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Bellwether Trials

Alexandra Lahav
University of Connecticut School of Law

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Alexandra D. Lahav*

Introduction

At the core of the controversy over mass torts lies a fundamental question: what justifies collective litigation? The conventional understanding of litigation is individualistic, founded on an eighteenth-century common-law tradition that "everyone should have his own day in court."[1] For this reason, tort law scholars and judges have consistently asserted that procedures aimed at achieving collective justice in mass tort cases—such as class actions and aggregative litigation—must be limited by an individual, process-based right to participation.[2] Those

* Associate Professor of Law, University of Connecticut School of Law. J.D., Harvard Law School. Many thanks to Jon Bauer, Paul Berman, Bethany Beyer, Robert Bone, George Conk, Anne Dailey, Amanda Frost, Mort Horwitz, Pnina Lahav, Henry Monaghan, Jeremy Paul, Sachin Pandya, Ariel Porat, Issachar Rosen-Zvi, Alex Stein, and participants in workshops at the University of Connecticut, Tel Aviv University, and Washington University in St. Louis School of Law for their thoughtful responses and criticisms, and to Lee Sims and Tom Hemstock for assistance in collecting research materials. All errors are my own.

1 Martin v. Wilks, 490 U.S. 755, 762 (1989) (internal quotation marks omitted).

2 *See* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 627 (1997) (overturning asbestos settlement based on concerns regarding rights of individual plaintiffs); Robert G. Bone, *Statisti-*

scholars who believe pure collective justice is possible rely solely on efficiency arguments.[3] Modern torts scholarship has thus been limited to two opposing rationales: individual justice based on autonomy values or collective justice based on efficiency values.

This Article presents a third argument for collective justice based on democratic participation values. It urges that we re-envision the tort trial as a democratic enterprise rather than only an individual's day in court. This argument draws an analogy to the theory of deliberative democracy, which values participation as a means of encouraging public deliberation and believes that contentious issues are best addressed through deliberative processes.[4] Holding public trials and allowing juries to determine outcomes constitutes a deliberative process in which reasoned arguments are presented to citizens who participate in decisionmaking.

Although the dichotomy between autonomy and efficiency values remains the bedrock of mass torts scholarship, trial judges have been using a procedure that embodies this democratic justification: the bellwether trial. A "bellwether" is a sheep that leads a flock, around whose neck a bell is hung.[5] In a bellwether trial procedure, a random sample of cases large enough to yield reliable results is tried to a jury. A judge, jury, or participating lawyers use the resulting verdicts as a basis for resolving the remaining cases. Judges currently use bellwether trials informally in mass tort litigation to assist in valuing cases

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cal Adjudication: Rights, Justice, and Utility in a World of Process Scarcity, 46 VAND. L. REV. 561, 650 (1993) (concluding that under a rights-based theory sampling is an acceptable form of resolving mass tort cases only in instances of extreme process scarcity); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (defending process-based rights to participation in litigation).

3 *See, e.g.*, David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 853 (2002) (advocating a deterrence rationale for mass tort cases); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 851 (1992) (presenting utilitarian arguments in favor of using sample cases to resolve mass tort cases); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545, 546 (1998) (presenting efficiency arguments in favor of statistical adjudication of damages).

4 Although not discussed explicitly, this analysis draws on a rich literature on deliberative democracy. *See generally* JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION (1991); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004). For a useful summary of different models of democracy and the arguments favoring and critiquing each, see Amy Gutmann, *Democracy*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 411–21 (Robert E. Goodin & Philip Pettit eds., 1993).

5 2 OXFORD ENGLISH DICTIONARY 94 (2d ed. 1989); *see also In re* Chevron U.S.A. Inc., 109 F.3d 1016, 1019 (5th Cir. 1997) (stating that the term "is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock").

and to encourage settlement.[6] Instituted as a formal procedure, bellwether trials offer an innovative way to achieve collective justice in mass tort cases because they realize the democratic policies animating the jury right and the aims of the substantive law. These trials promote a type of "group typical" justice that is at once participatory and collective.

The original bellwether was a typical, perhaps particularly docile sheep who signaled the direction of the flock because he traveled at its center.[7] Bellwether trials also approximate a "typical" case through averaging. In common usage, the term bellwether refers to a leader or an indicator of future trends. Bellwether trials also lead procedure in a new direction, adapting the eighteenth-century institution of the jury trial to twenty-first century needs for collective justice.

The Article begins with a description of bellwether trials using three examples: litigation arising out of the tragedy of September 11th, asbestos litigation, and a human rights class action against Ferdinand Marcos, former dictator of the Philippines. These case studies illustrate the reason that courts have developed innovative procedures such as bellwether trials to deal with mass tort litigation and provide some possible permutations of the procedure. They offer insights into the political economy of litigation that results in statistical adjudication and prompt us to think more deeply about the group typical justice that these trials promote.

Part II presents the policy arguments in favor of bellwether trials. Bellwether trials both realize the policies behind the right to a jury trial and the aims of the substantive law that procedures are meant to enforce. This Part begins by demonstrating that the jury right is a democratic, communal right.[8] The jury serves two central political functions. First, it provides a democratic decisionmaking body, made

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6 *See, e.g.*, Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 359–60 (2d Cir. 2003) (affirming use of bellwether trial to assist settlement of twenty-two cases involving Legionnaires disease on a cruise ship); Dodge v. Cotter Corp., 203 F.3d 1190, 1194 (10th Cir. 2000) (affirming use of bellwether trials to resolve case involving uranium contamination in a community). Informal bellwether trial procedures were also to be used in two cases that appear at this writing to have been largely resolved by settlement: the September 11th litigation, discussed *infra* Part I, and in the recent Vioxx litigation, *see* Case Management Order No. 3, *In re* Vioxx Litigation, No. 619 (N.J. Super. Ct. Law Div. May 12, 2004), *available at* http://www.judiciary.state.nj.us/mass-tort/vioxx/Vioxx_cmo3.pdf.

7 According to the Oxford English Dictionary, the term is used contemptuously when referring figuratively to individuals. 2 OXFORD ENGLISH DICTIONARY 94 (2d ed. 1989).

8 This fact has been asserted but rarely fully analyzed. *See, e.g.*, Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 745–46 (1995) (stating that the jury "ensures a role for the community in adjudicative proceedings").

up of ordinary citizens, for determining difficult questions to which there is no generally agreed upon answer. For example, juries lend legitimacy to the social process of monetizing injury.[9] Second, the jury system provides some measure of protection against systemic bias that judges may exhibit. The bellwether trial promotes both of these functions.

Not only do bellwether trials realize the democratic ambitions of the jury right, they also make possible the realization of the social aims of substantive tort law including deterrence, publication of wrongs, and compensation. Collective procedures for resolving mass torts, such as bellwether trials, rely on group typicality and probabilistic reasoning rather than particularized proof. Although some argue that group typical justice is fundamentally antithetical to tort law, the foundations of probabilistic thinking necessary for achieving group typical justice already exist within the substantive tort regime.

Procedure is an agent for social change as much as the substantive law is. Furthermore, procedures can change the social environment and thereby alter the policy goals thought to be worth pursuing.[10] Re-envisioning the trial as a democratic enterprise will influence the choice of substantive ends of law and make it possible to legitimately decide cases based on group typicality. This change is necessary in a world of mass industrial harms where individualized justice is increasingly difficult to achieve.

Part III presents and refutes objections to bellwether trial procedures. These objections fall into three categories: distributional, autonomy-based, and Seventh Amendment objections. Distributional objections concern the difficulty of determining the variables about which inferences are to be made, of accurately awarding compensation based on statistical analysis, and of fairly distributing compensation among plaintiffs. Autonomy-based objections also form the root of due process concerns raised by group typical justice. These objections contend that bellwether trials violate a process-based right to individual participation. A final constitutional objection to the procedure is that bellwether trials violate the right to a jury trial in civil

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9 The assumption here is that the process of monetizing injury is contextual and situated. *See* VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD 138–68 (1994) (providing a cultural history of the evolving value of children's lives and labor in the nineteenth and twentieth centuries).

10 *See* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1276 (1995) (ascribing this position to legal process theorists).

cases. Each of these objections deserves serious consideration, but none are fatal to formalizing bellwether trial procedures.

The fourth and final Part proposes a model constitutional bellwether trial procedure.

I. Bellwether Trials

The terrorist attacks on September 11, 2001, left in their wake thousands of bereaved families and injured individuals. Congress created the September 11th Victims Compensation Fund, an administrative body, to rationalize compensation for these victims.[11] By participating in this expedited, administrative process, the families and victims of the attacks gave up their right to sue.[12] The fund distributed $7.049 billion to victims of the terrorist attacks who filed claims.[13] Ninety-seven percent of the victims and their families participated in the administrative procedure instead of pursuing court cases.[14] Forty-one plaintiffs, representing forty-two victims and their families, filed lawsuits in federal court.[15] These forty-one cases were consolidated before a single judge, the Honorable Judge Alvin K. Hellerstein, in the Southern District of New York.[16]

Six years after the attacks, these lawsuits were still pending.[17] As Judge Hellerstein observed, the slow pace of the litigation frustrated the plaintiffs.[18] Some of the victims were adamantly against settlement because they wanted the publicity of a trial.[19] But others, the judge believed, wanted to settle, and the only obstacle to settling those cases was that the parties could not agree on their monetary value.[20] So he proposed holding bellwether trials for selected plaintiffs who would volunteer to participate. The trials were to be for damages only; the jury would not consider questions of liability or causation.

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11 September 11th Victims Compensation Fund of 2001, Pub. L. No. 107-42, tit. IV, §§ 401–409, 115 Stat. 230, 237–41.

12 *Id.* § 405(c)(3)(B), 115 Stat. at 239–40.

13 *See* 1 KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 1 (2004).

14 *Id.*

15 *See* Opinion Supporting Order to Sever Issues of Damages and Liability in Selected Cases, and to Schedule Trial of Issues of Damages at 3, *In re* September 11th Litigation, No. 21 MC 97 (AKH) (S.D.N.Y. July 5, 2007), *available at* http://www1.nysd.uscourts.gov/docs/rulings/21MC97_opinion_070507.pdf.

16 *Id.* at 2.

17 *Id.* at 1.

18 *Id.* at 3–4.

19 *Id.*

20 *Id.* at 4.

The results were intended to be available to other plaintiffs and to defendants to assist them in valuing cases for settlement.[21] As a result of the decision to conduct bellwether trials using reverse bifurcation, fourteen of the cases have settled so far.[22]

This is how the bellwether trial is used today. Cases are chosen, not quite randomly, for trial on a particular issue.[23] The results of the trials are not binding on the other litigants in the group.[24] The outcomes can be used by the parties to assist in settlement, but the parties can also ignore these results and insist on an individual trial.[25] There was a time, however, when courts experimented with binding bellwether trials. Those experiments were prematurely ended, perhaps due to the influence of a Fifth Circuit decision holding bellwether trials unconstitutional on Seventh Amendment grounds.[26]

In a binding bellwether trial procedure, the court will choose a random sample of cases to try to a jury.[27] The judge may then bifurcate the cases into liability and damages phases, or perhaps even trifurcate them into liability, causation, and damages phases.[28] The parties will try each bellwether case before a jury that will render a verdict in that case.[29] Finally, the results of the bellwether trials will be extrapolated to the remaining plaintiffs.[30] The underlying principle of such an extrapolation is that the bellwether plaintiffs are *typical* of the rest of the plaintiff group such that the results of the bellwether trials represent the *likely outcome* of their cases as well.[31] What these extrapolation plaintiffs get in a bellwether trial procedure is not individuated justice but rather group typical justice.

The following example explains how the extrapolation process might work. Imagine that a court tries 100 sample cases and 50% of

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21 *Id.*

22 *See* Order, *In re* September 11th Litigation, No. 21 MC 97 (AKH) (S.D.N.Y. Sept. 17, 2007), *available at* http://www1.nysd.uscourts.gov/docs/rulings/21MC97_order_091707.pdf (ordering fourteen cases closed due to settlement).

23 Richard O. Faulk, Robert E. Meadows & Kevin L. Colbert, *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH L. REV. 779, 791–92 (1998).

24 *See In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997).

25 *Id.*

26 Cimino v. Raymark Indus., Inc., 151 F.3d 297, 320–21 (5th Cir. 1998).

27 *See, e.g.*, *In re Chevron*, 109 F.3d at 1019.

28 *See, e.g.*, Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653 (E.D. Tex. 1990) (trifurcating asbestos case into three phases: failure-to-warn, causation, and damages), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

29 *See, e.g.*, *In re Chevron*, 109 F.3d at 1019.

30 Faulk, Meadows & Colbert, *supra* note 23, at 793.

31 *Id.*

them result in plaintiff victories. Of these 50, half are awarded $200 and the other half are awarded $300. Taking all of these results into account, and counting the defense verdicts as $0, the average award would be $125. Under a simple averaging regime, every plaintiff would receive $125. If this result seems too rough, the court could calculate separate averages based on relevant variables.

The following examples illuminate both the mechanics of binding bellwether trials and their potential as a solution for courts dealing with mass tort cases.

A. Trying Thousands of Asbestos Cases

Asbestos is the paradigmatic story of modern mass tort litigation. Although there are some unique features to the asbestos litigation, it raised for the first time many of the recurring issues in mass tort litigation. This story has been told at length elsewhere, but it is worth briefly reviewing to understand why a judge might think binding bellwether trials are the best solution to the seemingly intractable problems posed by mass torts.[32]

Although it is a useful product, asbestos is also extremely harmful. Manufacturers were aware of the risks of asbestos exposure by the 1940s, but they did not warn employees or provide adequate protection for them.[33] As a result, millions of workers were exposed to asbestos and suffered injuries such as mesothelioma (a deadly cancer), other cancers, asbestosis, and pleural abnormalities.[34] A 2004 study estimated that nearly 730,000 people filed asbestos-related personal injury lawsuits, many for nonmalignant injuries.[35] The courts are overwhelmed by the asbestos docket and have experimented with various types of innovative procedures to deal with this influx of cases.[36] Efforts at global settlements failed due to the limitations on settlement

32 For a thorough review of the development of asbestos litigation, see STEPHEN J. CARROLL ET AL., RAND, ASBESTOS LITIGATION xvii–xxviii (2005). For an accessible, shorter analysis, see Deborah Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System,* 12 CONN. INS. L.J. 255 (2006).

33 CARROLL, *supra* note 32, at xviii–xix.

34 *Id.*

35 *Id.* at xxiv.

36 *Id.* at xxi–xxiii.

imposed by the Supreme Court.[37] Despite repeated pleas from judges, legislative intervention has not been forthcoming.[38]

In 1990, Judge Robert Parker, then a federal district court judge for the Eastern District of Texas, had approximately 3000 wrongful death suits arising out of asbestos exposure before him.[39] The court could not have tried all these suits in a reasonable time frame, so he adopted an innovative procedure: binding bellwether trials. He approved a trial plan that was to proceed in three phases. The first phase provided class-wide determinations of failure to warn and punitive damages.[40] The second phase determined causation.[41] The court intended to have a jury establish asbestos exposure on a craft and worksite basis during the relevant time periods, rather than on the basis of individual proof.[42] Instead, this phase was resolved by stipulation, with defendants reserving their right to appeal.[43] The third phase, which is the one that concerns us here, was the damages phase.[44]

Judge Parker selected 160 cases to be tried before two jury panels.[45] Each jury was told that the causation requirement had been met and was charged only with determining damages in each individual case before it.[46] The trials took 133 days, involving hundreds of witnesses and thousands of exhibits.[47] The effort expended in the proceeding was enormous, and Judge Parker noted, "If all that is accomplished by this is the closing of 169 cases then it was not worth the effort and will not be repeated."[48]

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37 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620–29 (1997). For a trenchant critique of attempts to settle asbestos cases globally, see Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995).

38 "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution." *Amchem*, 521 U.S. at 628–29.

39 *See* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

40 *Id.* at 653.

41 *Id.*

42 *Id.*

43 Cimino v. Raymark Indus., Inc., 151 F.3d 297, 307–08 (5th Cir. 1998).

44 *Cimino*, 751 F. Supp. at 653.

