1998); *Blake*, 89 F. Supp. 2d at 351–52; United States v. Cheung, 952 F. Supp. 148, 150–51 (E.D.N.Y.1997); United States v. Ferranti, 928 F. Supp. 206, 220–23 (E.D.N.Y.1996), *aff'd*, 135 F.3d 116 (2d Cir.), *cert. denied*, 523 U.S. 1096 (1998).

stage when the criminal realizes the game is up and pays back the victim "voluntarily."[44]

Administrative agencies serve a function similar to that of criminal law.[45] Regulation through continuous supervision and intervention of the

44. *Cf.* Letter from Lawrence E. Maxwell, Inspector in Charge, U.S. Postal Inspection Service, to author (Oct. 16, 2000) (on file with the *University of Illinois Law Review*):

> [T]he Postal Inspection Service enforces approximately 200 federal statutes in protecting the Nation's mail system. Restitution is utilized primarily in mail fraud investigations (18 U.S.C. § 1341), mail theft (18 U.S.C. § 1708) and various other crimes in which the Postal Service is victimized financially. These include contract frauds, embezzlements, and fraudulent workmen's compensation claims. The Postal Service also receives criminal fines and civil penalties for violations of a number of statutes.
>
> First and foremost, the Inspection Service, as a law enforcement agency must and does seek to restore property to victims of these crimes, whether they are consumers, businesses, or other government victims. To do otherwise would not only be wrong, but would invite legislative restrictions on enforcement policies. In civil cases, our restitution strategy relies largely on a variety of statutes. For example, under the Program Fraud Civil Remedies Act (PFCRA) we can seek up to twice the amount of the loss plus penalties. In these types of cases, we weigh the seriousness of the act to the respondent's ability to pay. Other factors, i.e., the breadth of the fraud and deterrence value the impositions of penalties have also enter into the calculus. When cases are developed by investigators, the Agency first evaluates the underlying circumstances. Our recommendations are then presented to the Department of Justice (DOJ) who decides if the case will proceed through the judicial system. The Act also allows us to take action even if the agency did not incur a loss, but other conditions of the Act are met.
>
> Under the False Claims Act, a similar process is employed. One major difference, however, is the fact the government can seek treble damages and penalties up to $10,000 per occurrence.
>
> With the recent passage of the Civil Asset Forfeiture Reform Act (CAFRA), certain provisions enhance our ability to recover money and property in the fraud arena. We now have the authority to forfeit the proceeds of mail fraud schemes without employing a money laundering analysis. More importantly, CAFRA also provides a mechanism to restore the property to victims, where heretofore this process was difficult if not impossible in the wide range of cases we investigate.
>
> Although seemingly a logical and practical tool, formulating restitution strategies has not been as easy as we would hope. Some of the problems we encounter include coordination among civil and criminal prosecutors, our own General Counsel's Office, and coordination among other agencies involved in the task force operation. For example, whenever a complex criminal prosecution is in progress, the prosecutor is reluctant to invite a coordinated civil or administrative forfeiture, or some other administrative action without a complete bifurcation. One reason for this is the ever present discovery issues, which remain a concern for most prosecutors of the criminal aspects of the case. This issue is a continuing topic at DOJ Forfeiture Component Meetings as well as LECC conferences. One remedy to alleviate this concern was provided by CAFRA, in that civil judicial forfeiture can be stayed during the pendency of the criminal case.
>
> Coordinating the civil and criminal prosecutions not only allows the most effective strategical approach by the government, but also presents the most complete picture of the loss and the assets available for distribution to victims. Ultimately, a coordinated strategy provides the best opportunities for victim recoveries, while enabling the court to determine the appropriate penalty for the crime.
>
> The Inspection Service also is awarded criminal fines in some of its cases. Fines are intended not only as a punishment to the offender, but they help offset the investigative costs to the agency. However, the government should not benefit at the expense of victims. Every effort must be made to identify victims and their losses.
>
> I do not believe it is necessary to legislate greater cooperation amongst all interested parties in a case. This cooperation though should be strongly encouraged by the Department of Justice, United States Attorneys, and the courts.

45. *See* ABRAMS, *supra* note 8, at 4 (emphasis in original):

> What has not been generally observed is that the criminal process is a hybrid that *in its totality* is really an administrative process—that is, a system of governmental activity directly affecting the individual, one component of which happens to use the judiciary as a fact-finder, law-applier and sanction imposer.

Id.

government to prevent damages to the general population is the focus. The shift to administrative agencies with broad powers over pharmaceuticals, air and water, automobiles, discrimination, safety in the workplace, and consumer products and the like represents a tidal movement designed to protect the entire population.[46] These developments have considerably increased putative plaintiffs' protections.[47]

In addition to compensation of private persons and deterrence—now goals also of civil and criminal litigation—administrative law is designed primarily to prevent future harms to the general population by regulation. For example, it is much more effective in protecting those on the highways to regulate tires, air bags, instability, and the like *before* accidents occur by requiring safe construction through detailed standards, than by deterring dangerous design through the threat of future damage awards or fines.[48] The work of agencies such as the Nuclear Regulatory Commission is an extreme example of the need to regulate rather than solely to deter.[49]

46. On balance, the huge improvements in auto safety are due to: (1) statutory and detailed administrative regulation, and oversight of manufacturers by the DOT's requirement of accident reporting for recall purposes; (2) public perceptions of the need for safe cars when they buy new vehicles; and (3) new technological improvements. Recoveries in civil suits as a protective deterrent device are probably less effective than any of the first three. *See generally* Robert L. Rabin, *Keynote Paper: Reassessing Regulatory Compliance*, 88 GEO. L. J. 2049, 2070 (2000).

47. There has been a related expansion of the right to sue through whittling away of standing and other limiting doctrines preventing suits in the public interest that protect in environmental pollution matters. *E.g.*, Ara B. Gershengorn, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1074–75 (2000); *see also* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 685–90 (1973); Marcia Cole, *Campaign 2000 Focus Is "Judicial Activism"*, NAT'L L.J., Aug. 21, 2000, at A1 (the evolution of the standing doctrine has become "a major barrier against environmental enforcement efforts); Martin A. Schwartz, *Federal Rights Without Remedies*, N.Y. L.J., Dec. 19, 2000, at 3 (increasing Eleventh Amendment limitations on federal rights of action); *but see* Friends of Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167, 189 (2000) (reasonable environmental concerns sufficient to establish injury-in-fact); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109–10 (1998).

48. *E.g.*, *Congress to Expedite Passage of Tread Bill to Enhance NHTSA Power, Consumer Safety*, Prod. Safety & Liab. Rep. (BNA), at 859 (Sept. 18, 2000).

49. *See* Letter from Stephen G. Burns, Acting Gen. Counsel of Nuclear Regulatory Commission, to author (Sept. 28, 2000):

> [I]t is well-known that the civilian uses of radioactive materials, most notably in power plants, do pose the risk of injury to large numbers of people. The risk is quite small, but it is nonetheless not zero. . . . [I]n the event of a major offsite release of radiation at a nuclear power plant in the United States, all claims of radiological injury from the plant (other than those claims covered by workmen's compensation statutes) would be handled under the Price-Anderson Act, which is found at section 170 of the Atomic Energy Act of 1954, as amended (Price-Anderson is codified at 42 U.S.C. § 2210 and in definitions in 42 U.S.C. § 2014). Price-Anderson was . . . designed to address several of the features of mass torts, most notably the need to provide full and prompt compensation for widespread exposure to potentially harmful agents, the effects of which may not reveal themselves for many years; difficulties in proving causation; heavy transactional costs; and threats to the financial ability of many companies to respond to traditional damage awards.
>
> Price-Anderson mixes tort and administrative law principles, and although the Act covers only private suits, it could operate alongside the NRC's use of its authority under the Atomic Energy Act to pursue civil or criminal penalties for violations of the Atomic Energy Act or the Agency's regulations. Under the indemnification provisions of Price-Anderson, all liability is channeled to the licensed operator of a power plant, and an operator's liability is in turn limited. Cases are removable to the Federal District Court where the accident took place, but this Court must apply State tort law to the extent that it is consistent with the Act. Justified claims are com-

In the past century tort law has expanded its primary role to compensate.[50] Beginning with the adoption of the Federal Rules of Civil Procedure in 1938, the law began to favor strongly those seeking private remedies in the courts. Broad as-of-right discovery, flexible pleadings, consolidation of related cases, multidistrict transfers, long-arm statutes, as well as the relaxation of exclusionary evidence rules, tended to favor those plaintiffs seeking help from the courts.[51] Amendments to the Federal Rules as, for example, those widening Rule 23 on class actions, have tended to enhance the power of plaintiffs.[52]

---

pensated out of private insurance that the NRC requires each licensee to maintain, and, to the extent that damages exceed such insurance, out of a retrospective premium pool to which every power plant licensee must contribute in the event of an accident at any plant. The Act provides that there would be a waiver of defenses should the NRC determine that there has been an "extraordinary nuclear occurrence", that is, an event causing radiation levels off-site that are "substantial" and that have resulted, or will result, in "substantial" damage to off-site persons or property. The waivers relieve plaintiffs of a requirement to prove fault; they need prove only that the incident caused their injuries. The Act instructs the NRC to make full use of private insurance organizations to coordinate procedures for handling, investigating, and settling claims. Through 1997, there had been 195 claims, and compensation of about 131 million dollars paid. However, that amount included some transaction costs, such as legal expenses. The Act also permits punitive damages in some cases, thus reducing the amounts available to compensate injuries. In cases in which public liability may exceed the limit of liability, courts are authorized to establish priorities among claimants

. . . .

