

THE INDIVIDUAL JUSTICE OF AVERAGING

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Discussion Paper No. 285

6/2000

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The Center for Law, Economics, and Business is supported by  
a grant from the John M. Olin Foundation.

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## THE INDIVIDUAL JUSTICE OF AVERAGING

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### *Abstract*

In this essay, we examine the perceived problem of individual justice posed by compulsory averaging to resolve civil cases. The norm of individual justice we focus on is that of effectuating the interests and welfare of the individual litigant. We investigate, in light of this norm, the choice between two general types of rule: a rule of “individualization,” under which litigants may insist that a case be resolved according to its individual features; and a rule of “averaging,” under which a case is resolved according to the features of the average case, notwithstanding either party's desire for individualization. We consider this choice from the standpoint of a (prospective) litigant who is uncertain about the quality of his own case.

Our principal claim is that a litigant in such conditions of uncertainty would frequently choose the rule of averaging, even though this would be disadvantageous in the event his case turns out to be better than average. In particular, our analysis shows that if a prospective litigant is concerned only with the expected relief to be awarded, he would be indifferent between averaging and individualization. Two factors, moreover, favor a strict preference for averaging: (1) the expense of litigation, which by its nature is higher under individualization; and (2) considerations of risk, which is generally though not always greater under individualization. However, transaction costs and incentive problems generally prevent litigants from effectuating their preference for averaging. Under such circumstances, norms of individual justice would support a court-imposed rule of compulsory averaging.

This argument calls into question the widely-held view that compulsory averaging infringes the autonomy or welfare of the individual litigant. The flaw in that view, we believe, is that it adopts an ex post perspective, taking as given the quality of the individual litigants' cases. For purposes of rule design, however, the appropriate focus is on the interests of the prospective litigant who is uncertain about the relative quality of his claim.

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## INTRODUCTION

Should the resolution of a given case depend on the individual features of that case? Or should it instead depend on the features of the average case? Consider a set of disputes that differ along certain factual or legal dimensions.<sup>1</sup> To what extent should the legal system sort the cases according to their different factual and legal properties, and tailor the outcome accordingly? And to what extent should the legal system refuse (even over party objections) to sort the cases, and instead decide each case based on the properties of the average case?

This choice — we will call it the choice between “individualization” and “averaging” — arises pervasively in the legal process. Its presence is most obvious in the controversies over the use of class actions in mass tort litigation, in which enormous numbers of disparate claims are aggregated into a single collective proceeding. It is also at the heart of numerous other design problems in the legal process, including controversies over mandatory ADR; replacing the tort system with no-fault or other compensation schemes; the scope of the right to an administrative hearing; even the design of substantive legal rules themselves. In these and many other dispute resolution settings, the fundamental question arises: at what point should a decisionmaker refuse (over litigant objections) to further inquire into the individual circumstances of a given case, and

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<sup>1</sup>The cases may differ, for example, in the strength of the evidence supporting liability, or in the amount of losses sustained by the plaintiff. The precise nature of the difference is unimportant for present purposes.

instead resort to generalizations and averages to decide that case?

In this essay we examine this problem from the normative standpoint of individual justice. In particular, we are interested in the extent to which a rule of compulsory averaging across cases is consistent with the aim of protecting the autonomy and welfare of the individual litigant. Our basic claim is that the prospective litigant, uncertain of the quality of his case, would frequently choose to be governed by a rule of compulsory averaging. He would, moreover, choose that alternative knowing that it would be disadvantageous to him in the event his case turned out to be stronger than average. To the extent that is true, a rule of compulsory averaging is fully consistent with, indeed may be required by, the objective of safeguarding his autonomy and welfare.

This conclusion runs against the prevailing view that compulsory averaging across cases compromises individual justice. That view typically focuses on the litigant with the above-average case, who is disadvantaged by compulsory averaging. The prevailing view holds that to protect this litigant's interests, the legal system must give him the opportunity to insist on an individualized determination of the merits of his case. The difficulty with that view is that it ignores the ways in which that litigant is benefited, *ex ante*, by a rule of compulsory averaging. For the prospective litigant, we contend, the anticipated advantages of compulsory averaging would often outweigh its anticipated disadvantages. When that is true, the prospective litigant is harmed, not helped, by a rule that permits litigants to insist on an individualized decision.