45 *Id.* at 664.

46 *See id.* at 653–54.

47 *Id.* at 653.

48 *Id.*

Of the 160 bellwether verdicts, the court remitted 35 and 12 were awarded no damages.[49] The court allocated the cases into five disease categories and averaged the awards, including the zero awards, within those categories.[50] The average verdict in each disease category was "mesothelioma, $1,224,333; lung cancer, $545,200; other cancer, $917,785; asbestosis, $543,783; pleural disease, $558,900."[51] After hearing expert testimony, the judge determined that these cases were typical or representative of the remaining plaintiffs.[52] The judge held a hearing in which he assigned the remaining cases to one of the five disease categories.[53] He made an award in each case according to the average award for that disease category.[54] Thus, for example, each plaintiff with mesothelioma was awarded $1,224,333—even those whose cases had not actually been tried.

The plaintiffs agreed to this procedure, likely because the alternative was an untenably long wait for a trial. The defendants, by contrast, objected and appealed.[55] They argued that under Texas law and the Seventh Amendment they were entitled to an individual trial on causation and damages for each plaintiff.[56] The Fifth Circuit, perhaps hoping for legislative intervention, waited eight years before reversing the district court's trial plan.[57] The circuit court rejected the bellwether trial procedure, reasoning that the Seventh Amendment and Texas law entitled the defendants to individual trials against each plaintiff on both causation and damages.[58] The cases were remanded to Judge Parker.[59]

Judge Parker's experience encapsulates the political economy of mass tort adjudication. Most of these cases arise out of some type of regulatory failure, come to the courts in masses that are beyond the capabilities of the courts to adequately adjudicate one by one, and

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49 Cimino v. Raymark Indus., Inc., 151 F.3d 297, 300 n.3 (5th Cir. 1998).

50 *Id.* at 304.

51 *Id.* at 297, 305.

52 *Cimino*, 751 F. Supp. at 664 ("The Court is of the opinion that the distribution of variables between the samples and their respective subclasses is comparable."). Because the court relied on the plaintiffs' expert, who analyzed information provided by the plaintiffs only, this conclusion was suspect.

53 *Cimino*, 151 F.3d at 300, 305, 309. The court only entered judgment in five extrapolation cases. *See id.*

54 *Id.*

55 *Id.* at 300.

56 *Id.* at 300–01.

57 *Id.* at 297, *rev'g Cimino*, 751 F. Supp. 649.

58 *Id.* at 311.

59 *Id.* at 321.

there is little hope of a legislative solution. The congressional response to the terrorist attacks of September 11th is a notable exception to this rule. To put it more directly: the courts are stuck with mass tort cases, and these cases continue to multiply. For these reasons, bellwether trials are a promising alternative for promoting justice.

B. Adjudicating Human Rights Abuses

Mass torts can take many forms. Consider, for example, the class action litigation against the estate of Philippine dictator Ferdinand Marcos.[60] Marcos declared martial law in the Philippines on September 21, 1972.[61] Shortly thereafter, he ordered ratification of a constitution revised to keep him in power.[62] He issued several orders maintaining his power, including General Orders 2 and 2A, which authorized the arrest of dissidents.[63] Anyone who was either an opponent of the Marcos regime or perceived as one could be arrested and detained.[64] Persons arrested by the government on suspicion of opposition were tortured in a variety of ways. Some of the more disturbing practices included submerging the heads of prisoners in toilet bowls full of excrement, the placement of a cloth over the mouth and nose of a prisoner and pouring water over it to produce a drowning sensation, near suffocation of prisoners by placing a plastic bag over their heads, electric shocks to the genitals, rape and sexual molestation, and long terms of solitary confinement while tied with chains or rope.[65] Some prisoners "disappeared" and were presumed killed, some were summarily executed, others survived.[66]

Marcos ruled the Philippines as a dictator from 1972 until 1986, during which period the practices described above occurred.[67] In 1986 he fled to Hawaii with his family and loyal supporters. Lawsuits were filed against him, and subsequently his estate, in Hawaii under the Alien Tort Claims Act[68] and the Torture Victim Protection Act of

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60 The history provided here is taken from the district court opinion in *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995), *aff'd sub nom.* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

61 *Id.* at 1463.

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* at 1462–63.

66 *Id.* at 1462.

67 *Id.* at 1461.

68 Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

1991 ("TVPA").[69] One such lawsuit was a class action known as *In re Estate of Marcos Human Rights Litigation*.[70]

The class action lawsuit against the Marcos estate proceeded in three phases: a liability phase, a punitive damages phase, and a compensatory damages phase. In the liability phase, the jury found defendants liable to 10,059 plaintiffs for torture, summary execution, and disappearance.[71] This was followed by a punitive damages phase, in which the jury awarded the plaintiffs $1.2 billion.[72] Finally, the court oversaw a compensatory damages phase. This last phase is the most interesting from a procedural perspective.

First, the court established an opt-in class.[73] After the court invalidated some claims, a total of 9541 claims remained. Of these, the district court randomly selected 137 sample cases.[74] A special master traveled to the Philippines, where he conducted depositions and reviewed documents.[75] Utilizing this information, he made preliminary validity and damages findings with regard to each of the plaintiffs in the sample group.[76] He recommended that 6 of the 137 claims be found invalid.[77] His damages recommendation in each case utilized the following factors:

> (1) whether the abuse claimed came within one of the definitions, with which the Court charged the jury at the trial . . ., of torture, summary execution, or disappearance; (2) whether the Philippine military or paramilitary was . . . involved in such abuse; and (3) whether the abuse occurred during the period September 1972 through February 1986.[78]

He recommended a 5% invalidity rate because he found 6 of the 137 sample claims (4.37%) invalid.[79] The average recommended

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69 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2000).

70 *In re* Estate of Marcos Human Rights Litig., 910 F. Supp. 1460 (D. Haw. 1995), *aff'd sub nom.* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

71 *Id.* at 1463–64.

72 *Id.* at 1464.

73 *Contra* Kern v. Siemens, 393 F.3d 120, 128 (2d Cir. 2004) (invalidating opt-in damages classes).

74 The number of sample cases was chosen based on expert testimony that a sample size of 137 would result in "a 95 percent statistical probability that the same percentage determined to be valid among the examined claims would be applicable to the totality of claims filed." Hilao v. Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996). The margin of error used was five percent, that being prevalent in the social sciences. *Id.* at 783.

75 *Id.* at 782.

76 *Id.*

77 *Id.* at 783.

78 *Id.* at 782.

79 *Id.* at 783.

award for the 64 torture claims was $51,719; the average of the 50 summary execution claims was $128,515; and the average of the 17 disappearance claims was $107,853.[80] The special master further recommended that the total award to the class be determined by multiplying the number of valid claims in each subclass by the average award for claimants in that subclass and adding to this number the awards for the sample claimants.[81] These recommendations were then presented to the jury along with expert testimony that the methodology used by the special master was statistically sound.[82] The jury deliberated for five days and reached conclusions close to, but different from, the recommendations of the special master on the individual sample claims, indicating that the jury had independently evaluated the evidence.[83] The jury accepted the special master's recommendations with respect to the extrapolation claims without changes.[84] The jury's differences from the special master included both increased awards on some claims and decreased awards in others.[85] The Ninth Circuit upheld this procedure, finding that it did not violate defendants' right to due process of law.[86]

The *Marcos* human rights litigation benefited from some unique circumstances for a mass tort. Choice of law was not an issue. The TVPA does not specify how damages are to be determined, and so the courts have developed federal common law to address damages issues in such cases.[87] In a domestic mass tort case, by contrast, differing state laws present a barrier to certification of a class action.[88] In this regard, the case was easier to certify as a class action and therefore

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80 *Id.*

81 *Id.* The total compensatory award recommended by the special master was $767,491,493. *Id.*

82 *Id.* at 784.

83 *Id.* The same jury that had made the determination on liability and punitive damages was then reconvened to evaluate the testimony gathered by the special master and his recommendations, and to award damages. *Id.*

84 *Id.*

85 *Id.* at 784 n.9. One aspect of the extrapolation that raises due process concerns is that the jury found that only two (rather than four) of the sample claims were invalid. *Id.* at 784 n.10. Nevertheless, the jury awarded the extrapolation amount based on a five percent invalidity rate as recommended by the special master. *Id.* The invalidity rate should probably have been reduced to reflect the jury's findings.

86 *Id.* at 767–68.

87 *In re* Estate of Marcos Human Rights Litig., 910 F. Supp. 1460, 1469 (D. Haw. 1995), *aff'd sub nom.* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

88 *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1293–94 (7th Cir. 1995) (reversing class action certification in mass tort case because class members were subject to multiple and conflicting state laws).

more amenable to group typical justice. Nevertheless, individuation still stood as a potential objection to class treatment. Each plaintiff surely had his or her own unique and harrowing story of torture or murder and its consequences. The fact that the court upheld statistical adjudication in this case illustrates the possibility of achieving group typical justice.

The procedure used in this human rights litigation allowed the initial damages determinations to be made by an expert and thereafter evaluated and ratified by a jury.[89] This shows that the jury can be involved in multiple phases of the process. The jury can determine damages in individual cases and can also review suggested extrapolation options and thereby lend legitimacy to the extrapolation process. Nobody in the *Marcos* litigation received an individual jury trial, but the group of plaintiffs did. The litigation achieved several objectives: compensation, publicity, and a process that included a jury evaluation of the wrongs committed. In the absence of the procedure utilized by the court, it is almost certain that the plaintiffs in this case would never have received a day in court.

Group typicality, as these examples illustrate, is not perfect justice. Most of the individual plaintiffs cannot participate directly. The definition of the group may be inaccurate, such as by including persons with significantly different characteristics. It is furthermore certain that the average award this procedure provides to extrapolation plaintiffs will differ from what they would have received in an individual jury trial. The averaging process redistributes money from the highest-value claims to the lower-value claims, even within a group of similarly situated individuals.[90] But bellwether trials are a far more palatable method for resolving mass litigation than the alternatives: standing on the sidelines waiting to be heard or settling en mass. As Judge Weinstein observed in a recent opinion,

> [i]n mass fraud cases with hundreds of thousands or millions of injured the cost of one-on-one procedures is insuperable and unsuitable for either a jury or a bench trial. The consequence of requiring individual proof from each smoker would be to allow a defendant which has injured millions of people and caused billions of dollars in damages to escape almost all liability.[91]

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89 *Contra In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) (rejecting similar "lump sum" procedure on due process and state law grounds).

90 Bone, *supra* note 2, at 599–600.

91 Schwab v. Philip Morris U.S.A., Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (certifying

Despite the significant problems group typical justice poses, bellwether trials are a good second-best solution to this difficult problem.

II. The Policy Arguments for Bellwether Trials

The primary purpose of procedure is to realize the substantive aims of the law.[92] But procedure and substance have a reciprocal relationship. Procedures not only realize the aims of the substantive law, they also influence its direction. Furthermore, some procedures, such as the jury trial, also have an intrinsic value.[93] The bellwether trial procedure realizes both the aims of the jury right and the aims of substantive tort law. Bellwether trials also affect the aims of the substantive tort law in mass cases by making group typical justice possible.

A. The Jury Right

Two policy goals underpin the right to a jury trial: citizen participation and prevention of systemic bias. The jury trial introduces democratic values into the court system by involving citizens in judicial decisionmaking. Such citizen participation is an independent civic good. The jury trial also helps avoid the systemic bias that might develop if all cases were decided by professional judges. These two arguments are interrelated because the introduction of democratic decisionmakers avoids the bias of an entrenched judicial elite. Bellwether trial procedures realize both of these policy aims.

The debates around the right to a jury in the American colonies, and leading up to the ratification of the original Constitution and the Bill of Rights, illuminate the reasons for the strong American adherence to the jury right.[94] This is not to say that there are not other historical and contemporary sources to support the policies behind the

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RICO class action on behalf of smokers of light cigarettes and holding that use of statistical evidence to establish liability and damages did not violate defendants' due process rights).

92 This is what John Rawls called "perfect procedural justice," which presents an independent criterion for fairness and a procedure that provides that outcome. JOHN RAWLS, A THEORY OF JUSTICE 85 (1971).

93 The intrinsic value of procedure can be alternatively stated as "pure procedural justice," wherein whatever result is reached by the procedure is understood to be fair so long as the procedure is correctly followed. *Id.* at 86. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537–39 (1958) (describing the trial by jury in civil cases as an "essential characteristic" of the federal system).

94 By comparison, the jury right has declined in other common-law jurisdictions. *See generally* WORLD JURY SYSTEMS (Neil Vidmar ed., 2000); Hein Kotz, *Civil Justice Systems in Europe and the United States,* 13 DUKE J. COMP. & INT'L L. 61, 73 (2005) (describing the decline of the civil jury in England, Canada, and Australia). Although the jury right has been eroded in the United States, it still remains relatively strong.

jury right or that an originalist approach is the best method of establishing the principles animating the jury right.[95] Nor do I provide an exhaustive history here. The point is merely to revive the rationale for the jury right articulated in and around 1789.[96] The focus on early American materials is based largely on the fact that these sources remain compelling and is in part responsive to the focus on originalism embedded in Seventh Amendment doctrine.[97]

Many American colonists saw the jury as an antidote to the oppressive rule of British governors. The jury was understood as an egalitarian, democratic institution in contrast to equity courts, where the royally appointed governor was the decisionmaker. Thus, some colonists were more interested in the decisionmaker than the substantive and procedural differences between equity and common-law courts. Whereas in England equity courts were understood as an antidote to the rigidity of the common law, colonists were more concerned with the antidemocratic implications of royal control over equity courts.[98] Equity served as a reminder of the limits on civic participation. "The very existence of chancery courts, with their long tradition in English history, made it apparent that, in America, if the conscience of the King was not the source of equity jurisdiction, then a more popular legislative source must be identified."[99]

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95 My use of historical materials serves to inform the discussion about the function of the jury, not to take a position with respect to the active and fascinating debate on the uses (and misuses) of originalism in constitutional interpretation. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996) (describing and critiquing originalist jurisprudence); Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. (forthcoming 2008) (articulating a theory of constitutional interpretation that relies on fidelity to the original meaning and its underlying principles); Reva Siegel & Robert Post, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 545–74 (2006) (critiquing originalism's pretensions).

96 This foray is probably best described as "lawyer's history." For a discussion of the history and politics of lawyer's or "law office" history, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996). The use of historical materials in this manner is largely unavoidable in this analysis, but the reader should be aware that this work does not purport to provide a truly nuanced historical account. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (critiquing the Supreme Court's use of history in constitutional cases).

97 The test for determining whether the jury right attaches is referred to as the "historical test" and is based on the distinction between causes of action at law (where a jury was available) and in equity (where a jury was not available) as they were understood in 1791. The origin of this test is Justice Story's circuit opinion in *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). This approach is analyzed and critiqued in Part III.C, *infra*.

98 Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY 257, 272 (Donald Fleming & Bernard Bailyn eds., 1971).

99 *Id.* at 283. At the same time, Katz points out that the approach to the politics of law and

The jury injected the popular will into the court system. As Thomas Jefferson explained in 1789:

> We think in America it is necessary to introduce the people into every department of government as far as they are capable of exercising it . . . . Were I called upon to decide whether the people had best be omitted from the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making them.[100]

The argument that the jury right serves as a bulwark against systemic judicial corruption received support across political lines. For example, the Antifederalists opposed ratification of the original Constitution in part because Article III contained no right to a trial by jury in civil cases. They worried that debtors, as a group, would be treated unfairly by distant federal judges.[101] Antifederalists argued, "We know that the trial by a jury of the vicinage is one of the greatest securities for property. If causes are to be decided at such a great distance, the poor will be oppressed . . . ."[102] Thomas Jefferson expressed the same view more radically: "But we all know that permanent judges acquire an Esprit de corps" and may be tempted by bribery and misled "by a spirit of party, a devotion to the Executive or the Legislative," and "[i]t is left therefore to the juries, if they think the permanent judges are under any biass [sic] whatever in any cause, to take upon themselves to judge the law as well as the fact."[103] Federalists seem to have agreed on this point, as Alexander Hamilton wrote in *The Federalist No. 83*, "The strongest argument in its favour is that it is a security against corruption."[104] When introducing the bill to Congress that ultimately became the Bill of Rights, James Madison described the jury right variously as "that great bulwark of personal

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chancery was inconsistent during the colonial era. Even vociferous opponents of chancery courts sometimes served as chancellors. *Id.* at 284.