The Price-Anderson Act is designed to cope with a mass tort after the fact, but much of the NRC's work is devoted to *preventing* a mass tort. Under the agency's statutory authorities other than Price-Anderson, the agency employs civil, criminal, and administrative modes, encourages settlement of disputes, and employs forms resembling restitution. For example, seeking to maintain or restore safe conditions, the agency may, on its own, deny license applications, and modify, suspend or revoke licenses already granted, and it may seek, through the Attorney General, injunctive or other equitable relief for violation of regulatory requirements. Aiming to deter unsafe conduct, the agency may on its own impose civil penalties, and may ask the Attorney General to pursue criminal penalties, including imprisonment. In matters that reach litigation before the agency's administrative judges, the agency encourages settlement, and reviews each proposed settlement to determine whether it is in the public interest. An overview of the considerations in making this determination may be found in a recent Commission order, *In re Sequoyah Fuels Corporation and General Atomics*, 46 NRC 195, CLI-97-13 (1997) (available at 1997 WL 687867 [NRC]).

In pursuit of a safety-conscious work environment, the agency uses something like restitution, though restitution before adjudication. It is the policy of the agency to encourage licensees to maintain or restore the pay and benefits of an employee who alleges retaliation for raising safety issues, pending reconsideration or resolution of the matter. *See* 61 Fed. Reg. 24339, col. 3 (May 14, 1996)

50. Oral and written presentations to Conference on Restatement Third, Vanderbilt University Law School (Sept., 2000).

51. *E.g.*, Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context*: *The United States of America*, 45 AM. J. COMP. L. 675 (1997).

52. *E.g.*, 28 U.S.C. § 1367 (1994) (supplemental jurisdiction); Jack B. Weinstein, *After Fifty Years of Federal Rules of Civil Procedure Are the Barriers to Justice Being Raised*, 137 U. PA. L. REV. 1901, 1914 (1988); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOK. L. REV. 1, 24 (1988); Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 834 (1993).

For a good short summary of class actions and mass torts, with some quantification, see Deborah R. Hensler, Mass or Class? Form and Function in Mass Tort Litigation (papers to be delivered AALS annual meeting, San Francisco, Cal., Jan. 5, 2001).

The bankruptcy laws have also been useful in enhancing civil recoveries.[53] Some experts have suggested expanded bankruptcy as a substitute for class actions.[54] They underestimate, in my opinion, the transactional and other costs of bankruptcy and the difficulties of coordinating the bankruptcy proceedings with related civil cases.

Taking advantage of the open door to the courthouse has been a skilled plaintiffs' bar that has, partly through generous contingency fees and advertising, become powerful and well coordinated. In mass cases, the power of plaintiffs' and defendants' bars and the procedures available to them is now fairly equal.[55]

III. EXAMPLES

Having three separate branches of the law simultaneously providing compensation to the same victims for the same delicts creates difficulties. First is the obvious problem of duplicative (or triplicate) litigation. To have the same matter relitigated, often in different courts, wastes resources and sometimes risks conflicting approaches and outcomes. Such repetitive litigation can squander a defendant's resources, preventing victims from receiving as much compensation as they should. Partial fusion of the administrative, criminal, and tort systems offers an opportunity to amalgamate, enabling imposition of criminal and administrative controls and sanctions while compensating individuals for their losses in a coordinated civil proceeding. A few of my cases over the past several years illustrate the opportunities that this development offers, but also exposes some of the problems. The expansion of criminal and administrative actions into areas traditionally reserved for tort law poses problems of integration, communication among parties and institutions, and compensation for the victims.

A. The Docket of a District Court

An illustrative case is *United States v. Ferranti*.[56] It involved a particularly heinous arson. The defendant had set his store on fire at night. It was located on the ground floor of a three-story building. The upper

53. Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316 (E.D.N.Y. 2000).

54. John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM L. REV. 1343, 1384 (1995); Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANK. L.J. 487, 506 (1995); Nat'l Bankr. Review Comm'n, *Treatment of Mass Future Claims in Bankruptcy, Ch. 2*, *in* BANKRUPTCY; THE NEXT 20 YEARS (1997).

55. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 114–24 (1974) (documenting how wealthier parties are able to translate their privileges into litigation victories not only with high priced attorney's but also as repeat players in the system). Much of the classic analysis in this article does not apply today to massive actions where both sides are well represented because of the huge fees available.

56. 928 F. Supp. 206 (E.D.N.Y. 1996).

floors contained occupied residential apartments. The building was virtually destroyed, leaving the tenants psychologically seared and homeless, with most of their possessions gone. Even worse, a firefighter had been killed in attempting to contain the blaze.

In determining the proper fine and amount of restitution, this case was relatively simple because it involved only a single federal criminal prosecution. The award of restitution was authorized only for the loss caused by the specific conduct constituting the offense,[57] but that loss plus a fine absorbed all of the defendant's assets. Thus, there was no point in victims' bringing any separate civil proceeding. The sentencing took on a quasi-civil aspect because it was used to fulfill some of the goals of the tort system.[58] It was necessary for the court to analyze the assets of the defendant, which were sizeable, and to determine the amount of monetary harm the numerous victims had suffered.

The court ordered restitution of almost $1.5 million, allocating it among the tenants, the City of New York, insurance companies and owners of damaged real property. The rest of the defendant's assets were taken in fines. Because the defendant's real property had to be completely liquidated, the court ordered that the defendant provide the U.S. Attorney's Office with full information regarding his property so that it could monitor the sales. The distribution of assets was through the Court Clerk's Office and the Probation Department.[59] Had the assets of the defendant been greater, a civil suit would almost surely have been brought on behalf of some of the injured to recover for their emotional damages and possibly for punitive damages. The restitution statutes do not now cover such losses;[60] a separate civil action to recover such damages is required, unless the defendant voluntarily consents to pay.[61]

A second litigation, *United States v. Cheung*,[62] was somewhat more complicated. It consisted of both a criminal prosecution and a parallel federal civil suit. Both proceedings were before me. The case involved a ponzi-type financial fraud that mulcted Chinese immigrants. The defendant was indicted and also sued by a class of the victims pursuant to civil

57. Hughey v. United States, 495 U.S. 411, 413 (1990); *cf.* United States v. Soderling, 970 F.2d 529, 533 (9th Cir. 1991) (restitution greater than loss permitted if part of a plea agreement where government agrees to curtail prosecution); United States v. Casamento, 887 F.2d 1141, 1177 (2d Cir. 1989) (restitution in form of drug treatment to those who took drugs as a result of defendant's drug trafficking not permitted).

58. *But see* United States v. Brown, 744 F.2d 905 (not the equivalent of a civil judgment so that protections of civil adjudication not required); Bonnie Arnett Von Roeder, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 TEX. L. REV. 671 (1984).

59. United States v. Porter, 41 F.3d 68, 71 (2d Cir. 1994) (sentencing judge, not probation, must supervise restitution terms and enforcement).

60. *E.g.*, 18 U.S.C. § 3663 (1994 & Supp. IV 1998) (how court determines amount of restitution).

61. *Cf.* United States v. Maurer, 266 F.3d 150, 153 (2d Cir. 2000) (restitution did not have to take into account possible set-off available in a civil suit).

62. 952 F. Supp. 148 (E.D.N.Y. 1997).

RICO.[63] I sought to ensure that the victims received maximum recovery while minimizing transaction costs.

Through coordinated efforts of the magistrate judge, the Assistant U.S. Attorney, plaintiffs' counsel in the class action, and the FBI, a disposition was reached in which the defendant pleaded guilty to two counts of the indictment and the civil litigation was settled for $200,000, to be divided among the class members and the plaintiffs' attorney. As part of the sentence, the court ordered $1.25 million in restitution (essentially all of the defendants remaining assets) that was shared among all the victims. Distribution of the funds involved cooperation of the Probation Department, the U.S. Attorney, and private counsel for the victims.[64] Private counsel received an appropriate fee. He had played a useful role explaining to his clients what was happening. The victims appeared with class counsel before the court at the sentencing to express their rage.

In order to avoid any impropriety in the *Cheung* case, not only did I avoid participating in plea negotiations, (which the criminal law explicitly precludes),[65] but I declined involvement in the civil case as well. Because the two sets of negotiations were so closely related, I felt that involvement in either would raise the specter of impropriety. This detachment was also important when I conducted fairness hearings.

The third case, *United States v. Rubin*,[66] a securities fraud matter, raised more difficult problems. The criminal proceeding was the only part of the litigation in my court. Also pending were a class action in the Southern District of New York and an action brought by the SEC in the District of Columbia. In this situation, the three models, which should work together, were relatively uncoordinated except by counsel for the defendant. One of the considerations in the criminal case was to ensure that fines payable to the government would not so strip the defendant of assets as to make it impossible to make whole those defrauded. That was accomplished by setting aside enough restitution money through the criminal case to provide payments in the settled class action.

It was necessary in *Rubin* to determine what assets the defendant possessed so that victims were not shortchanged. Counsel for the defendant, the plaintiffs in the class action, and the U.S. Attorney prosecuting the criminal action appeared to be cooperating in exploring what could be paid. The SEC seemed quiescent, though it had threatened to seek appointment of a receiver to secure the defendant's assets. The government in the criminal case contended that during the pendency of these three proceedings, the defendant divested himself of most of his assets. Yet, in neither its criminal nor its administrative capacity had the gov-

63. 18 U.S.C. § 1964(c) (Supp. III 1997).

64. United States v. Berardini, 112 F.3d 606, 612 (2d Cir. 1997) (payment by defendant into a fund for known, but not located victims proper).

65. FED. R. CRIM. P. 11(e)(1).

66. 99 Crim. 84. (E.D.N.Y. 1999).

ernment sought injunctions or liens to prevent a possible loss of assets that might have been used for disgorgement or restitution in the criminal or SEC actions. By contrast, the plaintiffs' attorneys in the civil action moved promptly to ensure that assets sufficient to settle the civil case were set aside.

The *Rubin* case is further complicated by the fact that the defendant appears to be suffering from the early stages of Alzheimer's disease. By criminal statute, funds for a defendant's support and treatment and for care of his family must be taken into account, reducing the funds available for a restitution order[67]—factors not ordinarily considered in a civil or administrative proceeding.

Putative defendants have often avoided criminal prosecutions, or arranged for reduced pleas, by consenting to compensate victims. The hammer over their heads is the threat of a criminal or administrative prosecution. The use of district attorneys as collection agencies for locally favored institutions was at one time pervasive.