The intuition behind our analysis is straightforward. For the prospective litigant who does not know the quality his case will have, an averaging system offers the same expected recovery as an individualizing system. If he were concerned only with the expected recovery in

litigation, therefore, he would simply be indifferent between the two systems. Averaging, however, tends to reduce both the expense and the riskiness associated with litigation, and for these reasons will often be strictly preferable to individualization in the eyes of the prospective litigant. The only way to realize the benefits is to make averaging compulsory,<sup>2</sup> because ex post — once litigants know the quality of their case — they will have an incentive to avoid averaging. Yet transaction costs frequently prevent litigants from agreeing, ex ante, to a regime of compulsory averaging. Hence the argument for compulsory averaging imposed by the legal system.<sup>3</sup>

We believe this analysis has the effect of lifting the “burden of proof” regarding the use of compulsory averaging techniques in litigation. In prevailing discourse there is a sort of presumption against compulsory averaging across cases: because it is assumed to infringe litigant autonomy, compulsory averaging should be avoided unless strong countervailing reasons (such as limited resources) make it necessary. Our argument suggests that this position is unwarranted; values of individual justice may counsel in favor of rather than against compulsory averaging. As a result, courts should arguably have greater leeway than they have previously been granted to experiment with compulsory averaging methods.

In analyzing this question, we will put to one side the problem of deterring harmful behavior; our focus will be on situations in which a defendant’s incentive to take precautions

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<sup>2</sup>In the sense that, at the time of the litigation, individual litigants must submit to averaging.

<sup>3</sup>A similar argument is explored in Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 *J. Legal Stud.* 307 (1994). Our argument should not be confused with the very different argument that courts should use sampling and other statistical techniques in order to eliminate random variation in jury verdicts for substantively identical cases. See Saks & Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 *Stan. L. Rev.* 815 (1992). Here we are addressing the very different question of whether substantively non-identical cases should be treated alike.

against causing harm is not affected by the choice between individualization and averaging. Our assumption *throughout this article will be that averaging has no impact on primary behavior (the likelihood of accidents and the like)*. This assumption is made for clarity of analysis, so that we can focus on the separate issue of fairness to individuals who, for whatever reason, find themselves in a legal dispute. To be sure, a complete analysis of the averaging problem would have to take into account its effects on primary behavior; but we believe it is analytically clearer to bracket that issue here. Accordingly, we will ignore the effect of averaging on primary behavior,<sup>3</sup> and confine our attention to the question of fairness to litigants.

The essay is organized as follows. In part I, we preview the argument by discussing a simple example drawn from the mass tort context, perhaps the most pressing contemporary setting of our problem. In part II, we attempt a more general statement of the problem and indicate the range of settings in which it arises. In part III, we set forth our framework for analyzing the choice between averaging and individualization. We present a simple model in which prospective plaintiffs, uncertain of the quality of their claims, are given the hypothetical option of selecting either individualized adjudication of their claims or compulsory averaging.<sup>4</sup> In part IV, we analyze the choice a prospective plaintiff would make between the two systems in the model. In part V, we defend on normative grounds our focus on choice under uncertainty. In part VI, we assess the significance of our analysis for legal policy. Part VII concludes.

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<sup>3</sup>Kaplow, *supra* note \_\_, investigates at length the effect of averaging on deterrence.

<sup>4</sup>Though we focus on plaintiffs for the sake of analytical clarity, it will be evident that the basic analysis applies with equal force to defendants.

## I. A PREVIEW OF THE ARGUMENT

To set the stage for our analysis, consider the following hypothetical case. Suppose a large group of disease victims have claims against the manufacturers of a toxic substance product. The “quality” or expected judgment value of the individual plaintiffs' cases varies along numerous dimensions. For example, the evidence concerning causation of injury varies considerably among cases; in some the evidence is very strong, in others it is very weak. Similarly, the cases differ on issues such as evidence of contributory negligence and assumption of risk, the amount of damages sustained, the content of the applicable states' laws, timing of the lawsuit, and so forth. As a result of these differences, the plaintiffs' expected recoveries<sup>5</sup> in individual trials varies considerably. We can assume that, at the time of the litigation, these differences are evident to the litigants.