100 Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), *in* 5 THE FOUNDERS' CONSTITUTION 364 (Philip B. Kurland & Ralph Lerner eds., 1987). The political impetus for this statement may have had to do with Jefferson's relationship with Chief Justice John Marshall. On their difficult relationship from Marshall's perspective, see R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001).

101 *See* Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 169–76 (2002) (describing the role of debt in the establishment of the jury right).

102 Debates of the North Carolina Constitutional Convention, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 523 (Neil H. Cogan ed., 1997).

103 Letter from Thomas Jefferson to Abbe Arnoux, *supra* note 100, at 364.

104 THE FEDERALIST NO. 83 (Alexander Hamilton), *reprinted in* 5 THE FOUNDER'S CONSTITUTION, *supra* note 100, at 360.

safety," "one of the great securities of the rights of the people," and "a right resulting from the social compact which regulates the action of the community."[105] Individual jurors may be biased, as human beings sometimes are, but they will never introduce *systemic* bias to the courts. This is because a different jury sits in every case and the decision rests in the hands of twelve rather than one person.

Bellwether trials promote both the aims of democratic decisionmaking and protection against systemic bias. The only way to understand how bellwether trials can promote these goals is to evaluate them within the context of the political economy of modern mass litigation. When trials are not available to litigants for structural reasons, it is arguable that these litigants have no right to a trial by jury in a meaningful sense. Because individual jury trials are not a genuine possibility, modern mass litigation is both antidemocratic and prone to bias in decisionmaking. Bellwether trials ameliorate these problems.

In mass tort cases, the number of plaintiffs is enormous. The most extreme example is asbestos litigation: 106,069 cases were consolidated in multidistrict litigation in the federal courts alone.[106] The court system lacks the resources to provide an individual trial for each asbestos plaintiff. Instead, individual suits languish or are aggregated, consolidated, or, in the most unlikely case, certified as a class action.[107] If the litigation is settled, either as a settlement class action or through more informal aggregative settlements, the settlement will not provide individually determined compensation.[108] A plaintiff will be made an offer based on how his injuries fit into a matrix established for the purpose of determining damages, or he will be offered a set amount regardless of his individual circumstances. In the absence of mass settlement, the economics of litigation are such that only individuals with the most valuable cases are likely to receive an adjudicated result, and even they will wait for it. Those with less valuable cases are likely to

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105 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1834).

106 Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 EMPIRICAL LEGAL STUD. 459, 491 (2004).

107 *See, e.g.*, 28 U.S.C. § 1407 (2000) (providing for transfer of pretrial proceedings to one federal district court); FED. R. CIV. P. 23 (class actions); FED. R. CIV. P. 42(a) (consolidation). Because class certification of mass tort cases is extraordinarily difficult, these cases often result in either a settlement-only class action or aggregative settlement. *See* Elizabeth Cabraser, *The Manageable Nationwide Class Action: A Choice of Law Legacy of* Phillips Petroleum v. Shutts, 74 UMKC L. REV. 543, 545 (2006) (observing that most state court grants of class certification are for settlement purposes).

108 *See* Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005) (describing types of collective settlements to resolve nonclass multiparty litigation).

be excluded from the court system altogether, because bringing a case to trial is too time consuming and expensive. As a consequence, many mass tort victims face a choice between joining a mass settlement or nothing.[109] Thus, settlement is currently the only realistic option for collective resolution of mass claims, and it is of limited utility.[110]

The significance of the reliance on settlement to resolve mass tort litigation is twofold. First, individual litigants will not have the leverage that a realistic threat of trial provides.[111] Second, juries do not determine damages in settled cases and individual plaintiffs are not ordinarily involved in negotiations. Instead, lawyers (in some cases with judicial oversight) determine damages awards privately.[112] As a result, the current regime violates both of the principles that animate the right to a jury trial. Settlement is undemocratic because lawyers reach settlement privately with limited judicial or client oversight. It also risks corruption or bias because these decisionmakers may have systemic interests at odds with those of the individual plaintiffs. For example, judges have the interest of reducing their dockets and may become inured to the plight of plaintiffs. Lawyers may have their own interests that are at odds with their clients' and they may be tempted to trade some clients off against others to resolve large numbers of cases collectively.[113] When a trial is not available to litigants for structural or practical reasons, as is currently the case, then it is difficult to argue that these litigants have a right to a trial by jury in any meaningful sense.

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109 The recent aggregate settlement of cases against Vioxx, which requires the plaintiffs' lawyers to recommend the settlement to all of their clients and withdraw from cases not so settled, provides a good example of this stark choice. *See* Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto, para. 1.2.8.1, 1.2.8.2 (Nov. 9, 2007) (on file with author).

110 Settlement is of limited social utility both because not all cases can be settled, *see* Amchem Prods. v. Windsor, 521 U.S. 591 (1997) (overturning asbestos settlement on the grounds that the class certification did not comport with the underlying requirements of Rule 23), and because settlements are not always beneficial.

111 *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 607 (1997) (stating that the social utility of trials is "to provide victims with the threat necessary to induce settlement").

112 *See* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 189 (2001) (describing the dearth of individual plaintiff involvement and the quasi-administrative character of aggregative settlement).

113 *See* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 521–23 (1994) (discussing the considerable ethical problems that the allocation of funds in settlement raises for plaintiffs' attorneys).

Bellwether trials, by contrast, promote democratic decisionmaking by providing a procedure for citizens to be involved in the process of determining the outcome of mass tort cases instead of abdicating this role to lawyers with minimal judicial oversight. The inclusion of democratic decisionmaking is especially important in mass tort cases. Because of their scale, mass tort cases require the courts to adopt a regulatory function, which has usually involved jettisoning the jury trial.[114] Involving the jury legitimizes court resolution of mass tort cases because it inserts an element of democratic participation.

Furthermore, bellwether trials avoid the dangers of systemic corruption that plague mass settlements: the jury members have no financial interest in the outcome of the litigation and the determination of damages. They do not expect to hear multiple cases over a period of years. They will not grow weary of the cases. And they have no incentive to clear the docket. The jury members may be interested in having the trial completed more quickly in order to go back to their daily lives, but they do not stand to lose or gain anything based on the outcome of the litigation.[115]

There are limits, however, to the ability of the bellwether trial to realize the principles of the jury right. Bellwether trials are centralized rather than decentralized. If only one jury hears a number of trials and makes decisions that are to be extrapolated to a larger population, then one set of jurors, rather than many sets over many years, will decide the fate of thousands of cases.[116] Centralization means that there is a greater possibility for systemic bias to enter into the process than with the baseline of ordinary individual trials. There are cures for centralization,[117] but not for the passage of time required to achieve the truly decentralized "maturation" of a mass tort.

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114 This has often been remarked in the literature on mass torts. *See, e.g.*, RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007) (describing the use of administrative techniques in mass tort cases and proposing an administrative solution).

115 *See* GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES 57–78 (1978) (arguing that juries are well situated to make "tragic choices" free from political backlash or prejudice because they are one-time players).

116 This decentralization is central to the theory of the "mature mass tort." *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688–94 (1989). This theory has been adopted by prominent judges. *See, e.g.*, *In re* Rhone-Poulenc Rohrer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.).

117 For example, multiple juries could be used instead of having a single jury determine each bellwether case. *See In re Rhone-Poulenc Rohrer*, 51 F.3d at 1300 (suggesting, as an alternative to centralization of mature mass torts, "submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers").

The criticisms directed at the individual jury trial also apply to bellwether trials. These are too voluminous to describe in detail here, but two criticisms must be briefly addressed.[118] Critics of the jury trial have been concerned that juries cannot understand complex scientific evidence.[119] Scholars have also demonstrated that cognitive biases can affect jury decisionmaking.[120]

The criticisms should be weighed against the values the jury right was meant to support. The expertise and good sense of judges, even if superior to that of many jurors, is not so infallible that it is worth undermining the democracy-promoting values of the jury trial. Human fallibility is not the exclusive province of the jury. Even with substantial scientific expertise, judges may have their own biases and their own interests, such as in minimizing litigation management.[121] Furthermore, studies show that on the whole juries and judges agree as to the outcomes of most cases.[122] The jury provides a "fair and equitable" decision in a given case not necessarily because the jury's determination is more likely to be objectively correct, but because the jury is part of a legitimate decisionmaking process.[123] The acceptance of criticisms based on juror limitations may one day dislodge the jury from the role of legitimate decisionmaker, but it has yet to do so.

Jury decisionmaking lends greater legitimacy to nonobjective, controversial decisions such as the monetization of harm because it embodies the values of democratic participation and deliberation. Jury verdicts are understood to reflect the norms and morals of the community and this lends legitimacy to the procedure and the outcome.[124] Legitimacy is an even greater concern when lawyers, not

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118 For an overview of the criticisms, see VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 97–164 (1986).

119 *Id.* at 113–30.

120 *See, e.g.*, Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995).

121 *See, e.g.*, John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 533, 539–40 (2007) (discussing the incentive for judges in class action lawsuits to avoid trial); Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 421 (2007) ("Judges possess three sets of blinders: informational, cognitive, and attitudinal. These blinders . . . can be understood as obstacles to clear judgment and perception.").

122 *See* HANS & VIDMAR, *supra* note 118, at 117 (citing study that judges and juries agreed on outcome 78% of the time, and that the remaining 22% of the time their disagreement was balanced between plaintiffs and defendants).

123 *See* Martin Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1331 (2005). The jury is made legitimate both by long usage and by its democratic and independent qualities. It remains the primary politically legitimate means for ascertaining value within our legal system.

124 *See* Solum, *supra* note 2, at 183 (stating that "a process that guarantees rights of mean-

judges, make decisions through settlement.[125] By providing a viable procedure for publicly trying mass tort claims, binding bellwether trials at a minimum provide the leverage necessary to encourage good settlements. If successful, bellwether trials offer a procedure more likely to legitimate group typical justice than the alternative of private negotiation, because they rely on citizen participation and deliberation.

B. The Substantive Law

Procedures are created to realize the aims of the substantive law—that is, to achieve rectitude. But the availability of procedures can also alter the development of the substantive law. By providing a procedure for realizing group typical justice, bellwether trials both help realize the extant aims of tort law and move the substantive law towards group typicality.

Collective resolution of mass tort cases requires acceptance of probabilistic proof based on group typicality rather than individuation. Some judges and scholars believe that group typicality is antithetical to traditional tort law.[126] This is true to the extent that traditional common-law tort doctrines are based on theories of individual responsibility, such as corrective justice, requiring particularized proof of causation and damages. But there are substantial examples of probabilistic thinking within substantive tort doctrines that leave the door open for procedures such as bellwether trials. Innovative procedures, in turn, make possible the development of substantive doctrines aimed at achieving group typical justice.

The theories of tort law that procedures aim to realize fall into two general categories: individual responsibility and social insurance.[127] For example, corrective justice is a theory based on individual

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ingful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms").

125 *See* Samueal Isaacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 15 VAND. L. REV. 1571, 1621–25 (2004) (describing the history of aggregate settlements constructed by lawyers).

126 *See, e.g.*, *In re* Fibreboard Corp., 893 F.2d 706, 711–12 (5th Cir. 1990) (Higgenbotham, J.) (stating that procedures such as bellwether trials violate the fundamental principles of tort law).

127 There are many ways to categorize theories of tort law. The two general categories I choose here encompass many of the dominant theories, which are too many to fully explore in this brief Article. For a useful canvas of the dominant approaches to tort law in North America, see generally John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003), and G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (2003). The two classic works advocating deterrence theory of tort are GUIDO CALABRESI, THE COSTS OF ACCI-

responsibility; deterrence is a social insurance theory. An individual responsibility theory requires that plaintiffs pay the cost of uncertainty unless they can show proof that this *particular* defendant acted wrongfully and caused them this *particular* harm. It is therefore characterized by a requirement of particularized proof of specific causation. As a result, an individual responsibility paradigm for torts does not permit collective resolution of mass tort cases.

A social insurance theory of tort law, by contrast, allocates at least some of the cost of uncertainty regarding responsibility to the defendant who *might* be culpable or who is verifiably culpable even though the extent of the damage is difficult to determine. It permits and encourages collective resolution of mass torts. Bellwether trials realize the aims of the social insurance theory of tort law. More than this, bellwether trials are both made necessary by the social insurance function of tort law and breathe life into it.

Bellwether trials rely on the idea that the findings of one set of typical trials (the "bellwether" cases) can be extrapolated to many other plaintiffs who did not participate and who have not presented proof of causation and damages in their *particular* case. Because bellwether trials are based on group typicality, this procedure cannot allow the majority of plaintiffs to present particular evidence. For this reason, bellwether trials are generally understood to be incompatible with tort theories based on individual responsibility. One prominent judge has explained:

> Commonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury. Procedures can be devised to implement such generalizations, but not without alteration of substantive principle.[128]

The substantive principle at stake in the case of the asbestos plaintiff who is given an extrapolation verdict rather than an individualized result is corrective justice, an individual responsibility theory of

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DENTS: A LEGAL AND ECONOMIC ANALYSIS (1970), and WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987). For a more recent evaluation of deterrence theory, see Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (describing criticisms of deterrence theory and concluding, based on empirical data, that tort law can have a deterrent effect). For an analysis of individual responsibility in tort law, see Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031 (2003).

128 *In re Fibreboard*, 893 F.2d at 712 (Higginbotham, J.).

tort law. The reader who adheres to an individual responsibility theory of tort and disagrees on a normative basis that social insurance can ever be the animating principle of tort doctrine is unlikely to accept the validity of bellwether trials.[129] But the foundations for a social insurance approach to tort have already been laid, making it a plausible theoretical underpinning for tort doctrine and the implementation of bellwether procedures.

The operative theory of tort law will dictate the nature of acceptable proof. The choice between probabilistic and particularized proof consists of the allocation of the cost of uncertainty between plaintiffs and defendants, which requires a normative decision. The following familiar hypothetical illustrates the point.[130] Assume that the blue bus company owns eighty percent of the buses in a town. An accident is caused by a bus, but the victim cannot identify which bus company was responsible. There are three possible solutions to this case. First, the court could hold that plaintiff should not be able to obtain compensation because he cannot present any particularized proof that a blue bus caused the accident. Under this approach, the defendant cannot be held liable unless it is shown to be individually responsible, and therefore the cost of uncertainty is placed squarely on the plaintiff. Second, a court could hold that because it is more probable than not that the blue bus company caused the accident, it should be liable for plaintiff's damages. This places the cost of uncertainty on the defendant. It also has the negative effect of removing all incentives from the bus company that owns the other twenty percent of the buses to take reasonable care in driving. As long as there is no direct proof, the minority bus company can cause accidents with impunity. Third, the court could require the blue bus company to pay eighty percent of the damages in the accident. In that case, the defendant bears the risk of uncertainty to the limits of its share in the market. This solution best embodies a social insurance theory of tort law.

Within particularistic proof lie the seeds of probabilistic reasoning. In every tort case there is some element of uncertainty which is resolved by resort to probabilistic thinking. As David Rosenberg explains, "[a]ll knowledge of past as well as future events is probabilistic.

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129 For a well-known example of scholarship critical of social insurance theories of tort, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

130 *See* Laurence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1341 n.37 (1971) (describing Smith v. Rapid Transit, Inc., 58 N.E.2d 754 (Mass. 1945), the case on which this well-worn hypothetical is based).