B. Administrative Law Examples

The growing emphasis on protection of the safety of the population at large by administrative and criminal agencies has reduced the need for tort law as a deterrent to dangerous conduct. Examples regularly appear in the press showing the shift towards administrative law.[68]

A recent case involved allegedly anticompetitive behavior by Mylan Laboratories, a generic drug manufacturer. Mylan faced an action brought by the FTC as well as several private law suits. An agreement, in which Mylan agreed to pay $147 million, has reportedly been reached with the government and most of the private litigants. Much of the money will be used to compensate those who were forced to pay higher drug prices. Some $35 million will be used to settle some of the private lawsuits, and $12 million will go to the government and private attorneys.[69]

The Mylan result seems to benefit all the parties involved. The defendant has settled virtually all of the litigation against it and paid a substantial penalty for its behavior; the government and private attorneys were able to coordinate their actions, expediting a solution to this case in a single settlement; and, most importantly, restitution will be used to benefit those who were harmed by anticompetitive action.

67. *E.g.*, 18 U.S.C.A. § 3663(a)(1)(B)(i)(II) (West 2000) (court should consider financial needs of defendant in determining amount of restitution).

68. *E.g.*, Rhonda L. Rundle, *SEC Files Securities-Fraud Suits; Executives Also Face Indictments*, WALL ST. J., Sept. 28, 2000, at B18 (SEC filed "civil lawsuits and other enforcement actions," and "indictments" were also "handed up."). In describing these administrative law cases, I have relied on press reports.

69. Stephen Labaton, *Generic-Drug Maker Agrees to Settlement in Price-Fixing Case*, N.Y. TIMES, July 13, 2000, at A1.

In another recent incident—the ValueJet Airlines crash in the Everglades that killed 110 people in 1996—a federal judge in a criminal case ordered a contractor, SabreTech, to pay $2 million in fines and $9 million in restitution for illegally causing the transportation of hazardous waste that contributed to the accident.[70] The National Transportation Safety Board (NTSB) split the blame for the crash among SabreTech, ValueJet, and the Federal Aviation Administration (FAA) for lax oversight of the fast-growing discount airline. SabreTech's insurers have reportedly paid $262 million to settle lawsuits by the families of the victims. Private litigations can go forward (assuming the defendant has any assets). Finally, SabreTech has been charged with murder in state court.[71]

What is particularly interesting about SabreTech's defending in multiple venues is the relationship of the case to punitive damages. To the extent that the criminal and administrative penalties cover the full social costs and punishment for a massive wrong there seems to me to be little justification for adding punitive damages to an individual's compensatory tort judgment.

These cases are illustrative of a growing phenomenon—the seeking of restitution or disgorgement by administrative agencies.[72] For example, in the *Mylan* case, the district court held that the FTC had disgorgement authority pursuant to section 13(b) of the Federal Trade Commission Act.[73] The FTC argued in *Mylan*—a contention accepted by five courts of appeals and many district courts—that its power to seek injunctive relief includes the power to order disgorgement and restitution.[74] Central to the FTC's argument was that "companies, if advised by counsel that the only remedy [the FTC possesses] is [an order] to cease engaging in illegal conduct, will go ahead with the bad behavior until someone tells them to stop."[75] The court's ruling that the FTC had this power to order disgorgement undoubtedly helped settle the related litigations.

In another case, the United States Court of Appeals for the Sixth Circuit ruled that the FDA has the authority to seek restitution in con-

70. *Service Company Must Pay $11 Million in ValueJet Crash*, N.Y. TIMES, Aug. 15, 2000, at A12. The $2 million in fines was subsequently reduced to $1.75 million in a settlement between SabreTech and the FAA. Betsy McKay, *SabreTech Sets Accord with FAA on Role in 1996 ValueJet Crash*, WALL ST. J., May 23, 2001, at B2.

71. *Service Company Must Pay $11 Million in ValueJet Crash*, N.Y. TIMES, Aug. 15, 2000, at A12.

72. *E.g.*, Peter Aronson, *Disability Settlement Sets Record*, NAT'L L.J., Aug. 28, 2000, at B1 (American Airlines agrees to pay $1.7 million to ninety-nine individuals for violations of the Rehabilitation Act of 1973 after suit brought by the Department of Labor); Andy Pasztor, *U.S. Regulators Seek to Fine Boeing $1.2 Million*, WALL ST. J., Aug. 3, 2000 (FAA seeking to fine Boeing for lax manufacturing controls); *cf. Safety Commission Recalls 91,000 Go-Karts After One Death and Two Injuries*, N.Y. TIMES, Aug. 15, 2000, at A12 (CPSC acted after go-karts had reportedly caused death and injuries by entangling the hair or garments of the rider in exposed rotating parts); *see also* Letter from Eric Schaeffer, to author, *supra* note 15.

73. Fed. Trade Comm'n v. Mylan Labs. Inc., 62 F. Supp. 2d 25, 36 (D.D.C. 1999).

74. *Id.* at 37 (citing cases permitting the FTC to pursue monetary relief under § 13(b) of the Federal Trade Commission Act).

75. Letter from Robert Pitofsky, Chairman, Federal Trade Comm'n, to author (Aug. 14, 2000).

nection with its supervision of pharmaceuticals.[76] This case was relied upon by the FDA in suggesting disgorgement by Abbot Laboratory, resulting in a $100 million settlement. Pressure was applied jointly by the FDA and the Department of Justice seeking a global settlement without, apparently, cooperating with the private attorneys for the injured.[77]

The SEC itself has the power to administer a restitution fund.[78] This authority stems from its exercise of ancillary jurisdiction.[79]

C. Conclusions

These examples illustrate three important concepts. First, and perhaps most obvious, is the powerful authority criminal prosecutors and

76. United States v. Universal Management Servs., Inc., 191 F.3d 750 (6th Cir. 1999) (affirming $100 million award FDA obtained through disgorgement by a consent decree), *cert. denied*, 530 U.S. 1274 (2000); Dierdre Davidson, *FDA Now Packs a Heavy Punch*, NAT'L L.J., July 17, 2000, at B6. This trend is not to be confused with the Supreme Court's possible cutting back on the finding of *private* rights of action in a statute. *E.g.*, Alexander v. Sandoval, 121 S. Ct. 1511 (2001) (no private right of action to enforce regulations under Title VI of Civil Rights Act of 1964); Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996). The question in the former line of cases is whether an agency that is statutorily granted the power to institute litigation also has the power to seek restitution; this is a different question from whether individuals are allowed to bring suit even though a statute does not explicitly grant them such power.

77. Telephone Conversation with Litigation Deputy of FDA (Aug. 28, 2000). There are no guidelines with respect to cooperation of the agency with private attorneys for those claiming injury.

78. Herzfeld v. United States District Court, 699 F.2d 503, 506 (10th Cir. 1983).

79. *Id.*; *see also*, *e.g.*, Letter from First Senior Deputy Comptroller of the Currency, to author (Sept. 6, 2000):

> The OCC is authorized under its primary enforcement statute, 12 U.S.C. § 1818, to order a bank, or its officers, directors, or other "institution-affiliated parties," to pay restitution to a party that has suffered a loss as a result of the bank's or the individuals misconduct. While the OCC has issued no specific regulations or guidelines on this subject, both statutory and case law have established legal standards for when the agency may order a bank or an individual to pay restitution.
>
> Under 12 U.S.C. § 1818(b), the OCC may issue a cease and desist order to a bank or an individual who violates a law, rule, or regulation; condition imposed in writing or formal written agreement entered into with the agency; or who engages in an unsafe or unsound practice. The OCC's cease and desist power includes the authority to order a respondent to make restitution, provide reimbursement, indemnification, or guarantee against loss, provided that the respondent was either unjustly enriched, or the violation or practice involved a reckless disregard for the law or any applicable regulations or prior agency order. 12 U.S.C. § 1818(b)(6)(A).
>
> The case law has further defined when the OCC may order payment of restitution. Specifically, in *Rappaport v. U.S. Dep't of the Treasury*, 59 F.3d 212 (D.C. Cir. 1995), *cert denied*, 516 U.S. 1073 (1996), the D.C. Circuit held that the common law definition of "unjust enrichment" applied to the term as it is used in 12 U.S.C. § 1818(b)(6)(A). Under the D.C. Circuit's interpretation, unjust enrichment requires a showing that the party against whom restitution is sought has received and retained a benefit that properly belongs to another. *Rapport*, 59 F.3d at 217. Moreover, the amount of restitution owed is measured by the defendants gain, rather than the plaintiff's loss. *Id.*
>
> The OCC does not typically consult with the United States Attorney or private attorneys before making a decision to seek restitution. However, where there is a parallel criminal case, we routinely contact the appropriate U.S. Attorney's Office in order to coordinate our actions and ensure they will not in any way interfere with the criminal case.

Eliot Spitzer, the Attorney General of New York has suggested that joint federal-state cooperation can avail government restitutionary relief, even when unavailable under the agencies own statute. In a recent action brought jointly with the FTC against an Internet website publisher charged with fraudulently billing visitors to its sites, the New York Attorney General's participation in the action included a demand for restitution—relief generally unavailable under the FTC's own statute. Letter from the Attorney General of New York, to author (Sept. 12, 2000).

administrative agencies possess. In *Ferranti*, *Cheung*, and *Rubin*, the U.S. Attorney along with the probation department were responsible for recommending large fines and restitution, locating victims, monitoring the liquidation of assets and ensuring that the defendant retained adequate funds to compensate victims. *Mylan* and *SabreTech* illustrate how administrative agencies, like the FTC and FDA, are not only assuming larger roles in coordinating litigation, but seeking fines and disgorgement that may cover the full social cost of a massive wrong.

Second, these cases suggest that despite their increased authority, prosecutors and administrative agents are not always well suited to facilitate communication with, and provide effective remedies for, victims. In *Cheung*, the private plaintiff's lawyer was largely responsible for communicating with the victims, and in *Rubin*, the combined efforts of the U.S. Attorney's Office and the SEC proved to be less effective than those of private attorneys in protecting the funds necessary to compensate victims. The tort model continued to play an important role in addressing victims needs.