Now consider a proposal to replace individual trials with a mandatory “averaging” procedure that would work as follows: the victims of a given disease would all recover the same amount, regardless of differences in their cases; and that amount would be calculated by determining the expected trial recovery of the *average* claim in that disease category. Thus, for example, suppose that, in a given disease category, the victims' expected trial recoveries would be as follows: some victims — those with very weak cases — have an expected recovery of \$10,000; others victims — those with very strong cases — have an expected recovery of \$1 million; and the *average* expected recovery<sup>6</sup> is \$300,000. Under this proposed arrangement, every victim would simply get \$300,000, regardless of the strength of his case. Individual

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<sup>5</sup>That is, the probability of liability multiplied by the amount of damages awarded in the event of liability.

<sup>6</sup>That is, the sum of the expected recoveries divided by the number of claims.

litigants would be compelled to accept that amount; no one would be permitted to “opt out” of the arrangement and insist on an individual trial. Notice that the difference between the two arrangements is not in how much the defendant pays out in total (it will pay the same total under either arrangement). The difference, rather, is in how the payments are distributed among the plaintiffs.

Does such an arrangement do justice to plaintiffs?<sup>7</sup> Suppose a court (or a legislature) must decide on a rule governing the use of such mandatory averaging procedures. The court wants to choose the rule that best respects the autonomy and welfare of individual plaintiffs in the litigation process.<sup>8</sup> Should it adopt a rule providing for mandatory averaging of the type we have described? Or should it instead preserve litigants' ability to insist on an individual trial (assuming that is a feasible option)?

That, in broad terms, was the issue facing the Supreme Court in the widely discussed *Amchem* case,<sup>9</sup> on which our hypothetical is loosely based. *Amchem* involved a proposed mass settlement of over one million personal injury claims arising out of exposure to asbestos. The proposed settlement resembled our hypothetical arrangement in that plaintiffs with claims of varying strength would be compelled to accept roughly the same amount in settlement. The Supreme Court overturned the settlement, in concluding that the proposed class settlement was

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<sup>7</sup>We can assume for purposes of discussion that the defendants are prepared to accept the arrangement, provided that it binds all plaintiffs.

<sup>8</sup>We assume that the rule will have no effects *outside* the litigation process, such as effects on deterrence of harmful behavior and the like.

<sup>9</sup>*Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). One of us (Rosenberg) participated as counsel in that case. The views expressed here are the authors'.



not authorized by the Federal Rules of Civil Procedure.<sup>9</sup> In doing so, the Court emphasized that it was troubled by the notion of forcibly bundling together claims of such disparate quality.<sup>12</sup> In the court’s view, the settlement was inappropriate because there was “no structural assurance” that the amounts paid to different claimants would properly reflect the differences in their claims.<sup>13</sup>

Under that view, which we believe represents conventional wisdom, our hypothetical averaging arrangement would be deemed unfair to plaintiffs with relatively strong claims. In effect, our hypothetical arrangement seizes much of the value of those plaintiffs' claims and redistributes it to plaintiffs with much weaker claims. No plaintiff with a relatively strong claim, seeking to maximize his return from the litigation, would agree to such an arrangement. Hence, if we view the value of his claim as something that is rightfully his, compulsory averaging infringes his autonomy. That, we take it, is what the conventional response would be to the

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<sup>9</sup>The court held that the proposed class failed to meet the requirements for certification under FRCP 23, in particular the “predominance” and “adequacy of representation requirements. See 521 U.S. at 625-30.

<sup>12</sup>The settlement was negotiated by attorneys acting as class representatives; consent from individual plaintiffs had not been obtained. Though the settlement allowed a limited time for class members to “opt out” of the arrangement, the court concluded that this offered little protection for plaintiffs who would be disadvantaged by the settlement, because in practice they would often lack the information to make intelligent use of this option. See 521 U.S. at 628. We assume this is true for purposes of discussion.