Inevitably it rests on intuitive or more rigorously acquired impressions of the frequency with which similar events have occurred in like circumstances. 'Particularistic' evidence offers nothing more than a basis for conclusions about a perceived balance of probabilities."[131] Rosenberg provides the following useful example.[132] A lawsuit arises out of a fall down a darkened stairwell and evidence can be presented that the plaintiff's shoelaces were untied at the time of the fall.[133] That evidence increases the probability that the plaintiff's fall was self-inflicted, but the jury's decision would remain probabilistic because "inevitably there would remain a degree of uncertainty correlating with the frequency of falls caused by poor lighting within the larger set of cases."[134] A finding that the fall was self-inflicted in this case requires extrapolation from experience with shoelaces and stairwells and is not the result of certain knowledge. The difference between the type of probabilistic thinking already accepted and statistical adjudication is that the latter formalizes the decisionmaking process through rigorous techniques.[135]

Common-law doctrines such as foreseeability recognize the necessity of probabilistic thinking. For example, if courts adopted a foreseeability test under which falls are the foreseeable consequence of poor lighting, evidence that a given stairwell was poorly lit would be sufficient to create a presumption that all falls from that stairwell were more likely than not caused by poor lighting. Such legal presumptions are a way of introducing statistical evidence by converting a question of fact into a question of law.[136] Bellwether trials propose a similar move but in a more direct and transparent manner that enables jury participation in the decisionmaking process.

So far, I have argued that (1) all decisions by a preponderance of the evidence, i.e., that one outcome is more likely than the other, are based on probabilistic thinking; (2) these decisions require extrapolation from experience with a larger set of cases; and (3) therefore in-

131 David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 870 (1984).

132 *Id.* at 870 n.77.

133 *Id.*

134 *Id.*

135 *Cf.* Tribe, *supra* note 130, at 1331 (questioning the usefulness of formal statistical techniques in jury decisionmaking with particular reference to criminal cases because, among other things, they are likely to mislead the jury).

136 *See* Morton Horwitz, *The Doctrine of Objective Causation, in* THE POLITICS OF LAW 365 (David Kairys ed., 1990) (discussing the introduction of probability into the doctrine of causation in the early twentieth century through the doctrine of foreseeability).

herent uncertainty remains in the traditional model. These conditions are not sufficient to justify group typical justice. For example, in the case of the poorly lit stairwell, an individual responsibility theory of tort law would still permit the defendant to rebut the presumption that falls are more likely than not caused by poor lighting by introducing particularistic evidence about an individual plaintiff's shoelaces. This would limit the possibility of collective litigation. Nevertheless, a first step to legitimizing group typicality is to acknowledge that well-entrenched doctrines such as foreseeability recognize probabilistic thinking and extrapolation from one experience to another.

To move a step further toward group typical justice, consider the doctrine of market-share liability as a substantive analogue to bellwether trial procedures.[137] Under that rule, a defendant is liable for a share of the damages caused by a defective product in proportion to its share of the market for that product, even if the plaintiff cannot prove that this particular manufacturer caused her particular harm. Some believe that the market-share liability theory relaxes the requirement of causation because it compensates plaintiffs only for tortious exposure to risk.[138] Others argue that market-share liability does not compensate plaintiffs for exposure to risk alone because plaintiff must still prove that the product caused her harm. The plaintiff cannot prove which product caused her harm because the circumstances surrounding defendants' conduct made it impossible to determine which defendant's product caused her damages.[139] These scholars lay the cost of uncertainty at defendants' door. The key insight here is that somebody, either plaintiff or defendant, must bear the cost of uncertainty. If plaintiff bears this cost, then she will never be entitled to recover even though she has been harmed and even if *in fact* defendant's product caused that harm. If defendants bear this cost, then some defendants who did not cause *this* plaintiff's injury might have to

137 *See* Sindell v. Abbott Labs., 607 P.2d 924, 937–38 (Cal. 1980) (upholding market-share liability theory in diethylstilbesterol ("DES") cases).

138 *See* Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 478 (2006) (presenting analysis critical of market-share liability theory). Another useful discussion of market-share liability from a slightly different point of view is Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 214 (Gerald J. Postema ed., 2001).

139 Geistfeld, *supra* note 138, at 478–79.

pay her.[140] In that case, holding all defendants liable is a type of collective sanction aimed at deterrence.[141]

Like market-share liability theory, bellwether trials are a method for allocating uncertainty. Under market-share liability, uncertainty as to whose product harmed plaintiff is allocated among defendants. In a bellwether trial procedure, the uncertainty concerns the plaintiff's harm as well as the defendant's liability. That uncertainty is distributed among the plaintiffs as a group.

Insurance theories of tort embodied in both substantive doctrines, such as market-share liability, and procedures, such as bellwether trials, are logical reactions to massive industrial torts, which, because of their immense size, make particularized proof largely impossible. The move away from individual responsibility towards insurance as the animating theory of tort law coincided with the development of standardized, industrial harms to large numbers of individuals. Insurance-based theories such as market-share liability make sense in cases where a number of manufacturers produced a standardized product that is identical in composition and indistinguishable by brand. So too, insurance-based approaches to procedure make sense in cases where masses of people are subjected to the same type of harm by the same type of product.[142]

The social insurance approach to tort law embodies the following substantive aims: (1) deterring defendants from manufacturing harmful products and encouraging defendants to take safety precautions by forcing defendants to internalize the full costs of their activities; (2) publicizing harms caused by products and substances; (3) awarding compensation for persons harmed by various products. Bellwether trials realize these aims better than the existing procedural regime.

The dominant aim of the insurance approach to tort law is to deter defendants from manufacturing harmful products by encouraging defendants to take safety precautions and forcing defendants to inter-

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140 *See* Thomas *ex rel.* Gramling v. Mallett, 701 N.W.2d 523, 565 (Wis. 2005) (upholding similar risk-contribution theory of liability in lead paint cases, recognizing that some innocent defendants may be required to pay damages and holding that this was an acceptable cost to provide plaintiff with an adequate remedy at law). *But see* City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 115–17 (Mo. 2007) (rejecting lead paint action in which plaintiffs could not identify particular defendants causing particular damage).

141 *See* Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 348 (2003) (arguing that collective sanctions are justified where the group is in a better position to monitor wrongdoers than the individual).

142 *See* Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190 (1996) (arguing that the basic shift in tort theory is from a moralistic ideal of "corrective justice" to a policy-oriented ideal of "collective justice").

nalize the full costs of their activities.[143] Bellwether trials perform this function better than the current procedural regime. The amount extracted from the defendant pursuant to a bellwether trial procedure will reflect the full cost of the defendant's activities to the plaintiff population as a whole. This is because a bellwether trial procedure conducted using reliable statistical methods will yield a result that is an assessment of the overall damage over the entire population of plaintiffs. It reflects what would occur if individual trials were held for all plaintiffs and the results aggregated. Accordingly, the bellwether trial procedure will force the defendant to internalize the full cost of its activities. This will deter misconduct and encourage the adoption of safety precautions because defendants will know that they will be forced to internalize the damages they cause.

In the current regime, by contrast, the divergence between the private and social motive to utilize the legal system will often result in defendants externalizing at least some of the cost of injury.[144] Defendants can use overloaded dockets and the doctrinal and practical impediments to litigating lawsuits collectively to minimize their exposure. Various procedural rules are available to delay the litigation of cases and make litigation costly for plaintiffs. A credible threat to litigate each case to the ground can frighten off some plaintiffs with legitimate claims but insufficient resources.[145] Defendants can also leverage the high costs of litigation and the delay of individual trials to obtain lower settlements. The knowledge that actual litigation is a near impossibility alters the balance of power between the parties. In most cases, delay favors defendants who are better off postponing any transfer of assets for as long as possible. There may, however, be some cases in which delay can be leveraged by plaintiffs, such as when the uncertainty of a litigation outcome affects a defendant's stock price or in the case of the sale of the company.[146] In any event, considerations other than the merits of the suit are apt to play a larger role in settlement the more remote the possibility of actual litigation becomes.

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143 *See generally* Rosenberg, *supra* note 3, at 853–54 (advocating a deterrence rationale for mass tort cases).

144 *See generally* Shavell, *supra* note 111 (arguing that failure to internalize the full social cost of litigation distorts choices within the legal system).

145 This was Merck's stated strategy in the Vioxx litigation. *See* Alex Berenson, *Legal Stance May Pay Off for Merck*, N.Y. TIMES, Aug. 4, 2006, at C1 ("Lawyers on both sides agree that Merck's victories, and its stated strategy of trying every case rather than settling any, are discouraging plaintiffs with weaker claims.").

146 Thanks to Robert Bone for this point.

An insurance approach to tort law also aims to publicize harms caused by products.[147] This aim is achieved by bellwether trials just as well as by individual trials. The centralization offered by a bellwether trial procedure—the proximity in time of the trials to one another and the large amounts of money at stake—are likely to make bellwether trials a powerful tool for conveying information about a product through litigation. Bellwether cases are likely both to be litigated by skilled lawyers and to receive media attention. By contrast, the current practices of aggregation and private settlement discourage the dissemination of information about a product. The defendants' interest in large-scale settlement is to put the matter to rest, avoiding publicity and its attendant costs. Likewise, the plaintiffs' attorneys' interests are to resolve cases on the aggregate and to expeditiously obtain payment and recoup litigation costs. Although they may seek to publicize defendants' wrongdoing as a matter of principle, doing so will not assist them in achieving these interests and, in fact, their incentives run in the direction of discretion once settlement discussions are underway.

Bellwether trials also provide compensation to individual plaintiffs, the third aim of an insurance-based theory of torts. Compensation in bellwether trials is based on a probabilistic approach to individual desert. Participating individuals will get the *typical* award rather than an award crafted specifically to their circumstances. This approach is difficult for some to accept because the dominant paradigm has been individualized jury trials and awards.[148] But recall that ordinary trials require juries to extrapolate based on experience and utilize probabilistic thinking. The bellwether trial procedure is a more radical and transparent application of a probability principle already present in the substantive law. It does not impose a higher cost of error on the parties than an individual jury trial. Instead, a bellwether trial procedure merely distributes the risk of error differently.

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147 *See* Scott Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 907–08 (2007) (arguing that one of the purposes of tort litigation is to publicize which products are harmful, to assist consumer choice).

148 *See* Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2163 (1997) (describing the claim that American law is individualistic as a "truism"). The paradigm of individual trials does not reflect the historical reality. *See generally* Issacharoff & Witt, *supra* note 125 (presenting a historical critique of the claim that tort law has traditionally been individualistic). *See also* Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 EMPIRICAL LEGAL STUD. 689, 689 (2004) ("There never was a regime of full trials.").

What is radical about group typicality is not the use of probabilistic thinking in determining outcomes or the absence of particularistic proof as to each plaintiff, but rather the direct admission required by such a procedure that there is no objectively verifiable accurate outcome to an individual case that can be used as a baseline to which an award can be compared. Even the award in an individual case may not be the same if tried again before a different jury. The only point of reference is other jury verdicts in similar cases, an analysis that also requires a definition of the variables relevant to establishing that the cases are in fact similar. The legal system admits this fact in a variety of ways: by holding nonbinding bellwether trials, by remitting verdicts that do not fall within a reasonable range of verdicts, and by allowing substantive legal theories that allocate liability based on market share rather than individual responsibility.[149] Binding bellwether trials are another step in this direction.

The most powerful objections to the bellwether trial procedure concern the goal of compensation. Bellwether trial procedures give rise to objections on the basis of distributive justice because averaging awards transfers wealth from plaintiffs with the most valuable claims to those with less valuable claims. Furthermore, determining whether bellwether trials are fair depends on the composition of the group across which compensation is distributed, raising reference class problems. Bellwether trials also limit the ability of some individuals to participate in the process that determines their award, raising autonomy, dignity, and constitutional concerns. These legitimate objections are addressed below.

III. Objections to Bellwether Trials

There are three categories of objections to a binding bellwether trial procedure: objections concerning the makeup of the reference class and the consequences of extrapolation for distributive justice, objections based on autonomy values and their due process implications, and objections based on limits imposed by the jury right. This Part will address each of these objections in turn and show that although objections to mandatory bellwether trials deserve serious consideration, they are not insurmountable.

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149 Similarities might also be drawn to the doctrine of "lost chance" and res ipsa loquitor. *See* ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 57–100 (2001) (setting forth a nuanced theory of liability *for* uncertainty).

A. The Reference Class Problem and Distributive Justice

The central difficulty of bellwether trials is the reference class problem.[150] This problem is caused by heterogeneity within the group of plaintiffs to whom bellwether verdicts are to be extrapolated. Because individuals are different, a method is needed to determine which ones are sufficiently similar to justify extrapolating the results of bellwether trials to them. The more heterogeneous the group, the more serious the distributive justice problems. This is because people with divergent characteristics will receive the same awards under a bellwether trial procedure that uses averaging as a method of extrapolation. The same issue arises in class actions with respect to the "commonality" and "predominance" analyses.[151] With respect to which variables can it be said that common issues predominate in a class action? If the variables chosen are the most general, more commonality will be found than if the variables are more specific such that fewer claimants share them. At bottom, this is an epistemological question about the limits of statistical analysis, that is, to what extent is it possible to generalize across individuals?

Like all statistical analysis, the quality of outcomes in a bellwether trial procedure will depend on the power of the explanatory variables about which inferences are to be made. There are two critical issues with regard to determining relevant variables. The first is the question of *which* variables are relevant. The second is the extent to which relevant variables can be determined *objectively* in the extrapolation population.

Bellwether trials first require a determination of the number of variables to be considered in the extrapolation process. Accordingly, courts will need to choose variables relevant to establishing typicality. The variables chosen will determine whether a given bellwether plaintiff is part of the group such that the average of the bellwether trial awards yields a result typical for that group. A greater number of variables will increase the axes along which plaintiffs in a given group are similar. At the same time, the more variables chosen, the more difficult it will be to implement the bellwether trial plan and the more likely that the economies of scale intended to be achieved by bellwether trials will be lost.

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150 *See* Mark Colyvan et al., *Is It a Crime to Belong to a Reference Class?*, 9 J. POL. PHIL. 168, 172 (2001) (defining the reference class problem).

151 *See* FED. R. CIV. P. 23(a), (b)(3).

The inherent limits of statistical analysis are exacerbated by the likelihood of manipulation. If there is no obvious and objective means for determining the parameters of the group that will be subject to extrapolation, there arises a possibility for the designers of a bellwether trial procedure to manipulate the parameters of the group to appease factional interests. Alterations to group parameters driven by such private interests are likely to be systematically undesirable. Defendants wishing to derail the plan, believing that their settlement leverage is better in the absence of a litigated alternative, will push for more variables to be taken into account, resulting in balkanization of the group and the diminishment of the possibility of group typicality. Although the size of the groupings should not affect a defendant's overall liability, it will affect the utility of pursuing a bellwether trial procedure. Plaintiffs with higher-value claims will also want to decrease the size of the groups so that their high-value claims will not be averaged with lower-value claims. By contrast, plaintiffs with low-value claims will want to increase the size of the group and decrease the number of variables considered so that they can increase the value of their award by averaging lower awards with higher ones.[152] Plaintiffs' attorneys with large numbers of cases will likely want to increase the size of the group and diminish the distinguishing variables to obtain the benefits of the economy of scale achieved by the procedure. Judicial incentives are difficult to predict. Judges may favor larger groupings that reduce their docket more quickly. In the alternative, judges may choose groupings too small to use the procedure advantageously for reasons that have to do with the autonomy concerns addressed in the next Part.

The second critical issue for determining variables is subjectivity. Subjective variables by definition require individualized inquiries that defeat the benefits offered by extrapolation. Consider the example of a strip-search class action.[153] Assume that there are two variables that correlate with compensation. One is whether or not the plaintiff experienced a previous strip search, which could be determined by whether the individual had been incarcerated in a facility that routinely administered strip searches. This is an objectively verifiable variable. The second variable is the emotional condition of the plaintiff. For example, are they an "eggshell skull" plaintiff, more likely to be severely affected by this strip search? That information can only be

152 *See* Bone, *supra* note 2, at 599 n.108.

153 *See, e.g.*, Tardiff v. Knox County, 365 F.3d 1, 2, 7 (1st Cir. 2004) (upholding certification of class action brought by arrestees strip searched prior to arraignment).

determined by an assessment of this individual plaintiff's condition. The extrapolation phase of a bellwether trial procedure would be able to take into account the former consideration (previous strip searches) but not the latter (preexisting emotional state). Assuming that the sample chosen is random and sufficiently large, the cost of not taking into account a victim's preexisting emotional state in averaging awards falls largely on the eggshell skull plaintiffs. Because the plaintiffs will receive an average of the eggshell skull award and the ordinary award, eggshell skull plaintiffs will receive something less than the average eggshell skull award and ordinary plaintiffs will receive something more than the average award for their grouping. Defendants, however, will pay the same amount that they would have if individual trials were aggregated. Because determining subjective variables requires individualized fact-finding, subjectivity poses a significant barrier to implementation of bellwether trial procedure.