Finally, these examples demonstrate the desirability of guidelines that instruct attorneys and judges on how to coordinate and balance criminal, administrative, and private actions. The *Mylan* result benefited all the parties involved partly because the government and private attorneys were apparently able to coordinate their actions, expediting a comprehensive remedy in a single settlement. As administrative agencies and prosecutors exercise additional authority to address victims' needs, resolving conflicts of interest and better communication among themselves and with private counsel and the aggrieved will be essential to providing fair and adequate relief.

IV. THE TREND AGAINST COMPENSATING VICTIMS THROUGH THE TORT SYSTEM

While criminal and administrative law have moved towards victim compensation as one of their goals (even if it is a secondary one), concurrently there has been a recent marked attempt to limit the power of recovery through the civil system.[80] Congress, state tort reforms, federal court decisions, increased use of alternative dispute resolution,

80. *Cf.* Jane Stapelton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 956 (2001) (methods "to contain the voraciousness of the negligence principle within tolerable bounds"); John Caher, *Court Seen as Slow in Expanding Tort Claims, Criminal Defendants' Rights*, N.Y.L.J., July 24, 2001, at 1 (describing trend against private litigants in decisions by the New York Court of Appeals); Theodore Eisenberg & Steward J. Schwab, Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals (July 16, 2001) (unpublished manuscript, on file with the University of Illinois Law Review) (appellate courts more likely to reverse plaintiff victory than defense verdict in employment discrimination and other civil rights cases).

and parens patriae suits have all tended to limit the traditional effectiveness of the privately driven tort system.

Diverting and limiting private suits to vindicate tort rights is not new. Workers' compensation laws were adopted some one hundred years ago. They have served fairly well to reduce transactional costs while speeding modest recoveries without a required showing of fault.[81] The black lung cases, unlike asbestos, have been removed from the courts and assigned to administrative resolution;[82] the high costs, however, have somewhat soured Congress on this technique of using administrative agencies to compensate.[83] In the matter of children's vaccines, Congress has drawn most claims into the government-administered compensation program, reportedly at low costs of administration.[84]

An obvious example of the trend away from traditional private litigation is the concerted political effort to restrict civil actions in mass cases.[85] Tort reform in the states, sparked primarily by powerful potential defendants, has truncated substantive tort law, established procedural roadblocks, and capped remedies. Extensive limits on personal injury claims in the automobile field have also had some success in taking many relatively minor auto cases out of the courts.[86]

81. *See generally*, II AM. LAW INST., REPORTERS' STUDY, ENTERPRISE LIABILITY FOR PERSONAL INJURY, ch. 7, *Workers' Compensation and Product Liability* 183 (1991). In some states recoveries have not kept pace fully with rising costs of living. In other states it has been possible to circumvent the barrier against directly suing the employer by first suing the manufacturer of a "defective" machine involved in the injury, then having the manufacturer, in turn, sue the employer. *E.g.*, Ibarra v. Equip. Control, 268 A.D.2d 13 (N.Y. App. Div. 2000).

82. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 101–426, 83 Stat. 742, 745–98 (codified in scattered sections of 30 U.S.C.) (Black Lung Act); *see also Deal Reached on Aid for Uranium Miners*, N.Y. TIMES, Oct. 6, 2000, at A20 (proposals to compensate uranium miners and workers). *But see* Air Transportation Safety and Systems Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

83. *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 123–24 (1995); *see also* Matthew L. Wald, *Lawmakers Bar Payments for Workers on Weapons*, N.Y. TIMES, Sept. 27, 2000, at 12 (compensation proposed to those made sick or killed while working on nuclear weapons).

84. WEINSTEIN, *supra* note 83, at 123.

85. *E.g.*, Jack B. Weinstein, *Adjudicative Justice in a Diverse Mass Society*, 8 J.L. & POL'Y 385 (2000).

86. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 585–86 (5th ed. 1984) (discussing statutes dealing with auto insurance). *See, e.g.*, John M. Shields, *Reviewing the Threshold for "Serious Injury"*, 224 N.Y. L.J., Aug. 24, 2000, at 1 (referring to serious injury in automobile accident cases).

At the federal level, similar legislative efforts are underway, largely—but not completely—stymied to date by the power of rich plaintiffs attorneys' donations to one political party, balancing potential defendants' donations to the other. *See generally* Bob Van Voris, *Clinton's a Surprising Tort Reformer*, NAT'L L.J., Aug. 14, 2000, at 1 (listing as limitations on plaintiffs' suits: the General Aviation Revitalization Act of 1994, the Federally Supported Health Centers Assistance Act of 1995, the Small Business Job Protection Act of 1996, the Aviation Disaster Family Assistance Act of 1996, the Bill Emerson Good Samaritan Food Donation Act of 1996, the Coast Guard Authorization Act of 1996, Volunteer Protection Act of 1997, the Amtrak Reform and Accountability Act of 1997, the Securities Litigation Uniform Standards Act of 1998, the Biomaterials Access Assurance Act of 1998, and the Year 2000 Information and Readiness Act). Notably, federal legislation attempted to limit federally financed legal aid centers from pursuing class actions—severely restricting the ability of impact litigation in areas of poverty law. The Supreme Court recently held these restrictions unconstitutional. *See* Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001). For the effect of donating to political parties

The federal courts themselves have attempted, particularly at the appellate level, to limit class and other aggregate actions.[87] Judicial door-closing was recently accelerated slightly when Rule 23 of the Federal Rules of Civil Procedure was amended to permit interlocutory appeals from class certification orders, enabling the appellate courts to quash class actions quickly before settlement.[88]

Another federal development that has had some impact in reducing civil litigation alternatives is the preemption doctrine.[89] It allows the federal courts to throttle private state tort law.[90] The Supreme Court has been cautious in utilizing this technique to convert shielding federal statutes into swords striking at state litigation and administrative protections.[91]

Increased reliance by private and public institutions on Alternative Dispute Resolution (ADR) techniques has drained a good deal of potential civil litigation out of the courts.[92] The tendency to rely on ADR in

and candidates to obtain or deny such limiting legislation, see, for example, John M. Broder and Don Van Natta, Jr., *Perks for Biggest Donors and Pleas for More Cash*, N.Y. TIMES, July 30, 2000, at 1.

87. *E.g.*, Ortiz v. Fibreboard Corporation, 527 U.S. 815 (1999); Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997); *In re* Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993).

88. *See* FED. R. CIV. P. 23(f) and advisory committee notes. For a debate between proponents and opponents of interstate class actions, see Frederick M. Baron, *The Truth About 5.353: Unfairness in Class Actions*, 69 U.S. L. WK., Sept. 12, 2000, at 2131. *See, e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 77a); Paul A. Ferrillo, *New Tide Rising in Securities Class Action Litigation*, 223 N.Y. L.J., Aug. 8, 2000, at 1.

89. "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987). This permits removal cases even though a state claim and nondiversity action in a state court might appear to preclude removal. *See* Lyons v. Phillip Morris, Inc., 225 F.3d 909, 912 (8th Cir. 2000); Anthony E. Szdlowski, *Preemption in the Securities Industry: A Diminished Standard?*, 74 ST. JOHN'S L. REV. 259 (2000); Michael Hoenig, *More on Pre-Emption of Air-Bag Restraint Claims*, N.Y. L.J., Sept. 11, 2000, at 3.

90. United States v. Locke, 529 U.S. 89, 94 (2000) (preempting state regulations "governing oil tanker operations and designs"); *e.g.*, Pegram v. Hendrich, 530 U.S. 211 (2000); Geier v. Am. Honda Motor Co., 529 U.S. 1913 (2000); Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000); Sakellaridis v. Polar Air Cargo, Inc., 104 F. Supp. 2d 160 (E.D.N.Y. 2000); Burke v. Dow Chem. Co., 797 F. Supp. 1128 (E.D.N.Y. 1992); Leo T. Crowley, *ERISA Pre-Emption Returns in Managed Care*, 224 N.Y. L.J., Aug. 2, 2000, at 3; Allison M. Zieve, Grier v. Honda*: The News Is Not All Bad for Consumers*, 28 Product Safety & Liability Rep. (BNA) 622 (2000); *see also* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2000) (granting certiorari on whether federal medical devise law bars state tort claims that a company made fraudulent representations to the FDA in seeking clearance for an orthopedic screw system).

91. *See Sakellaridis*, 104 F. Supp. 2d at 162.

92. Mickey Meece, *The Very Model of Conciliation: Companies Adopting Postal Service Grievance Process*, N.Y. TIMES, Sept. 6, 2000, at C1 (documenting thirty percent drop of formal complaints within the postal service with new national mediation program); *see also* Samuel Estreicher & Kenneth J. Turnbull, *New Guidance on Predispute Mandatory Arbitration Agreements*, 224 N.Y. L.J, Sept. 13, 2000, at 3; Robert S. Greenberger, *As Arbitration Spreads to Consumer Purchasers, a Court Battle Looms, Attorneys Lead a Backlash Against Corporate Practice that Reduces Lawsuits*, WALL ST. J., Sept. 19, 2000, at A1; *Arbitration May Trump Class Actions Under TILA, Electronic Fund Transfer Act*, U.S. L. WK., Sept. 12, 2000, at 1132; Weinstein, Preliminary Thoughts, *supra* note 1.

securities disputes, labor matters, and international business disputes has been striking.[93]

Another important example of bypassing traditional private tort law is the recoveries sought by state and federal attorneys general. For example, in tobacco cases, they have acted as parens patriae on behalf of consumers, but using private plaintiffs' attorneys to conduct much of the litigation.[94]