<sup>13</sup>521 U.S. at 627.

question we have posed.

But let us take a closer look at the matter. The compulsory averaging arrangement is indeed disadvantageous to a plaintiff who turns out to have relatively strong claim. Yet consider the position of that same litigant, *before* his claim materializes. At this point in time, he is uncertain about what the strength of his claim will be. In this setting, the averaging arrangement offers him the same expected recovery as he would get in an individual trial: since he has no reason to expect his claim to be stronger or weaker than average, his expected recovery at trial is simply equal to the *average* expected recovery. He would, accordingly, have no reason — at this point in time — to eschew the compulsory averaging arrangement, at least if he is concerned primarily with his expected recovery.

Indeed, under such conditions of uncertainty, there are reasons to expect he might affirmatively prefer the averaging arrangement. Two such reasons stand out. First, the averaging arrangement is likely to generate fewer litigation costs for him, because he is spared the trouble of establishing the relative strength of his claim. If so, the arrangement offers a higher net expected return than an individual trial, since it gives him the same expected recovery but at less cost.<sup>15</sup> Second, the averaging arrangement may be less risky: in effect, it “insures” him against the possibility that he will have a relatively weak claim.<sup>16</sup> A risk averse prospective plaintiff

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<sup>15</sup>We recognize that this issue is complicated by the fact that he also may reap certain process-oriented benefits (a “day in court” and the like) from the individual trial. See *infra* section IVB.

<sup>16</sup>As we emphasize below, the risk in question has nothing to do with any supposed arbitrariness in trial outcomes. The random element we refer to is the “luck of the draw” in having a good claim or a bad claim. See *infra* section III.

would often find this insurance desirable.<sup>17</sup>

Notice, moreover, that to satisfy these concerns, the averaging arrangement would have to be mandatory in character — in the sense that it would not permit litigants to insist on an individual trial once they discover the quality of their case. For if the arrangement were purely optional, it would quickly unravel once the quality of an individual's case became apparent. Plaintiffs with relatively strong claims would opt out of the averaging arrangement, as would defendants facing plaintiffs with relatively weak claims.<sup>18</sup> Most cases would wind up leaving the arrangement — thereby generating precisely the costs and risks whose avoidance makes the arrangement desirable.

As a result, a prospective plaintiff might well agree to the mandatory averaging arrangement we have described, if he were given this opportunity before he knew what the

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<sup>17</sup>Whether they do so depends on the correlation between a plaintiff's pre-compensation wealth and the strength of his claim. We discuss this below in section IVC.

<sup>18</sup>Our assumption here is that the averaging arrangement provides for an award of \$300,000 (the average of all cases) regardless of who has opted out of the arrangement. If the expected trial recovery in a given case is a lot higher than \$300,000, the plaintiff will insist on an individual trial; if it is a lot lower than \$300,000, the defendant will do so.

Another imaginable arrangement would be one in which the amount awarded is equal to the average expected recovery *of cases that have not opted out*. This arrangement would be subject to a different kind of unraveling. Plaintiffs with the most valuable cases would opt out, which would have the effect of lowering the average, which would encourage the plaintiffs with the most valuable (remaining) cases to opt out, which would further lower the average, and so forth.

strength of his claim would be. Crucially, he may be willing to do this even though an individual trial will be preferable in event he winds up with a relatively strong claim. That is: a litigant's stance toward the averaging arrangement *once he knows the relative strength of his claim* is likely to be very different from his stance *before* he has that information. It is quite possible that under conditions of uncertainty he would prefer the arrangement, even though he would not if he turned out to have a relatively strong case.

It would, however, be difficult for a prospective plaintiff to effectuate his preference for the averaging arrangement. Suppose that, for reasons we have given, all prospective plaintiffs in our hypothetical case would find the averaging arrangement preferable before they knew the quality of their cases. In a world without transaction costs, they could in principle all sign an agreement with the prospective defendants to provide for the averaging arrangement once the litigation arose.<sup>19</sup> But in practice, transaction costs would often prevent prospective litigants from entering into such agreements before the litigation arose. And once the litigation arises, it is too late; parties will have strategic reasons for refusing to agree to the arrangement, even though they would have done so before the claims materialized.