Variable subjectivity provides further opportunities for manipulation. Defendants who object to the procedure will argue that subjective variables must be taken into account. This will increase the costs of the procedure and reduce the possibility of obtaining economies of scale. Plaintiffs who believe they have higher-value claims will prefer subjective variables to be taken into account because these plaintiffs are likely to obtain larger awards through an individuated procedure. Plaintiffs who believe they have lower-value claims, on the other hand, will prefer not to take the subjective variables into account because the averaging process will result in a wealth transfer from the higher-value claims to lower-value claims. As discussed above, plaintiffs' lawyers may prefer a larger undifferentiated group to increase their own payout and limit their workload.

Let us return to the strip search example to evaluate how such manipulations might play out. That hypothetical case identified only two variables: previous incarceration in a facility that routinely strip searches inmates and emotional condition prior to search. It would be relatively simple to split the larger group of strip-searched plaintiffs into two subgroups: the previously incarcerated and the remainder. But because the determination of prior emotional state is subjective, it would be impossible to determine this without individual hearings. Accordingly, a defendant seeking to derail the process will argue that it is essential to determine whether or not a plaintiff is a member of the "eggshell skull" to have valid groupings. So, too, eggshell skull plaintiffs will argue that they should be placed in a separate group, regardless of the cost of making that determination. On the other

hand, plaintiffs in the ordinary group will prefer a larger group that includes both eggshell skull and ordinary plaintiffs because this will raise their average award. The requirement that subjective variables must be determined through individual hearings eliminates the advantages that a bellwether trial procedure offers.

To complicate matters further, defendants can argue that additional variables are essential to a fair determination, either because they think taking these variables into account may lower awards overall or merely to make the procedure so complicated that it is abandoned by the court. There are, of course, infinite variables that might make a difference in a jury's award of damages in a given case: race, gender, work history, previous life experience of the plaintiffs, etcetera. An argument can be made that each of these variables is critical to a fair determination. Taken to the extreme, this could make the groups too small to justify a bellwether trial procedure.

Thus we return to the basic question of the limits of typicality: what variables are to be taken into account in the determination that a plaintiff is typical of a larger group and how rough can the justice that these variables dictate be? There is no uniform answer to this problem. The threshold of legitimacy will depend on the decisionmaker's normative evaluation of what constitutes an acceptable outcome.[154]

The extent to which plaintiffs are able to predict their individual entitlements and the size of the gap between predicted and actual awards will determine the legitimacy of the results. Acceptability is therefore a function of the consequences of typicality for distributive justice. In the strip-search example, for instance, it is possible to imagine a judge not utilizing the plaintiff's previous psychological condition in setting the parameters of the group because it is a subjective variable. The result of such a ruling will be that eggshell skull plaintiffs will likely receive less in the extrapolation process than they would have through an individual trial. If eggshell skull plaintiffs are guaranteed to obtain a higher award in an individual trial than the average award in a bellwether trial procedure, then they will find the bellwether trial procedure unacceptable. But if the results of an individual trial are highly unpredictable or the difference between the

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154 As Bone explains,

> [a]lthough people will disagree over the proper threshold since it depends on one's normative view of acceptable outcomes, there are bound to be easy cases. For instance, a sampling procedure that virtually guaranteed a level of recovery for high-damage plaintiffs far below their entitlements would be unacceptable even if it made committee participation possible for everyone.

Bone, *supra* note 2, at 637.

amount awarded the eggshell skull plaintiffs in the sample trials and the average award is not so great as to merit the costs of an individual litigation from a plaintiff's perspective, then the extrapolation process will probably be acceptable to them.

The attempt to achieve individual accuracy through group typicality is distorted by the divergence between private and public interests in litigation.[155] The private interests of the plaintiffs are to maximize their own recovery. Taking into account the costs incurred by the court system and the defendant, group typicality is preferable to individualized justice from an efficiency perspective. The problem, of course, is that litigants are not required to internalize the additional costs that the judicial system incurs as a result of choosing individuated litigation over collective litigation. The utilitarian calculus that takes into account all the costs of the litigation is limited by the persistence of autonomy values and process-based rights to participation that are independent of utilitarian concerns. Plaintiffs' and defendants' objections differ in this regard. Defendants' objections to bellwether trials will be utilitarian, whereas plaintiffs' possible objections concern both distributive justice and autonomy values.

In a bellwether trial procedure, defendants will pay the amount they would have paid if each individual case were tried. The defendants' objection is likely to be based on disputes as to the accuracy of the results. In due process terms, the extent of a defendant's property interest in the litigation is the accuracy of the total amount it is required to pay out. Under a deterrence theory of tort law, the defendant does not have a cognizable distributive justice interest—that is, the defendant cannot assert a protectable interest in paying the right people the right amount. Because "sampling can yield an extremely accurate average damage figure and thus an accurate total damage figure for the whole aggregation," the defendant's property interest is relatively well-protected by bellwether trials.[156]

If bellwether trials are so efficient and fair, then why have defendants resisted them?[157] It seems likely that defendants have resisted bellwether trial procedures because they prefer repetitive litigation. Defendants hope to settle more cheaply after either winning sufficient numbers of defense verdicts or as the effort and expense of defending individual suits wears their adversaries down.

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155 *See* Shavell, *supra* note 111, at 577.

156 Bone, *supra* note 2, at 572.

157 For example, the appeals in *Cimino* and *Hilao*, discussed *supra* Part I, were both brought by the defendants.

Bellwether trials, by contrast, prevent defendants from waging such a war of attrition.

The plaintiffs' objection to group typical justice is rooted in both distributive justice and process-based autonomy values. First, plaintiffs are subjected to a redistribution of wealth from the highest-value claims to the lowest in an averaging regime such as that used in bellwether trials. Secondly, extrapolation plaintiffs are denied the opportunity to participate in the resolution of their individual cases. This important autonomy objection is addressed next.

B. The Autonomy Objection and Due Process

Autonomy requires that each individual plaintiff have a right to participate in the proceeding that determines his entitlements.[158] The autonomy objection to bellwether trials can be asserted by the extrapolation plaintiff, who is denied the ability to participate in the bellwether trials but forced to accept their results. The defendant is not entitled to assert this objection because the defendant actually participates in the bellwether trials. In the context of damages class actions, which pose an analogous problem to that presented by bellwether trial procedures, due process requires the right to notice, an opportunity to be heard, the right to exclude oneself from the proceeding, and adequate representation of absent plaintiffs.[159] Extrapolation plaintiffs in mandatory bellwether trial procedures are not entitled to an individual hearing, but instead are awarded the results of *someone else's* hearing. Is group typical justice compatible with the autonomy values that animate our traditional due process doctrines? This Part argues that it is, when the loss of autonomy is offset by democratic gains.

Scholars analyzing the issue of statistical adjudication such as the extrapolation process in a bellwether trial have rightfully focused on autonomy concerns and on the question of whether the utilitarian arguments favoring economies of scale justify these severe limitations on process-based rights. In one of the most thorough treatments of the problems raised by such procedures, Robert Bone has argued that only in cases of extreme process scarcity should outcome be priori-

158 *See* Frank Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS: NOMOS XVIII 126–28, 154 n.4 (J. Pennock & J. Chapman eds., 1977); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1198 (1982) ("[R]espect for individual dignity, autonomy, and self-expression demands that those with rights directly at risk have an adequate means of registering their concerns.").

159 *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 803 (1985).

tized over process.[160] Similarly, in his analysis of procedural justice, Lawrence Solum argues that if individual participation is impracticable, then litigants should be offered the most accurate determination at the lowest possible cost.[161] It makes perfect sense from a pragmatic perspective to say that under conditions where the realization of autonomy values is impracticable, litigants ought to settle for an efficient procedure that maximizes accuracy and minimizes costs. Mass torts represent a category of cases where there is no realistic possibility of individual participation, and therefore more utilitarian procedural approaches are justified.

A significant problem with this argument is that it ignores the *source* of process scarcity. For example, if the legislature decides to severely limit funding of the court system, does this mean that the due process right to a hearing may be dispensed with? Under such conditions the courts must be permitted to rule that the creation of the condition of extreme process scarcity is itself a violation of due process and, in federal court, Article III. Similarly, in the case of mass torts, legislatures could increase funding to the court system so that each individual case could be heard individually. Courts that find bellwether trials to be unconstitutional violations of individual right to participation may be saying to the legislature that additional funding or a legislative solution is needed. Some judges have even made this point explicitly in the asbestos context.[162]

The pragmatic approach to bellwether trials taken here, which argues that the absence of a viable litigation alternative justifies group typical justice, is vulnerable to this critique. The conditions of the courts are not static. The political economy of the administration of justice can change and is subject to influence from the courts, legislatures, and citizens, who are themselves also participants in the legal system. If courts are willing to accept group typical justice because individual justice is impracticable, this may increase the chances that individual justice continues to be impracticable or becomes even more impracticable over time. The availability of a viable alternative to in-

160 *See* Bone, *supra* note 2, at 634 ("If there is not enough to go around, a condition of scarcity exists, and cases must be aggregated to distribute the available process goods fairly.").

161 *See* Solum, *supra* note 2, at 320.

162 *See, e.g.*, Cimino v. Raymark Indus., Inc., 151 F.3d 297, 339 (5th Cir. 1998) (Garza, J., concurring) ("[A]sbestos-related injuries have presented the courts with an unmanageable situation, which has resulted in an inadequate method of compensation for such injuries, both from the plaintiffs' and defendants' point of view. As such, I join Judge Hogan in urging Congress to formulate an administrative claim procedure for dealing with claims for asbestos-related injuries modeled on the Black Lung legislation.").

dividuated justice may result in the long-term diminishment of litigant autonomy as group typical justice becomes accepted and resources are reduced accordingly. In sum, group typical justice may reproduce itself.[163]

Resisting group typical justice, however, is also damaging to individuals. In the short term, resistance to group typical justice is likely to result in more privatization of justice through aggregated settlements and settlement-only class actions. In aggregate settlements, litigant autonomy is simply nonexistent. Plaintiffs are offered settlements consisting of standardized amounts reached through private attorney negotiation, without their participation and without the realistic possibility of adjudication.[164] There is not much hope for an injection of funding into the court system to guarantee individuated process to mass tort plaintiffs.[165] Assuming that funding for the courts is not likely to be dramatically increased, the availability of a litigated solution through bellwether trials, even though it limits autonomy, is better than the alternative of privatized, standardized settlements.

In addition to being preferable to the currently available alternatives, bellwether trials offer another benefit. Because they realize the democracy-promoting values of the jury trial, bellwether trials strengthen the legitimacy of the court system more than privately administered settlements reached in the absence of a realistic litigation alternative. Although bellwether procedures reduce the participation of extrapolation plaintiffs, they increase participation of citizens in the court system by involving the jury in a category of cases from which private settlements have largely excluded it.[166] Thus, there are other dignity and process-based participation values that are realized in bellwether trials. These democratic values should be given greater weight than they currently are.

One obvious response to the autonomy problem is that litigants should be permitted to opt out of mandatory bellwether trial procedures and obtain their own trial. This is the standard liberal solution to the existence of coercive groups.[167] The opportunity to exclude

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163 *See* Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 893 (2007); Francis McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1827–36 (1995) (calling this tendency of mass torts to expand "elasticity").

164 *See* Hensler, *supra* note 112.

165 *See supra* notes 32–57 and accompanying text (describing asbestos litigation).

166 *See* Galanter, *supra* note 106, at 466–67 (discussing downward trend in number of jury trials).

167 "Exit is a bedrock liberal value . . . ." Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 567 (2001).

oneself and obtain an individual trial should assuage autonomy concerns because it preserves litigant autonomy through exit. But opt-outs create a very serious problem for bellwether trial procedures. If litigants are permitted to opt out, then all litigants who believe that their award is likely to be above the average award will opt out. This will predictably reduce the average award. Because they predict that the average value will be lower than their entitlement, all litigants except for those with the very lowest-value claims—claims that are not otherwise worth litigating—will opt out, severely limiting the value of the procedure.[168] Yet forbidding opt-outs is an unrealistic solution. The right to opt out is firmly entrenched in our legal system and it is highly unlikely that courts will dispense with the opt-out requirement for bellwether trials given our longstanding tradition of valuing autonomy in litigation.[169]

If plaintiffs really do opt out en mass as the model in the previous paragraph would predict, this is an indication that the procedure creates fundamentally unfair results for large numbers of plaintiffs, such as awards well below their anticipated entitlement. Unlike a class action settlement situation, where the defendant is eager to obtain "global peace" and may condition its acquiescence to a settlement on a limitation on the number of opt-outs, a bellwether trial procedure would be judicially mandated, and the purpose would not be global peace but rather fair resolution by a jury of as many cases as possible. If enough plaintiffs choose to opt out to derail a bellwether trial procedure, this may be the systemically best and most fair outcome. When properly administered, opt-outs provide an indication that the variables chosen by the court do not provide acceptable results.

Practical realities may make opting out undesirable for plaintiffs. Litigant information about outcomes is imperfect. As a result, litigants who are uncertain as to the outcome of their case are not as likely to opt out because they cannot predict if their award will be higher or lower than the average. If litigants are sufficiently unsure of what their ultimate award will be, they may be unable to judge

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168 I am grateful to Ariel Porat and Robert Bone for this point. *But see* Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85 (1997) (applying game theoretic principles to opt-outs in mass tort class actions and concluding, based on core theory, that court-imposed limitations on these opt-out rights are sometimes warranted).

169 *See* Martin v. Wilks, 490 U.S. 755, 762 (1989) (referring to "our deep-rooted historic tradition that everyone should have his own day in court" (internal quotation marks omitted)); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (holding that due process requires right to opt out in damages class actions).

whether the extrapolation award is sufficiently below what they can expect at trial to justify opting out and the attendant litigation costs. In many cases, plaintiff's lawyers are also likely to discourage their clients from opting out if their interest is in resolving as many cases as possible as quickly as possible.

This picture may be different for lawyers with a few high-value claims. Because attorneys have their own interests with respect to the outcome, it is not clear that attorney intervention necessarily will be in the best interests of plaintiffs who would otherwise opt out. Additionally, this question may be complicated by the ability of defendants to settle selected bellwether cases, and in so doing either manipulate outcomes or scuttle the process altogether. Special rules would have to be adopted to prevent this from happening.

The history of attempts to conduct mandatory bellwether trials indicates that massive opt-outs are unlikely to be a problem. In *Cimino v. Raymark Industries, Inc.*, plaintiffs were willing participants in the bellwether trial procedure and defendants opposed it.[170] Similarly, in *Hilao v. Estate of Marcos*, plaintiffs did not object to the bellwether trial procedure.[171] Plaintiff acceptance of bellwether trials may be read as a testament to the state of process scarcity in which they find themselves.

It is by no means clear, however, that plaintiffs who do not opt out are voluntarily consenting to the procedure. We know, for example, that failure to object to standardized settlement in class actions or aggregative litigation does not mean that plaintiffs voluntarily consent to these settlements. A failure to object to collective procedures may merely reflect a lack of resources. It is very difficult to justify bellwether trial procedures by recourse to consent because of this reality in mass litigation.

A Rawlsian contractarian approach may be of some assistance to thinking about this issue.[172] In a recent article, David Dana applied such an analysis to mass tort class actions.[173] Although there is insuffi-

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170 Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998); *see supra* Part I.A.

171 Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996), *aff'g In re* Estate of Marcos Human Rights Litig., 910 F. Supp. 1460 (D. Haw. 1995); *see supra* Part I.B.

172 *See generally* RAWLS, *supra* note 92 (describing Rawls' theory that the principles of justice are those that individuals would choose if they were placed behind a veil of ignorance in which they understand themselves to be in a hypothetical situation of equal liberty, not knowing their own social status, talents, etcetera).