V. COSTS AND BENEFITS OF MASS ACTIONS

There are advantages and disadvantages to shifting compensation for private wrongs from the private system to the criminal and administrative systems. On the one hand, the tort model may be subject to abuse. Plaintiff attorneys may charge excessive fees, have conflicts with their clients and the public interest, deter technological innovation, and create high transaction costs for victims and society. But, on the other hand, as my own experience has convinced me in cases that I have presided over—such as Agent Orange, DES, asbestos, tobacco, gun, and breast implants—the tort model provides an effective democratic and egalitarian means for protecting victims and ensuring that their injuries are properly compensated. On the whole, the tort system can be more flexible, prevent agency capture, promote procedural and substantive law innovations, and be more sensitive to people's needs than governmental processes.[95]

Private mass actions are subject to abuse. Particularly upsetting to some are the billions of dollars in legal fees in the recent tobacco cases.[96] While private lawyers have the opportunity and obligation to stay in

93. *E.g.*, Major League Baseball Players Ass'n v. Garvey, 121 S. Ct. 1724 (2001) (courts not authorized to review labor-arbitration decision on merits despite alleged error); Lawrence W. Newman, *Ethics in International Arbitration*, 224 N.Y. L.J., July 31, 2000, at 3 (American Attorneys more likely to reveal adverse information); Steven J. Shore & Franklin D. Ormsten, *Arbitration Still Has Broad Reach in Securities*, 224 N.Y. L.J., Aug 9, 2000, at 3; *DOL Seeks to Expand Use of Mediators to Resolve Disputes Under Employment Laws*, U.S. L. WK., Jan. 9, 2001; Weinstein, Preliminary Thoughts, *supra* note 1. The use of binding arbitration has become increasingly popular—particularly for Internet businesses where the choice of applicable law is uncertain and new technology has made it easier to impose. Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 179–84 (2000) (describing trends in arbitration as more favorable to businesses who can choose applicable substantive and procedural law and less favorable to consumers).

94. *E.g.*, Watson v. Texas, No. 00-41269, 2001 WL 883533 (5th Cir. Aug. 7, 2001); United States v. Philip Morris, Inc., 116 F. Supp. 2d 131 (D.D.C. 2000); Pam Belluck, *Chicago Gun Suit Fails, but California's Proceeds*, N.Y. TIMES, Sept. 16, 2000, at A9; Richard B. Schmitt, *Cities Begin Fact-Finding Phase in Gun Law Suits*, WALL ST. J., Sept. 25, 2000, at B30.

95. *E.g.*, Alison Frankel & Paul Breverman, *ATLA's War Room*, AM. LAW., Oct. 2000 (coordinated work of plaintiff trial lawyers).

96. Henry Weinstein, *Attack Waged on Fees Anti-Tobacco Attorney Received*, L.A. TIMES, Mar. 15, 2001, at A1.

touch with clients, some have disregarded this role.[97] Personal injury lawyers sometimes also neglect their larger obligation to the public interest in their "vigorous advocacy." As personal injury lawyers shared with each other information about dozens of deaths involving Ford Explorers equipped with Firestone Tires, they reportedly held back much of the information from federal regulators. In this instance, the general lack of confidence in the National Highway Transit Safety Administration may have been reasonable.[98] According to one report on the coordination of lawsuits against auto and tire makers, plaintiffs lawyers feared prompting a federal investigation that could unfairly find Firestone tires free of defects.[99]

Private litigation may also chill scientific innovation and create high transaction costs for victims and society at large. A 1991 ALI study suggested that the tort system, combined with administrative regulation, might over-deter development of technologically complex products such as drugs, vaccines, and aircrafts.[100] The study recommended that industry compliance with federal regulations plus preemption be used as a limited defense to product liability suits.[101]

Transaction costs to society and in compensating victims can be very high. It has been estimated that such costs of the tort system in dealing with products liability and environmental claims consume up to two-thirds of the resources that society devotes to resolving such claims; only about one-third of total outlays by the parties and the court system

97. *E.g.*, Barry Meier, *Lawyer in Holocaust Case Faces Litany of Complaints*, N.Y. TIMES, Sept. 8, 2000. Some of the attorneys in this case have served without fees in a striking example of devotion to the public interest. *Id.*

98. Michael Winesip, *The Explorer on Trial*, NY TIMES, Dec. 17, 2000, (Magazine), at 52 (describing the staffing, investigatory, and budget limitations of the National Highway Traffic Safety Administration).

99. Keith Bradsher, *Documents Portray Tire Debacle as a Story of Lost Opportunities*, N.Y. TIMES, Sept. 11, 2000, at A1. The nondisclosure of this information raises serious problems of ethical obligations owed by attorneys to report damages to law enforcement officials. The problem of secret settlements may also provide a reason for concern. Jack B. Weinstein, *Secrecy in Civil Trials*, 9 BROOK. J.L. & SOC. POL. 53, 58 (2000).

100. AM. LAW INST., 1 REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, THE INSTITUTIONAL FRAMEWORK 398–402 (1991) [hereinafter ENTERPRISE RESPONSIBILITY].

101. The study summarized its proposal for preclusion of tort liability for negligence as follows:

> First, the risk must have been placed under regulatory control by a specialized administrative agency, a body with statutory authority to monitor and assess risk-creating activities in its area of responsibility, and with a mandate to establish and revise regularly specific regulatory controls on enterprise behavior. . . .
>
> Second, the enterprise in question must have complied with all relevant regulatory requirements.
>
> Third, the defendant must have publicly disclosed to the relevant regulatory agency any material information in its possession (or of which it has reason to be aware) concerning the risks posed by the defendant's activities and/or the means of controlling them. This requirement would extend to information indicating that agency standards or tests may be inadequate or inappropriate.

ENTERPRISE RESPONSIBILITY, *supra* note 100, at 95–97.

is paid as compensation to successful plaintiffs.[102] In the DES cases, a defense attorney suggested to me that transaction costs in that litigation consumed almost ninety percent of the total award to victims. This was probably true at the earlier stages of the controversy when many cases were being contested. Now that settlements take place on a privately administered matrix basis with the help of a court appointed special master, the transaction costs are probably no longer excessive.

Despite these costs, on balance, I think the tort model provides a distinctly democratic and effective means for protecting victims and ensuring that their injuries are properly compensated.[103] On the whole, the tort system provides more flexible forms of relief, prevents agency capture, promotes vigilance of both producers and the public, spreads information relevant to the public interest, and displays sensitivity to populations not always served by the general political process.

First, the tort system can provide more flexible forms of recovery. Considerations long associated with equity jurisprudence have motivated many of the procedural and substantive responses of American courts to problems posed by complex multi-party, multi-issue mass tort cases.[104] Many mass tort resolutions have moved away from the traditional courtroom individual remedies, and have instead set up aggregated settlements, compensation-administrative plans, and insurance-type installment payment programs supervised by the courts.[105]

Second, the tort model can reduce tendencies toward "agency capture."[106] While government has a vital role in our society's health, I have an inherent distrust of government as the *sole* protector of our rights and

102. Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual Track System*, 88 GEO. L.J. 2167, 2168 (2000) (citing ENTERPRISE RESPONSIBILITY, *supra* note 100, at 384).

103. Significantly, as civil rights abroad become more effective, American style litigation is expanding abroad. *E.g.*, Suzanne Kepner, *Britain's Legal Barriers Start to Fall, Discrimination Lawsuits Are Becoming More Common*, N.Y. TIMES, Oct. 4, 2000, at W1 (proposes that "thanks, in part, to the cultural influence of America" smaller claims have been brought to court).

104. The procedural techniques to aggregate and manage mass disaster cases, such as broad joinder devices and class actions, are creatures of equity. Promulgation of the Federal Rules of Civil Procedure in 1938 theoretically merged law and equity in the federal system, which is where most mass tort cases are filed. Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 279.

105. In the Dalkon Shield litigation, some 195,000 claims have been filed since A.H. Robins's bankruptcy resulted in a personal injury compensation trust fund that will eventually total some $2.5 billion. The court appointed five trustees to carry out functions of the trust. The trustees were responsible for designing and implementing a claims-restitution facility pursuant to guidelines set out in the trust agreement for purposes of resolving personal injury claims. *See id.* The hundreds of millions in Agent Orange funds were used to aid tens of thousands of veterans and hundreds of thousands of family members in an administrative scheme. *See* Final Report of the Special Master in Agent Orange Litigation on the Distribution of the Agent Orange Settlement Fund, Sept. 1997, *In re "Agent Orange" Product Liability Litigation*, MDL No. 381.

106. *See generally* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039 (1997) (discussing the development of administrative legal doctrine).

safety.[107] Administrative agencies are subject to political pressures not to regulate too stringently; the finances of agencies can be cut if enforcement policies of the executive or legislature change; pressure to appoint administrators favorable to industry sometimes exists; and there is a movement to and from private industry that can create conflicts.[108] In sum, agencies are susceptible to the needs of the industry they are charged with regulating.

Admittedly, the recommendation of the American Law Institute regarding regulatory preclusion of private actions does have a certain charm in its symmetry. As Professor Richard B. Stewart posits, the recommendations do streamline the "two track" system of tort and administrative law (but not the third track of criminal law).[109] Nevertheless, as regulatory failures with a host of products suggest—from Asbestos to tires to the Zeppelin—tort law often provides more reliable, open, and politics-free protection to the public.[110]

107. Bob Van Voris, *Tire Deaths: Criminal Acts?*, NAT'L L.J., Sept. 18, 2000, at A1 (discussing the involvement of the U.S. government in the Bridgestone/Firestone controversy).

108. Paul Strauss, *Handling a Plaintiff's Sexual Harassment Case*, 26 LITIGATION 4, 37 (2000) (discussing limitations of EEOC interviews and investigations); Tom Hamburger, Laurie McGinley & David S. Cloud, *Industries That Backed Bush Are Now Seeking Return on Investment*, WALL ST. J., Mar. 3, 2001, at 1; John Harwood & Kathy Chen, *Under President Bush, Regulatory Rollback Has a Major Impact*, WALL ST. J., Aug. 3, 2001, at 1 (describing "quiet revolution" of regulatory relaxation for banks, hospitals, oil companies, telecommunication giants employers, and corporations); *e.g.*, Tom Brune, *Reno: $23M Needed in Big Tobacco Suit*, NEWSDAY, Oct. 6, 2000, at A16 ("Reno also objected to provisions [of a proposed statute effectively cutting off funds to prosecution of tobacco companies] saying that could 'allow politics to interfere with the conduct of litigation.'"); *see also* Leslie Wayne & Michael Moss, *Bailout for Airlines Showed the Weight of a Mighty Lobby*, N.Y. TIMES, Oct. 10, 2001, at A1.

109. Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167 (2000).

110. The recent "revelation" that Firestone tires used on heavy Ford sports utility automobiles had dangerous tread separation problems, probably leading to scores of deaths, is instructive. In 1978 there was a recall of almost fifteen million Firestone tires that had passed government tests devised for an earlier technology, but insufficient for new steel belted tires. New regulations were drafted in 1980. But the next administration cancelled procedures to devise any new regulations and the budget of the National Highway Safety Commission was sharply cut to avoid the "high cost of government regulation on the industry." Keith Bradsher, *Stricter Rules for Tire Safety Were Scrapped by Reagan*, N.Y. TIMES, Sept. 4, 2000, at A10. Neither Congress nor the executive branch adequately protected the public. *See* Joan Claybrook, *Congress's Part in the Firestone Crises*, N.Y. TIMES, Sept. 4, 2000 at A17. Now the administrative branch may require the recall of many millions of tires at an expense of hundreds of millions of dollars, but after extensive loss of life and injuries resulting from the defects.

We can also expect private class action and individual suits for death, injuries and property damage in the tire cases. Although the threat of private suits did not prevent either the 1978 or 2000 recall fiascoes, I am convinced that such suits do discourage carelessness and cover-ups of dangers by industry. Potential civil suits are an important back-up for governmental inadequacy. Keith Bradsher, *Documents Portray Tire Debacle as a Story of Lost Opportunities*, N.Y. TIMES, Sept. 11, 2000, at A1, A23 (discussing information sharing between personal injury attorneys regarding the Firestone's situation); *see also* 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, 6 (2000) (describing the relationship between private and public lawyering); Joseph L. Gastwirth, *Suggestions for Reconciling the Values of Statistical Science with the Goals and Need of the Legal and Regulatory Processes, Proceedings of the Section on Epidemiology*, AM. STAT. ASS'N (1998) (impact of delayed warning on some substances can entail substantial risk to public). In a letter dated March 13, 2001 to the author,

Third, I believe there is a distinct, continuing, and prominent role for private litigation and entrepreneurial private attorneys in this field.[111] Both the criminal and administrative agencies are somewhat less tenacious in pursuing delictors than private civil attorneys induced by their desire to earn fees and of private litigants for personal vindication.[112]

Fourth, private litigation is good at exposing bad acts. As contrasted with the Continental and English civil systems, which place premiums on secrecy and confidentiality, U.S. courts provide for liberal discovery rules, open courtrooms, and presumptions in favor of unsealing documents that may involve the public interest.[113] The U.S. court system is able to make bad acts visible and subject to public discussion in ways that administrative FOIA requests sometimes cannot.[114]

The tort model also provides sensitivity to populations otherwise under-served by administrative and prosecutorial action.[115] This is true

Professor Gastwirth concludes that some 100 cases of Reye syndrome may have been averted if the FDA had not delayed warnings of the affect of aspirin on children in 1982.

111. Jack B. Weinstein, *A View from the Judiciary*, 13 CARDOZO L. REV. 1957 (1992) (Proceedings of the Administrative Conference of the United States, October 31, 1991 Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims). Neither administrative nor criminal law will stop attorneys who see big bucks in civil litigation. *See, e.g.*, Bob Van Voris & Matt Fleischer, *Feeding Frenzy over Firestone*, NAT'L L.J., Sept. 11, 2000, at A1 (discussing plaintiff attorney preparation for possible Firestone litigation); *Center for Auto Safety, Car Owners Sue Bridgestone, Say Recall Insufficient*, 69 U.S. L. Wk. Aug. 29, 2000, at 2123; *see also, e.g.*, Jenna Greene, *FTC Affected by Deluge of Mergers*, NAT'L L.J., Sept. 18, 2000, at B5 (discussing FTC difficulties at prosecuting violations in areas other than mergers); Gretchen Morgenson, *Many Holes Weaken Safety Net for Victims of Failed Brokerages*, N.Y. TIMES, Sept. 25, 2000, at A1; Mathew L. Ward & Keith Bradsher, *Safety Agency Wants Increase in Its Authority*, N.Y. TIMES, Sept. 9, 2000, at C1 (discussing the National Highway Traffic Safety Administration's request for more money to investigate safety problems).

112. The author recently heard a case that provides an intriguing example of the limitations of criminal restitution. In a scheme involving fraudulently rolled back automobile odometers, the government was unable to identify the victims of the fraud. The defendant's activities extended from 1990 until late 1996. By this time, many of the consumers had already resold the cars to second or third generation purchasers without suspecting the fraud. The U.S. Attorney stated in the pre-sentencing report that

> tracing chains of ownership would be labor-intensive and time-consuming. Moreover, given the number of victims in the case, the difficulty in setting a fair market value for each vehicle at the time of its fraudulent sale, and the difficulty of calculating the value of extra charges (such as the increased finance charges or insurance costs) it is impossible to set an exact restitution amount.

United States v. Faden, Docket No. 99 CR 275-01 Pre-Sentence Investigation Report, March 31, 1999. A plaintiff's attorney interested in certifying a class has a market incentive to identify these victims for the purposes of compensation.

113. *See* Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL'Y 53, 58 (2000); Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1 (2001) (forthcoming).

114. Notably, the 1991 A.L.I. study recommendations would only grant regulatory compliance as a defense to liability if defendants publicly disclosed relevant information concerning the risks posed by their actions:

> [T]he defendant must have publicly disclosed to the relevant regulatory agency any material information in its possession (or of which it has reason to be aware) concerning the risks posed by the defendant's activities and/or the means of controlling them. This requirement would extend to information indicating that agency standards or tests may be inadequate or inappropriate.

Stewart, *supra* note 102, at 2168.

115. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 135–79 (1980); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1937) ("[P]rejudice against discrete and insular minorities

not only of the large desegregation, prison, discrimination, and disability cases, but also in environmental and consumer regulation.[116]

In sum, these features of the private civil system provide a democratic addition to administrative and criminal forms of compensation. This private counterweight is a critical component of American jurisprudence. At an international conference in Geneva on class actions and other methods of compensating masses of injured people, I was struck by what I took to be an underlying assumption of Europe, South America, and the Far East. They emphasize a "top-down" approach: the government and other agencies provide protection and compensation for those injured without much say by the individual.[117]

In contrast, the U.S. civil system is, I suggest, one of "bottom-up." The individual, through his or her attorney, defends and prosecutes private rights against corporations, the government (subject to the somewhat outdated and unjust governmental immunity defenses), and others. The attitudes of American society obviously affect its view of courts and litigation. From the outset, the colonies and subsequently the postrevolutionary generations showed a sense of private independence and initiative somewhat different from that of the British Empire and other nations.[118] This tradition continues today in the evolution of American law.

---

may be a special condition . . . [c]urtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry.").

116. *See* Staci Jeanne Krupp, *Environmental Hazards: Assessing the Risk to Women*, 12 FORDHAM ENVT'L L.J. 111 (2000) (describing how models used by the EPA are based on weight and fat levels of the average male and do not adequately protect the needs of women).

117. *E.g.*, ARBITRATION ASS'N, THE CLAIMS RESOLUTION PROCESS ON DORMANT ACCOUNTS IN SWITZERLAND (1999); Richard Capalli & Caludio Consolo, *Class Actions for Continental Europe*, 6 TEMPLE INT. & COMP. L.J. 217, 218 (1993); Weinstein, *Compensating*, *supra* note 27. *But see* Phillippe A. Grumback, *Notorious Swiss Holocaust Denier Imprisoned*, JUSTICE, Summer 2000, at 12 (three associations had right to appear in proceedings); Norbert Wükler, *United Nations Compensation Commission: A New Contribution to the Process of International Claims Resolution*, J. INT'L ECON. L. 249 (1999).

It is interesting to refer to the "clash" between the Americans and Japanese respecting their versions of constitutional democracy, which was "seen" by the Americans who, in effect, wrote the new Japanese constitution. *See* JOHN W. DOWER, EMBRACING DEFEAT, JAPAN IN THE WAKE OF WORLD WAR II 353 (1999).

> In mid-February 1946, . . . Matsumoto attempted to persuade occupation authorities that fundamental differences between East and West were at issue here. "A juridical system is very much like certain kinds of plants, which transplanted from their native soil, degenerate, or even die," he wrote in a memorandum to [U.S.] GHQ. "Some of [the] roses of the West, when cultivated in Japan, lose their fragrance totally." This East-is-East-and-West-is-West improvisation was less red rose than red herring, for far more was involved here than white men's flora ill suited to Eastern soil, or a simplistic clash between "Western" and "Japanese" cultures. The basic conflict lay between two Western systems of legal thinking. Put over simply, these experts, well grounded in German legislative and administrative law and a German-style "theory of state structure," were largely indifferent to American concerns about popular sovereignty and human rights."

Id.

118. *E.g.*, FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754–1766, at 219–22 (2000) ("exasperating," independence of colonial soldiers, "colonial obstinacy," "resistance to imperial authority"; contrasted with attitude of British Commander "that his authority flowed from the royal prerogative and royal commission" with command control over colonial governors, officers, legislatures, and troops); JOYCE APPLEBY, INHERITING THE REVOLUTION, THE FIRST GENERATION OF AMERICANS 5 (2000) ("Independence made

VI. OPPORTUNITIES AND DIFFICULTIES IN INTEGRATING THE THREE MODELS

As the attack continues on our traditional tort system and as its role is attenuated in remedying large-scale injuries, we should ask: How can we design our hydra-headed system to compensate individuals fairly and efficiently? How can we maintain the tort system's known advantages in compensating for mass disasters while effectively utilizing the criminal and administrative system to ensure that those injured receive adequate compensation at reasonable cost? I believe that an integrated administrative-criminal-tort system offers distinct advantages even though it presents difficulties and risks.