173 *See* David A. Dana, *Adequacy of Representation After* Stephenson*: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 292–300 (2006) (ap-

cient space here to do his argument justice, a sketch of Dana's analysis is useful. Under this approach, mass tort plaintiffs who are in an "original position" do not know the extent of their injury, and they know there is uncertainty as to their entitlements. Dana assumes that people will agree to the fundamental principle that persons with equal injury are entitled to equal remuneration.[174] If this is the case, plaintiffs will likely agree to a procedure that departs from the default regime of an individual trial when there is a gain from that procedure. Such a gain might be that plaintiffs receive more than they would have otherwise because of the savings in litigation costs and delays. Under this analysis, whether plaintiffs find a particular bellwether trial procedure acceptable will depend on the extent of the predictable spread between awards, their faith in the variables chosen to measure entitlement, and the possibility of recouping some savings from administrative costs. This analysis does not account for individual insistence on a process-based right to participation for its own sake.

Whether bellwether trials are preferable to the realities of individual litigation is both an empirical and a normative question. But in weighing two incommensurable goods—the economies of scale and benefits of group typicality to society and to individual plaintiffs as against the dignity and autonomy values offered by individualized participation—the bellwether trial adds a third value. Because it involves the jury in the decisionmaking process, the bellwether trial reaffirms the value of adjudicated results and democratic involvement in decisionmaking. The affirmation of public values, although not a cure for autonomy concerns, adds another benefit to the bellwether trial procedure beyond purely utilitarian justification. Focusing on democratic values is also consistent with the nature of mass torts, in which thousands are subjected to the same injury, most often as a result of regulatory failure. The procedural mechanism is therefore suited to the harm.

C. The Seventh Amendment Objection

Critics have argued that bellwether trials violate both due process and the Seventh Amendment. The due process analysis boils down to the trade-off between utilitarian and process-based participation val-

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plying Rawls's theory to class actions and concluding that a right to challenge certain types of class actions settlements is necessary).

174 *See id.* at 299.

ues discussed above.[175] Courts considering the due process question have uniformly held that bellwether trials do not violate the Due Process Clause when they use valid statistical methodology.[176] The effect of bellwether trials on the jury right has been a far more serious stumbling block.[177]

The Seventh Amendment establishes that "[i]n suits at common law . . . the right of trial by jury shall be preserved . . . ."[178] The jury right has long been understood to attach to tort suits brought in federal courts sitting in diversity, where many (although by no means all) mass tort cases end up. In analyzing the jury right, the court will inquire whether the case before it is one that would have been tried at law or in equity in 1791, the year that the Seventh Amendment was ratified.[179] This is known as the "historical test" and has been the subject of much criticism by judges and scholars.[180] If the jury right attaches and an alteration of the jury procedure is proposed, the court will consider the novel procedure in light of the purposes of trial by jury to "assure a fair and equitable resolution of factual issues" and in light of current needs, such as the efficient administration of justice.[181] The Supreme Court has upheld procedures that limit the jury's decisionmaking power and were unknown at common law, including nonmutual issue preclusion, the use of auditors, judgments as a matter of

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175 *See generally* Bone, *supra* note 2 (providing a thorough discussion of due process in the context of statistical adjudication).

176 *In re* Chevron U.S.A. Inc., 109 F.3d 1016, 1020–21 (5th Cir. 1997); Hilao v. Estate of Marcos, 103 F.3d 767, 786–87 (9th Cir. 1996). *But cf. In re* Fibreboard Corp., 893 F.2d 706, 711–12 (5th Cir. 1990).

177 The Seventh Amendment question has been touched upon, but not adequately analyzed. *See* Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1496–99 (1992) (concluding that jury right is subordinate to due process analysis); R. Joseph Barton, Note, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 221–35 (1999) (concluding that mandatory bellwether trials are unconstitutional).

178 U.S. CONST. amend. VII. The analysis in this Article focuses on the federal jury right because the federal courts are faced with many such cases. This discussion may also be usefully applied to state jury provisions in some cases. *See, e.g.*, Bruce D. Greenberg & Gary K. Wolinetz, *The Right to a Civil Jury Trial in New Jersey*, 47 RUTGERS L. REV. 1461, 1485–501 (1995) (comparing New Jersey and federal jury rights).

179 The origin of this test is Justice Story's circuit opinion in *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). For a more recent statement of this test, see City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 708 (1999).

180 *See* Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 574–81 (1990) (Brennan, J., concurring) (suggesting historical test should be simplified); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 731–47 (1973) (criticizing the historical test and proposing a "dynamic" reading).

181 Colgrove v. Battin, 413 U.S. 149, 157 (1973) (upholding six-person civil juries).

law, and remittitur.[182] Bellwether trials, by contrast to these procedures, *increase* the jury's power.

The Fifth Circuit's decision that bellwether trials violate the defendant's Seventh Amendment right to a jury trial has been influential despite its poor reasoning.[183] Since then no mandatory bellwether trial procedure has been attempted, although informal bellwether trial procedures have flourished.[184] Judges seem to want to use this innovative procedure but believe that they are constitutionally constrained from doing so.[185]

In fact, bellwether trials do not violate the jury right. First, the attachment of the jury right need not be an all-or-nothing proposition. The jury right can attach for some purposes and not others. A more flexible approach to the attachment of the jury right can be found by analogy to the common-law doctrine of the feigned issue procedure. Second, when bellwether trials are compared to other, modern procedures that limit the role of the jury and introduce probabilistic thinking, it is clear that a bellwether trial procedure does not alter the "basic institution" of the jury and is therefore constitutional.[186] For example, the doctrine of nonmutual collateral estoppel legitimates the use of bellwether trials by permitting a previous decision in which a party did not participate to bind that party. Third, the bellwether trial can be analogized to other permissible streamlining procedures, such as the use of auditors. Finally, the procedure bears similarities to the constitutionally permissible doctrine of remittitur.

1. A Hybrid Jury Right

Mass torts represent a clash between the modern industrial world of mass harms and an eighteenth-century world in which probabilistic thinking was still in its nascent stages. Eighteenth-century judicial in-

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182 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979) (upholding nonmutual collateral estoppel); Dimick v. Schiedt, 293 U.S. 474, 485 (1935) (upholding remittitur); *Ex parte* Peterson, 253 U.S. 300, 310 (1920) (upholding use of auditors).

183 *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 312, 319 (5th Cir. 1998) (holding that bellwether trials violate defendant's right to try each plaintiff's case before a jury).

184 *See supra* note 6 (listing cases using informal bellwether trial procedures).

185 *See In re* Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., Master File No. 1:00-1898, MDL No. 1358 (SAS), No. M21-88, 2007 WL 2781946, at *6 (S.D.N.Y. Sept. 20, 2007) (implying that because court was not extrapolating results of bellwether trials, objections to the bellwether trial procedure were unwarranted).

186 *See* Galloway v. United States, 319 U.S. 372, 392 (1943) ("[T]he Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.").

stitutions such as the jury seem unequipped to handle mass torts because these types of cases were unknown at that time. The significant differences between the legal and economic world of 1791 and today make it very difficult to reason analogically from historical categories. As a result, courts must look to "precedent and functional considerations" rather than relying solely on the formal categories of law and equity in determining the attachment of the jury right.[187]

There are practices that existed during the founding period that set precedents for innovative approaches to modern problems. Looking to such practices for guidance is superior to the search for a direct analogy. One such helpful precedent is the procedural overlap between common-law and equity courts in the eighteenth century, which was achieved through the feigned issue procedure. Because the equity and common-law courts were separate, jurisdictional fictions had to be created for facts from a case in equity to be tried at law.[188] The feigned issue procedure was such a legal fiction. When the equity chancellor wanted an issue to be determined by a jury, he did not have the power to convene a jury or refer the issue to the common-law court to be so tried. Instead, the parties would file a new action in the common-law court that was styled as a wager between them concerning the question at issue in the equity action. The jury would determine the winner of the wager and in the process be required to determine the underlying fact that was the subject of the wager. Blackstone described the procedure as follows:

> [I]f any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury . . . . But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king's bench or at the assises, upon a *feigned issue*. For . . . an action is feigned to be brought wherein the pretended plaintiff declares, that he laid a wager of 5*l.* with the defendant, that A was heir at law to B; and then avers that he is so; and brings his action for the 5*l.* The defendant allows the wager, but avers that A is not the

187 City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 718 (1999); *cf.* Markman v. Westview Instruments, Inc., 517 U.S. 370, 378 (1996) (asserting the primacy of analogical reasoning).

188 *See* Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999 (1974) (describing various procedural methods by which courts of law and equity shared jurisdiction in England and the American colonies).

> heir to B; and thereupon that issue is joined, which is directed out of chancery to be tried: and thus the verdict of the jurors at law determines the fact in the court of equity.[189]

The feigned issue procedure shares some similarities with the advisory jury procedure already codified in the Federal Rules of Civil Procedure, except that the jury's findings were binding.[190]

The existence of the feigned issue procedure was recognized in 1780s America prior to the adoption of the Seventh Amendment. The "Democratic Federalist," writing in support of enshrining the right to a jury trial in the original Constitution, wrote: "Whenever a difference arises about a matter of fact in the courts of equity in America or England, the fact is sent down to the courts of common law to be tried by a jury, and it is what the lawyers call a feigned issue."[191] There were other, similar hybrid procedures. In New Jersey, for example, the equity court was permitted by statute to direct an action at law and retain jurisdiction over it.[192] These types of procedures were understood to be a means for deciding cases that were not amenable to clear determinations by the chancellor, such as land valuation or fraud.[193] Valuing damages in tort cases is similarly difficult.

Feigned issue and similar procedures shed light on the constitutionality of bellwether trials. The right to a trial by jury need not be understood as all or nothing, determined solely by the formalist distinctions between law and equity. Instead of trying each case to a jury individually or trying none, the bellwether trial permits the judge to

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189 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 452 (Oceana Publ'ns 1967) (1772).

190 *See* FED. R. CIV. P. 39(c).

191 A Democratic Federalist (Oct. 17, 1787), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 100, at 354. Hamilton replied to this argument:

> It has been erroneously insinuated, with regard to the court of chancery, that this court generally tries disputed facts by a jury. The truth is, that references to a jury in that court rarely happen, and are in no case necessary, but where the validity of a devise of land comes into question.

THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 104, at 361. The truth is probably somewhere between these two extremes.

192 *See* Miller v. Wack, 1 N.J. Eq. 204, 215 (1834). Strictly speaking, this evidence is outside the timeframe of the historical test.

193 In *O'Connor v. Cook*, (1803) 32 Eng. Rep. 463, 463 (Eldon, L.C.), the Lord Chancellor noted the possibility of manipulation of land value, especially where the owner might be in possession of parcels of land with different values. Rather than deciding the manner in which value would be computed himself, the Chancellor assigned this difficult task to the jury's judgment. *See also Miller*, 1 N.J. Eq. at 215 (holding that feigned issues should be used "in cases of real difficulty, growing out of contradictory testimony; or opposing facts and circumstances, which it is impossible for the court to reconcile").

try some cases and apply the information obtained from those verdicts to the remaining cases. In so doing, the bellwether trial provides what might be called a hybrid version of the jury right. The jury right can apply to fact-finding in the litigation as a whole, but not necessarily to each individual case, because some cases are resolved by extrapolation instead of being awarded individual verdicts. To achieve this as a formal matter, courts can hold that the jury right attaches to the sample plaintiffs' trials but not the extrapolation process, almost as though these were two separate proceedings, one at law and the other in equity.[194] Another option is for a jury to make the final extrapolation determination as well as render verdicts in individual bellwether trials. A hybrid procedure combining the jurisdictions of law and equity permits a creative approach to the jury trial and permits the courts to retain it as means of introducing democratic values into the justice system.

The analogy to the feigned issue procedure illustrates one of the strongest criticisms of the common-law writ system: its interminable formalism.[195] I do not advocate returning to the days when litigants were forced to style a claim as a wager to be heard.[196] We need not do so because judges can interpret the law to recognize this hybridization outright. A legal fiction such as the feigned issue works its way into the law by common usage and in so doing expands the law.[197] The

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194 *See* Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 REV. LITIG. 463, 487 (1991) ("The use of the class action in mass-tort cases represents two very separate proceedings with differing [S]eventh [A]mendment implications. The first concerns the legal action of plaintiffs as a group against the alleged tortfeasor; in this action the [S]eventh [A]mendment right to trial by jury clearly applies. The second aspect relates to an administrative procedure established by the equitable powers of the court that allows for the determination of individual entitlements independent of the claims against defendants.").

195 *See* JOHN HAMILTON BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 66–67, 80–81 (Butterworths 3d ed. 1990) (1971) (describing the formalism of the English writ system and nineteenth-century reactions to it). The contrast between law and equity was complicated in the colonies. The political importance of these distinctions for the colonists is discussed in the text accompanying notes 94–95, *supra*.

196 The feigned issue procedure fell out of favor in the nineteenth century because it was perceived as permitting too much litigant abuse, especially as a way to bring cases without meaningful opposition. *See* Chesnin & Hazard, *supra* note 185, at 1010 (describing the fall out of favor in English courts beginning in the 1790s through the 1830s and noting that the practice was eliminated in 1845); *see also* Lindsay G. Robertson, *"A Mere Feigned Case": Rethinking the* Fletcher v. Peck *Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 263 (arguing that in America the "tide was turning against the use of feigned issues" by 1810 due to abuse of this procedure by land speculators).

197 JOHN HAMILTON BAKER, THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY 54–55 (2001); *see also* Lon L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 513, 518–29 (1930) (describing legal fictions as transitional devices).

objection to a legal fiction "from the point of view of jurisprudence, is not so much that it is untrue—after all, it deceives nobody and has no dishonest purpose—but that it works off the record, without overt legal reasoning, and therefore suppresses principle."[198] For this reason, the hybridization of the jury right in mass tort cases should be recognized directly.

The main objection to a hybridized view of the jury right is that any limitations on the jury right constitute impermissible erosions of that right. Such objectors assume the jury right to be a zero-sum procedure. In this view, hybridizing the jury procedure is merely a way of eliminating the jury right for hundreds or thousands of plaintiffs. As Justice Rehnquist explained, "nearly any change in the province of the jury, no matter how drastic the diminution of its functions, can always be denominated 'procedural reform.'"[199] The Supreme Court has recognized that the jury right is not zero-sum in other contexts, holding that the Seventh Amendment "did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791."[200] This was the Antifederalist position as well: "[I]t is the jury trial we want; the little different appendages and modifications tacked to it in the different states, are no more than a drop in the ocean . . . ."[201] Nevertheless, Justice Rehnquist was correct in his observation that drawing the line between what is simply an appendage and what goes to the substance of the right is difficult. It is essential to recognize that a refusal to deviate in any way from the common-law procedures surrounding the jury right requires courts to ignore the realities of modern litigation and potentially erodes the right even more than recognizing modern doctrines does. Bellwether trials should be adopted by jury proponents because they will strengthen rather than weaken the institution of the jury right and its underlying policy goals.

Over the past 200 years, the courts have accepted many changes to the jury trial of similar scope to the bellwether trial. Many of these changes have limited the jury right in instances where it would otherwise be available. By contrast, bellwether trials reintroduce the jury

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198 BAKER, *supra* note 197, at 55.

199 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 (1979) (Rehnquist, J., dissenting); *see also* Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting) (arguing that the Court has eroded the right to a jury trial).

200 *Galloway*, 319 U.S. at 390; *see also id.* at 391 ("Nor were the 'rules of the common law' then prevalent . . . crystallized in a fixed and immutable system.").

201 Federal Farmer No. 16 (Jan. 20, 1788), *reprinted in* THE FOUNDERS' CONSTITUTION, *supra* note 100, at 358.

into an area of litigation from which it has been largely excluded for practical reasons. The remainder of this Part compares the bellwether trials with previously accepted limiting procedures.