First, I want to discuss how the growing use of the criminal and administrative system to compensate individuals ironically tends to alienate individual victims from the legal process. Second, I will highlight the risks and advantages of a fully integrated system. Finally, I will underscore the valuable role the tort system can continue to play in compensating individuals fairly, reducing transactional inefficiency, and deterring future bad acts.

A. Alienation of Individuals from the Legal Process

Ultimately, the developments I have already described present a serious risk: they will further alienate individual victims from the legal process. As described in the last section, the traditional tort model can be more "democratic" because the individual litigant plays a central role. By contrast, the tendency in administrative and criminal law is to favor the government's position over that of the person injured.[119] As I have noted, there is pressure on the courts to reduce private mass litigation.[120] These tendencies disfavor the tort leg of the compensation stool and threaten our "bottom-up" jurisprudence.

possible the creation of a distinctive American Society that honored individual initiative, institutional restraint and popular public participation."); *id.* at 7 ("the autonomous individual emerged as an ideal"); *id.* at 26 ("Thomas Jefferson's presidential election ushered in an era of participatory politics, making way for a distinctive American political culture.") *id.* at 75 ("The principal citizens of American cities were merchants or lawyers—the former to make the money, the latter to adjudicate the suits that money provoked."); *id.* at 109 ("lawyers were abundant"); *see also* Alan Ryan, *My Way*, N.Y. REV., Aug. 10, 2000, at 47 (more self-seeking than communitarian efforts by Americans). *But cf.* Larry McMurty, *Inventing the West*, N.Y. REV., Aug. 10, 2000, at 24 ("most of the traditions which we associate with the American West were invented by pulp writers, poster artists, impresarios, and advertising men.").

119. *E.g.*, *In re* Rashid, 210 F.3d 201, 208 (3d Cir. 2000) (restitution to fraud victim entered prior to October 1998 amendments to the Bankruptcy Code are dischargeable if payable to private parties, but not if payable to the government).

120. *E.g.*, Summary of Report of the United States Judicial Conference Committee on Federal-State Jurisdiction, March 2000 (recommendation that Congress be urged to provide for state courts as the primary forum for personal injury claims arising from denial of health benefits).

Individuals are squeezed out of the legal process in other ways as well. Victims now have a right to be heard at sentencing, particularly for purposes of restitution, as well as in some rule-making and other decisions of administrative agencies.[121] Yet those seeking to be protected or compensated are usually only peripheral players in the administrative and criminal law systems.[122] By contrast, in civil litigation, the individual harmed has a right to be heard from the outset and throughout. Even in class and other mass actions, more and more attorneys remain in contact with their clients through group meetings, telephone exchanges, and new mediums like e-mail and the Web.[123] Additionally, those claiming injury have an absolute right to be heard in any fairness hearing held by the court before approval of a class settlement.[124]

We must also consider the different legal burdens a victim assumes in order to receive compensation. If a victim must rely on the criminal system to receive compensation, the prosecutor must satisfy the "beyond a reasonable doubt" standard of guilt and demonstrate that a defendant acted with the requisite mens rea, which usually requires a subjective intent to harm.[125] In comparison, the traditional tort model requires proof of negligence only by a preponderance of the evidence. Under the civil standard, it is more likely that victims will be compensated. The compassion of jurors for persons like themselves who have been injured also places victims at an advantage in civil trials. This may be particularly true of previously unprotected groups.[126]

121. *E.g.*, Administrative Procedure Act (APA), 5 U.S.C. § 553(c) (1994) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.").

122. According to Michael Solender, General Counsel of the Consumer Product Safety Commission, "the overriding issues in our cases are typically different from private litigation. Our cases focus on the risk to the public and the conduct of the company, not on whether an individual deserves compensation for his or her injury." CPSC Letter to author, 2 (Sept. 6, 2000). CPSC counsel is generally discouraged from coordinating activities with plaintiff's counsel, and "strives to treat all plaintiff and defense lawyers evenhandedly" to avoid an appearance of conflict. *Id.*

The FTC, which unlike the CPSC seeks disgorgement in addition to equitable relief and penalties, generally only seeks this relief "in cases that do not require the application of agency expertise to develop new principles of law." Letter from General Counsel Valentine, to author 3 (Sept. 1, 2000).

123. *See* Weinstein, *Compensating*, *supra* note 27. The U.S. Attorney General guidelines actually call for similar victim contact in criminal matters. For example, the guidelines state:

> [A] toll free telephone number system can be established that not only would permit victims to call in and get recorded information concerning the status of the matter, but would actually call the victims to alert them to a change in status. With individuals' increasing ability to access the Internet, Web sites can be created that contain information concerning the progress of investigations and prosecutions.

U.S. DEP'T OF JUSTICE ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 13, Jan. 13, 2000. I have not spoken with many attorneys who knew of these guidelines or consistently follow them.

124. FED. R. CIV. P. 23(d).

125. Once guilt is established beyond a reasonable doubt, sentencing decision on restitution and the like are made by the judge utilizing a preponderance standard.

126. *See* Krupp, *supra* note 116 ("governmental regulation provides women little protection").

The burden in administrative cases varies. Usually a government agency must merely demonstrate something by a preponderance of the evidence;[127] occasionally it must demonstrate by clear and convincing evidence.[128] Hence, the ability to obtain recovery usually—albeit not always—requires no greater burden than in civil cases, and sometimes the practical burden is less than it would be in a civil case.[129] Because of these differences, it is possible that a civil or administrative action can succeed where an earlier criminal case failed. This may be particularly true for minorities.[130]

B. Advantages and Disadvantages of Full Integration

Even a balanced administrative-criminal-tort system will pose challenges. A fully integrated system increases the burden of coordination among parties, stimulates the creation of federal barriers for private litigants, and may induce excessive recoveries. Overall, however, a coordinated tort—administrative—criminal system will reduce the threat of duplicative litigation, give judges a more complete picture of victims' needs, and provide opportunities for more creative remedies.

1. Disadvantages

i. Coordination

A potential difficulty with an integrated system is that any coordination among governmental agencies, prosecutors, private attorneys, and the courts can slow ultimate disposition. Nevertheless, particularly if private attorneys recognize the advantage of cooperation with criminal and administrative agencies in their private suits, they can be expected to try to expedite the matter in order to obtain their fee.[131] Moreover, if a sin-

127. New York state agencies enjoy less oversight than federal agencies. *E.g.*, Steadman v. SEC, 450 U.S. 91, 102 (1981) (holding that under section 7(c) of the Administrative Procedure Act, a sanction may not be imposed or rule or order issued unless the case is proved by a preponderance of the evidence); David Siegal, *Only an "Abuse of Discretion" that "Shocks the Conscious" Can Be Used by a Court to Overturn Sanction by an Agency*, N.Y. L. DIGEST, Feb. 2001 (discussing Featherstone v. Franco, 95 N.Y.2d 550 (2000)); Thomas R. Newman & Steven J. Ahmuty Jr., *Review of Administrative Penalties*, N.Y.L.J., May 2, 2001, at 3 (discussing New York case law).

128. *E.g.*, Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996) (denial of Social Security benefits must be supported by clear and convincing evidence).

129. *See* 42 U.S.C. § 423(f) (1994); Jack B. Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 902 (1984).

130. As a result of the different burdens of proof and substantive and mental elements, an acquittal in a criminal case does not have a collateral estoppel effect in a civil one. No situation more vividly illustrates this fact than the O.J. Simpson trials. A refusal of an administrative agency to act will not preclude a civil suit on the initiative of private litigants.

131. Plaintiff's attorneys have already become adept at using government agency studies published on the Internet to their advantage. *See* Erichson, *supra* note 110, at 1; Robert J. Ambrogi, *From Tobacco Hazard to Auto Safety, Sites Abound*, NAT'L L.J., Mar. 26, 2001, at B9. In qui tam actions, if the Department of Justice does not intervene, private attorneys can themselves run with the ball. Sometimes the urge to obtain fees can appear unseemly. *E.g.*, Van Voris & Fleischer, *supra* note 111,

gle broad settlement—such as in a generic drug case—can be reached, the need for multiple actions can be eliminated.

ii. Restrictive Legislation and Federalism

There is the possibility that coordination will encourage those who oppose private recovery to enact legislation requiring permission from the relevant governmental agency before bringing class actions.[132] A threat to our federalism exists if the more potent federal criminal-administrative-civil litigation triumvirate overwhelms the state *Erie* tort approach. Preemption increases the threat to private civil litigation; but it does not seem a serious impediment to civil actions at the moment.[133]

iii. Excessive (or Inadequate) Recoveries

The use of criminal law and administrative law as a club to induce excessive (or inadequate) recoveries presents risks of abuse, but these risks can be guarded against. The courts have felt no compunction about reviewing unfair administrative action. Criminal law rights and forfeiture rights have been protected by both Congress and the courts against over-reaching.[134]

As a matter of policy the criminal system should not occupy a central role in providing for private compensation. This is true regardless of the mental state required for the particular crime charged. Criminal convictions still carry a great stigma of moral turpitude, even in regulatory offense crimes where mens rea is minimal.[135] The system should not force a defendant into settling unfair civil claims in order to avoid a criminal prosecution.

If we are to provide fair remedies (in and out of the courtroom), Congress and the courts should ensure that criminal and administrative proceedings do not overshadow the tort system. If, however, there is a good independent reason to bring administrative or criminal proceed-

at 2 (describing several attorneys' efforts to capitalize a Firestone tire recall); Alison Frankel, *Tobacco Fees*, AM. LAW., Sept. 2000, at 98.

132. *Cf.* Lindblom, *supra* note 33; Victor E. Schwartz, *Finally, a Chance to Reform Product Liability Law*, WALL ST. J., Sept. 9, 1992, at A15 (proposing federal product liability law as method to clarify law of punitive damages).

133. For example, the court of appeals for the First Circuit upheld Massachusetts' restrictions on cigarette advertisements in the state's three largest metropolitan areas after they were attacked on preemption grounds. *See* Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000), *rev'd sub nom.* Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404 (2001). See discussion in *Blue Cross & Blue Sheild of N.J., Inc. v. Philip Morris, Inc.*, No. 98 CV 3287 (E.D.N.Y. Oct. 4, 2001) (Memorandum and Order).

134. *E.g.*, United States v. Bajakajian, 524 U.S. 321 (1998) (holding that Excessive Fines Clause applies to forfeiture).

135. While the mens rea problem is not extreme in administrative rulings, in general, it would seem appropriate to approach the roles of the administrative agency in much the same way as the criminal prosecutor—i.e., the administrative agency should not be used primarily to enforce tort liability.

ings, private compensation through restitution or disgorgement as a collateral matter is appropriate.[136]

2. Advantages

i. Duplicative Litigation

The integrated model offers several advantages. First, if all three prongs can be combined in the same court, the threat of duplicative litigation is minimized. Lawyers and judges who are familiar with the case can work together to bring about a speedy termination of the dispute. The possibility of a global settlement increases.

ii. Equitable Allocation and Restitution

The judge who has all aspects of the case before him or her is able to get a complete picture of the entire group of victims and of the defendant. This permits allocation of the defendant's resources in the most equitable manner. It also minimizes the risk that the defendant will hide his or her assets. The danger that plaintiffs in another civil action will be shortchanged is reduced.[137] By ensuring that the victims are heard in any related proceeding, a judge can guarantee that they are not forgotten or crushed by an overly bureaucratic process.

iii. Flexible Relief

Finally, a more integrated system has advantages in designing the form of relief and how it is allocated. For example, the so-called fluid recovery in a class action or a private action based upon damage, in nuisance cases, to the community generally (rather than to individuals seeking compensation), permits private persons and private attorneys to accomplish some of the things the government should be doing through executive, legislative, administrative, or criminal action.[138] Private actions by individuals or private nongovernmental groups to obtain remedies for the population generally against abuses in prisons, mental insti-

136. For an interesting example of the interplay between criminal and civil prosecutions, see Douglas Franz et al., *The Unraveling of a Conspiracy: Private Files Fuel an Art Auction Inquiry*, N.Y. TIMES, Oct. 8, 2000, at A1.

137. When the criminal, administrative, and civil actions are brought separately, the opposite risk also exists—the possibility of double recovery by some victims. Consolidation before one judge is the most effective way to avoid this problem. Judges can deal with this potential difficulty on a case by case basis. *E.g.*, SEC v. Palmisano, 135 F.3d 860, 865–66 (2d Cir. 1998); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996) (upholding award of disgorgement to agency with set-off amounts paid to private litigants in prior settlement).

138. An example is the tobacco passive exposure to smoke class action on behalf of flight attendants in Florida. Broin v. Philip Morris Co., 641 So. 2d 888 (Fl. Dist. Ct. App. 1994); *Miami Trial Settles*, LEGAL INTELLIGENCER, Feb. 10, 1998, at 4. The result, appropriately I think, was the provision of medical treatment for the flight attendants rather than compensation to the individual members of the class.

tutions, schools, toxic dumps, or the like are in this category. By combining the skills and resources of government prosecutors, administrators, and the private bar, an integrated model provides new opportunities for community protection. As already noted, to the extent that the administrative and criminal systems eliminate all the benefits of noncompliance with the law, punitive damages in civil suits can be eliminated, leaving the private action to deal only with pure compensation.[139]

C. The Role of the Tort System

The private tort model plays a valuable role in this integrated system.[140] Without an effective procedure for obtaining compensation for large numbers of people injured through the tortuous conduct of malefactors, most of the injured would be uncompensated and the tortfeasor would not pay the full social cost of its activities. Consolidations, advertisements by plaintiffs' counsel, contingency fees, class actions, and the whole panoply of organizational approaches we have developed for private enforcement of private rights are essential in a society as complex as ours. We should not dismantle or substantially reduce the private tort model solely in reliance on the administrative and criminal law models. Cooperation among them to increase transactional efficiency and reduce costs to defendants, plaintiffs and the government should be encouraged.

An approach to conflicts of laws and jurisdiction that will permit one court to apply one rule of law and one procedural system in conducting one litigation involving one related series of dispute is desirable.[141] It is useful, where the dispute is pending in different federal courts, to have multiple actions consolidated before one judge. Transfers, either pursuant to § 1404 of title 28 of the U.S. Code or by the multidistrict panel, or by stays of cases pending in other federal district or state courts should be utilized where appropriate to put all related proceedings—civil, administrative, and criminal—before the same judge.[142]

In the federal system, transfer by the multidistrict panel to one court can be only for pretrial purposes,[143] although that centralization often results in a settlement. A federal civil case can more easily be transferred to the place where the criminal case is pending[144] because venue

139. *See* Letter from Eric Schaeffer of the EPA, *supra* note 15.

140. I am not here dealing with the substantive matters of what the tort law is or the scope of preemption or the kind of regulatory compliance preclusion that may block private suits. *See* Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. (2000) (distinguishing related doctrines of regulatory compliance and preemption); Symposium, *Regulatory Compliance as a Defense to Product Liability*, 88 GEO. L.J. 2049 (2000).

141. *See* Weinstein, *Mass Tort*, *supra* note 27, at 145.

142. *E.g.*, Note, *Firestone Litigants Ask Multidistrict Panel for Consolidated Pretrial Proceedings*, Class Action Litigation Reporter, Sept. 22, 2000, at 3888 (defendants seek consolidation of more suits based on defective tires in one federal district court).

143. *See* 28 U.S.C. § 1407(a) (Supp. IV 1998); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).

144. *See* 28 U.S.C. § 1404.

rules are stricter for criminal than for civil cases.[145] If the cases are pending in the state and federal systems, or in a number of states, consolidation becomes difficult, although there are limited provisions for stays and for removal of some matters from state to federal court.[146] Statutory authority for more comprehensive consolidation would be useful.[147]

VII. CONCLUSION

Ours is a mixed economy and legal system, energized by private entrepreneurship, government responsibility, and charitable communal impulse. All elements have their roles. Often these roles overlap. How all of our institutions can work together without impinging on and reducing the effectiveness of each presents intriguing problems for the law and for society.

It is natural for administrative lawyers and criminal prosecutors to resent private attorneys piggy-backing on their work to bring large civil suits with high fees. Yet, as evidenced by examples such as the *Rubin* case, administrative agencies are sometimes ill-suited to aggressively retrieve money on behalf of private plaintiffs. There are many cases of the government itself contracting out private collection services. Private lawyers can be extremely competent and innovative in pursuing damages.

As Professors Goldberg and Zipinsky write, private litigation protects the "default norm that the civil justice system will provide a remedy for every wrong."[148] Efforts should be made to ensure that the private attorneys, motivated by fees, are available.[149]

Private counsel can assist in gathering facts and in advising and quieting the fears of clients. They have an important role in our judicial system. Our "bottom-up" approach to protection of individuals should not be abandoned or hobbled. Excessive fees can be avoided, but adequate fees that will nurture a strong bar—capable of protecting individual rights generally and their clients' rights particularly—should be maintained in any joint criminal-administrative-private integrated proceeding.[150]

145. *Compare* 28 U.S.C. § 1391 (1994) (civil venue provisions), *with* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . [be tried by a] an impartial jury of the State and district wherein the crime shall have been committed . . . .").

146. *See* 28 U.S.C. § 1441.

147. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 28–31 (2000).

148. John C. Goldberg & Benjamin C. Zipinsky, *The Third Restatement and the Place of Duty in Negligence*, 54 VAND. L. REV. (forthcoming 2000).

149. *E.g.*, Dick Thornburgh, *Sue, but Don't Prosecute*, N.Y. TIMES, Sept. 20, 2000, at A27; Carol Vogel & Ralph Blumenthal, *Art Auction Houses Agree to Pay $512 Million in Price Fixing Cases*, N.Y. TIMES, Sept. 23, 2000, at A1; Carol Vogel & Ralph Blumenthal, *Ex-Chief to Pay Bulk of Claims for Sotheby's*, N.Y. TIMES, Sept. 25, 2000, at A1 ($156 million and $30 million).

150. *E.g.*, Edward W. Gerecke, *Halting Regulation Through Litigation*, NAT'L L.J., Oct. 9, 2000, at B11 ("In these gun and tobacco cases, a sometimes frustrated, and oftentimes very willing, governmen-

It would be useful for the government agencies involved—state and federal—together with the private bar to work out policies for cooperation, perhaps through such associations as the American Law Institute or the American Bar Association's Section on Litigation. Appropriate administrative rule making and amendments of sentencing guidelines and the Attorney General's guidelines need consideration.[151]

The courts must ensure fairness. The threat of administrative or criminal action to force a civil settlement would be particularly dangerous. Nor should a civil settlement allow the "buying-off" of a justifiable criminal or administrative proceeding.

More complex technology, globalization of communication, aggregation of production and distribution entities, and growth and urbanization of populations all conspire to make more effective methods for compensating large numbers of those injured by mass delicts desirable—whether through private suits, criminal prosecutions, administrative actions, mediation and arbitration, or a combination of them.[152]

tal entity joins forces with teams of lawyers to pursue the industry. Many of these lawyers have the financial capacity to take on an industry . . . .").

151. *E.g.*, Abrams, *supra* note 21, at 539, 559–74 (discussing rule making by the Department of Justice and Sentencing Commission). These agencies could provide guidelines for integrating civil and criminal practice in compensation. The Attorney General Guidelines for Victim and Witness Assistance recognizes that "the use of representative victims and victim proxies (such as organizations that represent the interests of the victim class or actual class action representatives)" may be appropriate methods to provide victims with notice and information. OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 2000, at 13 (2000). Given the complexity of the issues that I have outlined above, more guidance will be necessary.

152. *See generally* WEINSTEIN, INDIVIDUAL JUSTICE, *supra* note 27; Weinstein, *Mass Tort*, *supra* note 27; Weinstein, *Compensating*, *supra* note 27.