2. *Nonmutual Issue Preclusion*

By abandoning the requirement of mutuality in issue preclusion, the Supreme Court arguably limited the right to a jury trial. The common-law rule was that to preclude a party from litigating an issue in a second action, the same party must have participated in the first action. Mutuality remains a requirement for claim preclusion. The Supreme Court rejected the doctrine of mutuality with respect to issue preclusion and held that a plaintiff may foreclose a defendant from relitigating an issue that the same defendant had previously litigated unsuccessfully in an action with another party if the plaintiff could not have easily joined the prior suit and preclusion would not be unfair to the defendant.[202] The application of the doctrine of nonmutual collateral estoppel shifts the question from whether or not the litigant got a jury trial to whether the issue was fully and fairly litigated.

To better understand the application of issue preclusion to bellwether trials, it is helpful to recall the facts of *Parklane Hosiery Co. v. Shore*,[203] the Supreme Court case adopting the doctrine of nonmutuality. *Parklane* was a shareholder derivative class action alleging that Parklane Hosiery and its officers and directors had issued a materially false and misleading proxy statement in connection with a merger.[204] Before the action came to trial, the Securities and Exchange Commission ("SEC") filed a second lawsuit against the company making similar allegations that the proxy statement contained materially false and misleading information.[205] Because the SEC action was injunctive, no jury was empanelled. A bench trial was held in the government's suit; the district court found the defendant liable and issued a declaratory judgment.[206] The plaintiffs in the first lawsuit sought to take advantage of this outcome by precluding Parklane from relitigating the question of whether the disclosures in the proxy statement were materially false and misleading.[207] The Supreme Court held that plaintiffs

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202 *Parklane*, 439 U.S. at 331–32, 337.

203 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979).

204 *Id.* at 324.

205 *Id.*

206 *Id.*

207 *Id.*

could preclude the company from relitigating the issue even though the plaintiffs were not parties to the first lawsuit.[208]

Defendants did not receive a jury trial, yet the Court held that the Seventh Amendment was not violated.[209] The Court's reasoning began with the historical test.[210] Because in 1791 judicial findings of fact in equity could be preclusive over factual issues at law, the right to a jury as defined in the Seventh Amendment was not violated by the doctrine of nonmutual collateral estoppel.[211] As the Court explained, both in cases of mutual and nonmutual issue preclusion, "there is no further factfinding function for the jury to perform, since the common factual issues have been resolved in the previous action."[212] Because parties could use findings of fact in equity to preclude relitigation in common-law courts in 1791, it did not violate the defendant's right to a jury trial to preclude litigation of the misrepresentation issue based on the adverse judicial ruling in the SEC injunctive action.[213]

The Supreme Court's adoption of nonmutuality expresses a flexible approach to the historical test, similar to the hybrid approach proposed above. A less charitable characterization is that the Court chose the doctrines that it liked from 1791, and ignored the ones that it did not. The Court used the existence of an alternative, though by no means dispositive, aspect of preclusion doctrine to admit policy considerations that would have been foreclosed by the direct application of the historical test. The policy issues that were of more pressing concern to the Court in *Parklane* were the efficiency of the court system, risk of inconsistent judgments, and unfairness to defendants.[214]

These efficiency and fairness concerns are similar to the policy considerations that support the use of bellwether trials. For example, with mandatory bellwether trials, courts seek to avoid situations in which litigants cherry-pick judgments to use against the other party. Instead of a system with numerous trials held one after the other, where defendants and plaintiffs try their luck in the court system, the

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208 *Id.* at 332–33.

209 *Id.* at 337.

210 *See id.* at 333.

211 *See id.* at 333 n.21.

212 *Id.* at 336.

213 *Id.* at 335 (citing Katchen v. Landy, 382 U.S. 323, 339 (1966) (holding that "an equitable determination can have collateral-estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment")).

214 *See id.* at 329–31. I deduce the Court's priorities from the fact that the Court analyzed the policy arguments first and addressed the Seventh Amendment issue almost as an afterthought. *Cf. id.* at 333.

sampling approach of bellwether trials limits needless repetition and minimizes the lottery aspect of tort trials. Recognizing the risk of inconsistent judgments that can result because different juries may render different verdicts in similar cases, the bellwether trial procedure sets out to determine an acceptable outcome using statistical tools. Litigating a random sample of cases is an efficient way to establish a probabilistic award without permitting a single chance outcome to determine numerous cases.

The most obvious application of nonmutual collateral estoppel in the bellwether trial context is offensively, against defendants, as it was used in *Parklane*.[215] In such a case, the plaintiffs would have to meet the four-part test articulated by the Supreme Court in *Parklane*: (1) the same issue must have been fairly and fully litigated in a previous proceeding;[216] (2) the resolution of the issue must have been necessary to the outcome of the first action;[217] (3) the plaintiff must not have been able to join the first action easily;[218] and (4) the application of preclusion must not be unfair to defendant.[219] In the bellwether trial context, a court can preclude the defendant from relitigating in extrapolation cases those issues that have been fully litigated in the sample trials.

Whether preclusion doctrine can be used to preclude defendants from relitigating extrapolation cases in bellwether trials turns on the limits of the definition of "same issue." Consider the September 11th litigation discussed in Part I, in which Judge Hellerstein decided to hold a set of sample trials.[220] In those trials, the jury would have determined a damage award for plaintiffs with certain characteristics. Arguably, other plaintiffs whose cases were not tried but share the same characteristics present the same damages issue and therefore can be subject to issue preclusion. To bind the defendant in subsequent September 11th cases to the damages awards in the sample cases would require holding that these cases present the same issue. The defendant could then be precluded from relitigating the issues of the sample cases in any extrapolation case.

The "same issue" question returns us to the reference class problem. Litigants may argue that the issues in any two September 11th

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215 *See id.* at 329.

216 *Id.* at 328.

217 *Id.* at 326.

218 *Id.* at 331.

219 *Id.*

220 *See supra* notes 15–21 and accompanying text.

damages cases are not the same because the plaintiffs have different objectively determinable characteristics, such as previous income. Alternatively, they may argue that the issues could never be the same because individuals are too different based on subjective variables, such as the plaintiff's winning personality or credibility on the stand. This question can be framed doctrinally as a due process concern: to what extent is the justice system able to accept probabilistic predictions of likely outcomes in place of individualized hearings presenting particularistic evidence? In light of this concern, how similar does the same issue have to be? Statistical analysis attempts to flatten differences between individuals to make generalizations. Whether those generalizations are acceptable turns, to some extent, on whether courts can isolate and objectively choose the variables that actually determine damages awards in jury trials. If so, then the issues in the sample cases and the extrapolation cases will be the same and the doctrine of collateral estoppel can properly apply. If not, then the defendant should be entitled to a trial on each different issue raised with respect to each of the extrapolation plaintiffs. The trick from a social science perspective, then, is isolating sufficient explanatory variables that can both serve the identity requirement of the doctrine and be determined.

Once framed as a question of issue preclusion, the analysis turns on the fullness of the hearing rather than on the nature of the decisionmaker. As long as the requirements for preclusion are satisfied, the fact that a jury did not try the factual issue in question is not fatal. For example, in *Parklane*, the Court held that even though a jury was not available in the first injunctive proceeding, because the defendant had been fully heard it could be precluded from litigating the issue before a jury.[221]

Reframing the question of plaintiffs' rights as a preclusion issue eliminates the jury question and leaves instead the question of how extrapolation can be justified given that extrapolation plaintiffs have not had *any* hearing. The problem with this preclusion argument for overcoming the Seventh Amendment objection from a plaintiff's perspective is that it appears to eliminate the jury right through doctrinal formalism. Simply reframing the question as one of preclusion—can the extrapolation plaintiffs be deemed to have been heard through bellwether trials?—cannot truly resolve the jury issue. One response to this argument is that unlike *Parklane*, in a bellwether trial proce-

221 *See Parklane*, 439 U.S. at 332–33, 337.

dure the plaintiff does get the benefit of the jury right. Although the jury does not try the plaintiff's individual case directly, the result reached is based on a jury's determination of the facts of the bellwether cases. In other words, the jury is still the decisionmaker in the prior adjudication. The right to benefit from that decisionmaker is not an individual one but rather is applied to the group.

More serious than the jury question is the autonomy objection raised by the requirement that the issue being litigated in the second proceeding be the "same issue" as that in the first proceeding. The autonomy concern is that when collateral estoppel is used to preclude extrapolation plaintiffs from litigating their cases, persons who did not have an opportunity to litigate the issue in a prior proceeding are being denied the opportunity to be heard. Nonmutuality still requires that the person who is being precluded has had the opportunity to litigate the issue. At its limits, the preclusion issue thus transforms into a due process problem.

Representative litigation could provide a solution to this problem because adequacy of representation can justify preclusion for parties who did not have an opportunity to participate in the first litigation.[222] Courts have upheld preclusion in the class action context for the same reasons that they have upheld nonmutual collateral estoppel: permitting plaintiffs to relitigate the issue of certification would multiply litigation. The application of the doctrine of issue preclusion "will stop such a process in its tracks and hold both sides to a fully litigated outcome, rather than perpetuating an asymmetric system in which class counsel can win but never lose."[223] To use the class action device, however, the requirements of the class action rule would have to be met. This returns the analysis to the definition of the "same" issue that was raised earlier and to the reference class problem. The answer comes down once again to the normative decision about the proper balance between group typicality and individuation in the circumstances presented in a given case.

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222 *See* Hansberry v. Lee, 311 U.S. 32, 45 (1940) (requiring adequacy of representation for class action to have preclusive effect).

223 *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003) (holding that a decision to deny certification of a nationwide class action precludes adequately represented plaintiffs in that first action from attempting to certify the class in a different forum).

3. *Streamlining Procedures*

Another doctrine that provides a useful analogy for bellwether trials is the use of auditors to determine which facts are at issue. The use of auditors has been upheld as a streamlining procedure that does not rescind the ability of the jury to determine the facts in dispute. In *Ex parte Peterson*,[224] the Supreme Court upheld the costs of an auditor used to simplify questions for the jury, analogizing the auditor's role to that of pleading or a preliminary hearing, in which the existence of facts for the jury to find is determined.[225] The case concerned a breach of contract action and counterclaim relating to a sale of coal.[226] The district court judge appointed an auditor

> to make a preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties; and make and file a report in the Office of the Clerk of th[e] Court with a view to simplifying the issues for the jury; but not to finally determine any of the issues in this action . . . .[227]

The auditor was further to allocate the facts into ten categories and provide the jury with his opinion as to those facts.[228] The final factual determination was to be made by a jury, and the parties were to pay for the auditor.[229]

The Court upheld the use of the auditor's report as prima facie evidence, obviating the need to introduce evidence of any matter that the auditor found not to be in dispute.[230] The Court anticipated that this procedure would "shorten the jury trial, by reducing both the number of facts to be established by evidence and the number of questions in controversy."[231] The Court further held that the use of an auditor was consistent with the Seventh Amendment, emphasizing that although an auditor of this type was not known in common law, such "changes are essential to the preservation of the right."[232]

Using an auditor to determine which facts are in dispute is like summary judgment in that it permits the existence of disputed facts to be determined by a decisionmaker other than the jury. This is also similar to the bellwether trial procedure where the variables used in

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224 *Ex parte* Peterson, 253 U.S. 300 (1920).

225 *See id.* at 310.

226 *See id.* at 304.

227 *Id.* (internal quotation marks omitted).

228 *Id.* at 304–05.

229 *Id.* at 304.

230 *Id.* at 307.

231 *Id.*

232 *Id.* at 309–10.

extrapolation and the parameters of the reference class are determined by experts working in conjunction with the judge. In another permutation of the bellwether trial procedure, an expert may make recommendations regarding total damages and extrapolation and the jury can make a final determination.[233] In such a case, control of the factual determinations leading up to the jury's assessment is retained by the judge, who oversees the expert's work. Because, as in *Peterson*, the jury retains final decisionmaking power, this type of procedure is permitted under the Seventh Amendment.

Peterson was decided at a time when the courts were becoming increasingly aware of the beneficial uses of expertise and social science methodology.[234] The decision relied on a robust concept of objectivity. The Court trusted the auditor's objectivity, but did not consider the extent to which the auditor's discretion in determining which facts would go to the jury actually required the type of subjective, factual decisionmaking ordinarily reserved for juries. The capacity and objectivity of such experts as well as social science methodology has since come under fire.[235] The recognition that statistical studies and expert opinions may be erroneous, misleading, and biased does not require rejection of social science methodologies, but it does require judges to evaluate them critically.[236]

4. Remittitur

Judgments as a matter of law permit a judge to substitute her judgment for that of the jury if the jury's judgment is against the weight of the evidence.[237] The doctrine of remittitur further permits the judge to reduce damage awards that she finds to be outliers. A bellwether trial procedure likewise limits the considerations of the jury with respect to the extrapolation cases to possibilities that are within a reasonable range of jury findings.

A motion for judgment as a matter of law requires the judge to evaluate the evidence to determine if a reasonable jury has a "legally

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233 *See* Hilao v. Estate of Marcos, 103 F.3d 767, 784 (9th Cir. 1996).

234 *See generally* Rebecca Roiphe, *The Most Dangerous Profession*, 39 CONN. L. REV. 603, 612 (2007) (describing reliance on expertise to justify the development of the administrative state during the progressive era).

235 *See* Tribe, *supra* note 130, at 1330 (critiquing statistical methodology in trials as misleading to lay jurors).

236 John J. Donohue III & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 841 (2005) (critiquing empirical claims that death penalty deters homicides).

237 *See* FED. R. CIV. P. 50.

sufficient evidentiary basis to find for the party on that issue."[238] Judgments as a matter of law permit a judge to substitute her judgment for that of the jury to evaluate the probability of a litigant's success. The doctrine limits the judge's evaluation of the verdict to the jury's finding on liability.

The doctrine of remittitur permits a judge to go a step further and evaluate the jury's award. If the judge finds the verdict to be excessive, she can give the plaintiff a choice: accept a lesser amount determined by the court or elect to try the case again.[239] The legal standard for remittitur is whether the jury award "shocks the conscience."[240] In determining whether a jury award is so excessive that it meets this standard, the court must look to verdicts for comparable injuries and, based on these awards, determine whether the award in question is "within a reasonable range."[241] When determining remittitur on a state-law claim, a federal court should apply the state standard.[242] In New York, for example, the standard is stricter than the federal remittitur standard, requiring the court to determine whether the jury's award "deviates materially from what would be reasonable compensation."[243]

The concept of "reasonable" compensation is probabilistic. A reasonable verdict is one that is within the normal range of similar verdicts. Once a judge has determined that the jury verdict is outside the reasonable range, the most common approach is to remit to the highest possible verdict that the plaintiff could have obtained.[244] The

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238 *Id.*

239 FED. R. CIV. P. 59; 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2815 (3d ed. 1998) (describing remittitur as "a practice, now sanctioned by long usage, by which the court may condition a denial of the motion for a new trial upon the filing by the plaintiff of a remittitur in a stated amount").

240 *See, e.g.*, Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 165 (2d Cir. 1998) (holding that a compensatory damage award may be set aside if "the award is so high as to shock the judicial conscience and constitute a denial of justice").

241 *See* Ismail v. Cohen, 899 F.2d 183, 187 (2d Cir. 1996).

242 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 430–31 (1996).

243 N.Y. C.P.L.R. 5501(c) (McKinney 2007). The judge would still provide the maximum award that would comply with the standard. *See* Funk v. F & K Supply, Inc., 43 F. Supp. 2d 205, 227 (N.D.N.Y. 1999) (remitting $450,000 award to $30,000, which the court found to be the maximum possible award).

244 11 WRIGHT, MILLER & KANE, *supra* note 239, § 2815. Two other approaches, now rarely used, permit the judge to award either whatever the judge deems appropriate or the minimum amount a jury could have awarded. *Id.* The rationale for remitting only the minimum amount a jury could have awarded is that to grant anything more is to deprive the defendant of his right to a jury trial. *Id.* This rationale is specious because the jury's award of an excessive amount could not in any way lead to the conclusion that the minimum available amount is what a reasonable jury would award.

rationale for this is that in awarding the excessive amount the jury intended to award the maximum possible amount, and therefore the court is justified in awarding the plaintiff that maximal amount without violating defendant's jury right.[245] The data set of verdicts is chosen by the judge based on briefs and data presented by the litigants and usually not gathered or analyzed using rigorous social science methodology. The courts use a convenience sample to determine the appropriate amount by basing it on jury awards in similar cases that happen to have been brought to the court's attention.[246] The problem with this practice is that, in addition to being inaccurate, it permits judges to systematically reduce the possible range of verdicts. By consistently determining that verdicts fall outside a range, judges can reduce over time the range outside which a verdict will be deemed an outlier that is unreasonable or "shocks the judicial conscience." This raises the fear of systemic corruption underlying the adoption of the Seventh Amendment.[247]

The Supreme Court discussed remittitur in a perplexing opinion in *Dimick v. Schiedt*, in which the Court reasoned that remittitur was permissible because the judge would not add anything to the verdict, but only removed the "excess" that should never have been there in the first place.[248] By contrast, the Court rejected the doctrine of additur as violating the Seventh Amendment because it *adds* to the verdict something that the jury did not include.[249] The inconsistency of the Court's reasoning may lead to the inequitable result that defendants are entitled to specific lower jury verdicts, but plaintiffs are not entitled to specific higher ones. In any event, in both cases the courts substitute their judgment regarding a factual finding for that of the jury. Because there is no objectively verifiable way to measure what a case is "worth," both doctrines interfere with the jury's verdict. Unless the plaintiff elects a new trial, the judge's determination, not that of the jury, will prevail. Both additur and remittitur also depend on probabilistic thinking. The judge will determine with reference to past

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245 *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2815 (2d ed. 1995).

246 *See* 1 SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS 197 (Michael S. Lewis-Beck, Alan Bryman & Tim Futing Liao eds., 2003) (defining a convenience sample as a nonprobabilistic sample readily available to the researcher).

247 *See supra* notes 101–05 (discussing role of the jury as a bulwark against corruption in the judicial branch).

248 Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

249 *Id.* Additur is permitted in some states. *See, e.g.*, Jacobson v. Manfredi, 679 P.2d 251, 255 (Nev. 1984) (upholding additur in products liability case).

verdicts whether the verdict before her is within a range of reasonable verdicts (or, in other words, within "normal" range).[250] This is a very rough form of statistical methodology, not least because the judge's determination in remitted cases is based on an analysis of a convenience sample.

The methodology for determining outcomes in a remittitur differs from a bellwether trial procedure in three ways. First, in a bellwether trial procedure the extrapolation plaintiffs are not entitled to the maximum amount reached by the sample plaintiffs, but to a reasonable amount determined by social science methods, such as an average award. Second, in some permutations of the bellwether trial procedure the jury can determine the extrapolation amount, whereas remittitur requires a judge to displace the jury's findings with her own unless the plaintiff decides to relitigate. Third, if the verdict is remitted, the plaintiff has an opportunity to reject the remittitur and relitigate. A mandatory bellwether trial procedure, by contrast, does not necessarily provide the option to opt out *after* the extrapolation process.[251]

The strongest counterargument to this analogy is that there remains a fundamental difference between remittitur doctrine and bellwether trials: remittitur aims to give the plaintiff a judgment in line with what a reasonable verdict should be, whereas bellwether trials aim to give plaintiffs extrapolated verdicts that are not tightly tailored to their individual entitlements.[252] In other words, remittitur doctrine is animated by accuracy whereas bellwether trials are animated by standardization. There is some truth to this argument, but it focuses too much on the intent rather than the result of the procedures. Remittitur has the effect of producing standardized verdicts (within the "reasonable" range) despite what a jury in a particular case found. The judge may claim that she is producing a more accurate result, but that claim of accuracy is not based on the intrinsic value of the claim but only by reference to a class of claims. The real difference between the two procedures, then, is that remittitur, at least formally, guarantees a verdict at the higher range of plaintiff's entitlement rather than an average. Like any judicial decision, this guarantee is subject to whatever biases about the intrinsic value of the particular claim the judge may harbor.

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250 *See* Ismail v. Cohen, 899 F.2d 183, 187 (2d Cir. 1996).

251 *See supra* notes 167–69 (discussing opt-out requirements of bellwether trials).

252 I am grateful to Robert Bone for alerting me to this argument.

A bellwether trial procedure that utilizes a jury both to determine the sample verdicts and to determine the overall extrapolation amounts shows greater fidelity to the jury right than remittitur. The jury determines the reasonable range of awards that is appropriate for an extrapolation plaintiff to receive based on sample trials and furthermore can determine how the extrapolation is carried out, such that its judgment always prevails. The jury can be the decisionmaker throughout the process. The defendant is guaranteed that the jury's verdict will never be outside the range of reasonable verdicts, because the averaging method requires that each extrapolation award stay within the range of reasonable verdicts reached in the sample trials.

The extrapolation process raises problems under *Dimick* because the process is not removing the "excess" from an already existing verdict, but in fact creating an award for each plaintiff consistent with the sample. If the judge determines the final extrapolation award, as was proposed in *Cimino*, the court's judgment is completely substituted for the jury's.[253] The determinations made by the judge cannot be compared to what the individual extrapolation plaintiff would have gotten and thus leaves open the argument that the judge is "adding" to what the verdict might have been if an individual trial had been held in each case. To avoid accusations that this process violates the prohibition on additur in federal court, a jury could determine the extrapolation amounts. A conservative evaluation of this analogy argues in favor of allocating the extrapolation decision to the jury.

The argument that extrapolation plaintiffs who obtain an award greater than they would have gotten in an individual trial are in fact obtaining something in *excess* of what the jury would have given, and that this violates the Seventh Amendment just as additur would, brings us back to the question of probabilistic and particularistic evidence. The probability is not that the award is what this plaintiff would have gotten at trial. Rather, the award reflects the *probable value of this plaintiff's claim* given the distribution of verdicts. The doctrine of remittitur recognizes that litigants are entitled to a verdict that is within a reasonable range. Given the inconsistent nature of jury verdicts, there is no reasonable basis for the argument that either litigant is entitled to a specific jury verdict. By upholding remittitur, the *Dimick* opinion tacitly approves probabilistic reasoning in judicial evaluation of verdicts.

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253 *See supra* Part I.A (describing the *Cimino* litigation).

Moreover, the rejection of additur in federal court places no burden on bellwether trials if the defendant's jury right attaches to the total compensation award rather than to the compensation of each individual plaintiff. The defendant is entitled to jury verdicts within the normal range and, as a due process matter, to an accurate determination of liability and total compensation. Assuming the statistical methodology is sound, regardless of the variances among individual plaintiffs, the overall amount defendant is required to pay under a bellwether procedure will be equivalent, on the whole, to the amount that would have been awarded by a jury if each of the individual cases were tried and the total compensation calculated based on those results.

Accordingly, the defendant is no worse off in a bellwether trial procedure than in remittitur. If the procedure is set up as it was in *Hilao*, where the jury awarded overall compensation, then the defendant is paying exactly what the jury awarded, no more and no less.[254] In some ways the defendant is actually in a better position with respect to bellwether trials than remittitur. In a remittitur situation, the judge must remit the maximum award that plaintiff could have gotten, whereas the extrapolation awards will all be within the normal range and, because they are averaged, all below the maximum amount. The defendant does not get the advantage of a lottery, but there is also an advantage in averaging.

The case is different with respect to the extrapolation plaintiffs. They might argue that they received less in the extrapolation process than they would have received in an individual jury trial and that rather than lopping off the "excess," the extrapolation procedure represents a diminution of their rightful compensation. In this event, the judge is doing something no different from what occurs in remittitur, only in a manner that is more accurate and that allows plaintiffs' representatives more control over the process. True, any single plaintiff might have received more (or less) in an individualized jury trial, but that plaintiff might have received more (or less) if their individual case was tried to a different jury. There is no support for the proposition that variations in individual jury trial results with respect to similarly situated litigants (of which both plaintiffs and defendants take advantage) are a constitutional right. Tolerance of variations in jury awards indicates that litigants have no right to a specific award but only to an

254 *See supra* Part I.B (describing the procedure used in *Hilao*).

award within a reasonable range and a full and fair procedure for its determination.

Another objection that an extrapolation plaintiff might make is that remittitur permits the plaintiff to elect a new trial rather than acquiescing to the reduced award proposed by the judge. The plaintiff whose award has been remitted retains his ability to have his award decided by a jury, whereas in a mandatory bellwether procedure the extrapolation plaintiff has no such option. For this reason, an opt-out provision is necessary for bellwether trials not to violate plaintiffs' jury right as well as their due process rights. As discussed above, permitting an opt-out is not likely to diminish the usefulness of a bellwether procedure.[255]

A recent study indicates that in practice there are few retrials in remitted cases.[256] If the likelihood of relitigation in the remittitur context is low, low too is the likelihood that an opt-out in a bellwether trial procedure will lead to individual trials. This can be interpreted in two ways. If remittitur has resulted in an unconstitutional erosion of the jury right, then bellwether trials will do the same. On the other hand, by permitting sample trials, the bellwether trial procedure may result in more jury trials and less substitution of the court's judgment for that of the jury. Furthermore, it may result in less substitution of the judgment of attorneys for that of the jury through private mass settlements.

Like judgments as a matter of law and remittitur, bellwether trial procedures limit the possible range of jury awards. The difference between the doctrines is that bellwether trials produce an award that is an average or probabilistic, whereas (at least theoretically) remittitur provides the maximum award. But even that maximum award is determined based on a reasonable range and requires the judge to exclude outlier awards and to make probabilistic judgments. Thus, although there are differences between the two procedures, they also share important similarities that support the constitutionality of bellwether trials.

IV. A Model Bellwether Trial Procedure

In the previous three Parts, this Article laid out the arguments in favor of bellwether trials and addressed the practical, normative, and

255 *See supra* notes 167–69 and accompanying text (modeling results of an opt-out regime).

256 *See* Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 793 (2003) (presenting evidence that "plaintiffs take the remittitur or settle in 98% of the cases in which a judge grants a remittitur").

constitutional objections to the procedure. This Part describes a model bellwether trial procedure that is constitutional and realizes the democratic policy aims of the jury right and the policies animating the substantive law.

Consistent with the basic requirements of due process, the court must provide notice to the litigants of the exact nature of the proceeding. It must use recognized social science methods to determine the sample and the variables that will be considered. For example, the sample used must be randomly selected and sufficiently large so that the results are statistically significant. The variables chosen to delineate the parameters of the group to whom the results are to be applied must be objectively verifiable and shown to be relevant to the jury's determination. The determination of the sample size, explanatory variables, and the selection process should be done by an expert who is as objective as possible. Thus, the expert may not be hired by either side, although the expert's services perhaps can be paid for by both sides. A public determination of the soundness of the quantitative methods used must be required. All the experts' findings and determinations must be made publicly available prior to implementation. The judge should hold a hearing, evaluate any objections to the expert's findings, and issue a reasoned opinion.

The plaintiffs must be permitted to opt out before the trial process has begun. Although an opt-out is not necessary under a pure democratic theory of group typical justice, it does provide a positive gesture for those who adhere to deeply imbedded individualistic tradition in adjudication by allowing the plaintiffs who want an individual trial to realize their autonomy. This expression of autonomy may derail the process, but it is necessary for two reasons. First, an opt-out provides a mechanism for determining whether the procedure as structured is likely to yield a highly unfair result. If large numbers of plaintiffs opt out, this is a good indicator of a significant problem. Second, permitting individuals to opt out allows them to choose a collective procedure and in so doing affirms both the dignity and autonomy values that are central to our court system and increases the legitimacy of the collective procedure. Even if the opt-out is not a realistic option for many, among the highest-value cases where the most is at stake there will be some for whom the choice is more than symbolic.

Some might suggest that the plaintiffs be permitted to opt out *after* the extrapolation process has been completed so that the plaintiffs can make a fully informed choice. If one believes that there is

some predictability to jury awards then an end-of-process opt-out should not be necessary, because the parties can predict what the likely outcome will be. Permitting plaintiffs to adopt a "wait and see" attitude and opt out after the procedure has been completed will result in a substantial waste of resources. As Judge Parker stated in his opinion approving binding bellwether trials, "[i]f all that is accomplished by this is the closing of 169 cases then it was not worth the effort and will not be repeated."[257] Because so much is at stake, bellwether trials are likely to be expensive and involve substantial resources of jurors, courts, and litigants. If the structure of the procedure is predictably unfair, then this must be determined in advance through opt-outs and judicial review. Of course, after the extrapolation, plaintiffs will have the right to appeal. Assuming that the procedure meets due process requirements and is statistically sound, however, they will lose their ability to have an individual trial since they did not opt out at the start of the process.

After the parties receive notice, the structure of the sample is settled and the opt-out period has ended, the court will oversee the bellwether jury trials. Because the bellwether plaintiffs' results are to be extrapolated to others, the court should evaluate the lawyers chosen to represent the bellwether plaintiffs in the individual trials and verify that they provide adequate representation.[258] The problem of centralization in bellwether trials and the potential for systemic bias that it engenders requires that more than one jury hear the bellwether cases. Several different juries ought to decide randomly assigned bellwether cases. For the same reason, having an expert determine damages and then bringing the expert's recommendations to a single jury for ratification is not the preferable procedure, although it is constitutional.

After the juries have rendered their verdicts, an objective expert will evaluate the verdicts with reference to the relevant variables and make extrapolation determinations. In an ideal procedure, a subsequent jury would be convened to ratify the experts' extrapolation determination. This second layer of jury participation is beneficial because it involves democratic decisionmaking on all levels of the procedure and therefore increases its legitimacy. However, it is also possible to have the judge, in consultation with an expert, determine the extrapolation amounts. This would be consistent with the hybrid procedure described in Part III.C.1 above. The extrapolation would be

257 Cimino v. Raymark Indus., Inc., 751 F. Supp. 648, 653 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

258 *Cf.* FED. R. CIV. P. 23(g) (requiring court oversight over appointment of class counsel).

achieved through averaging, either of the results of all the bellwether trials or of smaller subgroups chosen based on relevant variables. Every plaintiff would then be awarded the applicable average amount.

This Article has not addressed several significant technical issues in implementing bellwether trials with regard to certain mass tort cases. For example, courts would need to determine whether and how to bifurcate or trifurcate cases to hold bellwether trials.[259] The benefits and potential pitfalls of special jury forms would have to be considered. A court would also need to make a determination regarding choice of law in the case of a national mass tort.[260] Finally, the possibility of cherry-picked settlements that scuttle the procedure must be addressed. These open issues would need to be decided by a court in any aggregative litigation, including a court contemplating bellwether trials. In making these determinations, this Article argues that one of the considerations should be the benefits of making the democratic body of the jury available to every litigant through the bellwether trial procedure.

Conclusion

The bellwether trial procedure reintroduces the jury into an area of law where settlement rules. It injects public, democratic decision-making into a process that has been almost completely dominated by private settlement. In so doing, bellwether trials provide a new justification for group typical justice grounded in democratic participation and deliberation.

Courts have been using bellwether trials informally for many years to provide a basis for settlement between litigants. The development of informal bellwether trials is a testament to the procedure's usefulness. But bellwether trials need not be purely informal. They can and should be conducted using reliable social science methods, including random sampling, so that they can provide a valid litigation alternative to settlement for mass tort cases.[261] Whether or not

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259 *See* FED. R. CIV. P. 42(b) (permitting bifurcation); *Cimino*, 751 F. Supp. at 653–54 (trifurcating asbestos case into failure-to-warn, causation, and damages phases).

260 *See* Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1840 (2006) (propounding a "goods on the national market" theory of choice of law). *But see* Linda S. Mullenix, *Gridlaw: The Enduring Legacy of* Phillips Petroleum Co. v. Shutts, 74 UMKC L. REV. 651 (2006) (arguing that choice of law remains a substantial barrier to all class actions and aggregations).

261 *See* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 568–70 (2006) (arguing in favor of adjudication as a means of protecting the public dimensions of courts).

mandatory bellwether trials are actually used routinely, the affirmation of a realistic alternative for litigating mass tort cases will in itself result in settlements that are more equitable. If they are used to resolve mass tort cases directly, bellwether trials will increase citizen participation in an area of the law that has been the consistent target of allegations of capture, bias, and abuse.