In such a setting, we believe considerations of individual justice would favor the legal system's adoption of the hypothetical averaging arrangement. If the legal system seeks to respect the interests or aspirations of the individual, it will adopt the rule that the individual would

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<sup>19</sup>Recall our assumption that the defendants are willing to employ the averaging arrangement provided that all plaintiffs do. See supra note \_\_\_. In general, the same cost and risk considerations that would lead prospective plaintiffs to prefer averaging would lead prospective defendants to do the same (though risk aversion may be less pronounced among prospective defendants).

choose for himself. If today's prospective litigant would choose a rule of mandatory averaging for himself, then to protect his interests the legal system should adopt that rule. The legal system scarcely protects his interests by *refusing* to adopt his preferred rule! For this reason, it would be misguided for a court to conclude, in our example, that it protects the interests of the individual litigants by preserving their right to an individual trial in our example.

This argument can be applied to many design issues in the legal process. In what follows, we have three basic objectives. First, we will try to show that the choice between mandatory averaging and (permissive) individualization is a quite general problem in the civil process. Second, we will examine how prospective litigants would choose between these alternatives under conditions of uncertainty about their cases. Third, we will develop the claim that choice under uncertainty is the appropriate frame of reference for assessing the demands of individual justice in process design problems.

## II. THE PROBLEM OF COMPULSORY AVERAGING

### A. Nature of the Problem

#### 1. Averaging vs. Individualization

The hypothetical just discussed is representative of a very broad and fundamental problem confronting adjudicators. This is the problem of deciding the extent to which they should inquire into, and base their decisions on, the individual circumstances of a dispute. On the one hand, adjudicators may strive for specificity in their resolution of disputes, attempting, to the extent possible, to tailor their decisions in a given case to the unique circumstances of that case. On the other hand, they may instead resort to generalizations, or data drawn from broad

categories of disputes, with which to decide individual cases. This choice faces not just courts but all adjudicatory bodies.

Let us give a simple illustration. Consider, say, a medical malpractice case involving three contested issues: what the standard of care is; whether the physician violated the applicable standard; and what damages the plaintiff should collect. On the first issue, the court may resort to generalizations about what the appropriate level of care is most cases, or may instead use a standard tailored to the specific circumstances of the case.<sup>20</sup> On the second issue, the court may again draw on generalizations about what usually happens in such cases, or may instead make a detailed inquiry into what the available evidence shows.<sup>21</sup> On the third issue, the court may once again resort to generalizations about the losses typically sustained by victims of similar injuries, or it may attempt to determine with precision the losses sustained by this particular plaintiff.

We term these alternatives “averaging” and “individualization,” respectively. We employ the former term because resorting to generalizations to decide cases is, in its functional effect, normally equivalent to averaging across cases. Thus, for example, to award a plaintiff the amount *generally* recovered by plaintiffs in a given set of cases is normally equivalent to awarding him the amount recovered by the *average* plaintiff; to ask what the facts generally are in a given set of cases is normally equivalent to asking what the facts are in the average case; to employ the legal standard generally used in a given set of cases is to employ the standard used in

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<sup>20</sup>Thus, it might require the same conduct or precaution level of all doctors, or it might tailor the requirements to the doctor's abilities, level of experience, local custom, and so forth.

<sup>21</sup>Thus, for example, the court might simply look at the injury and use this as the basis for estimating the probability that the physician was negligent; or it might instead examine witness accounts, the doctor's past history, expert opinions about what happened, and so forth

the average case; and so forth. Hence, we can restate the problem facing adjudicators as one of choosing between averaging and individualization in deciding cases.

This problem arises in connection with virtually any issue that affects the likelihood or amount of recovery in a given case. In particular, as the above example suggests, it arises in connection with both “factual” and “legal” questions (as well as mixed questions). On any question of fact, the court must decide on the extent to which it should inquire into the evidence peculiar to the case before it, or should instead rely on generalizations drawn from a broader category of cases. A similar problem emerges on questions of law, inasmuch as the court has the power to craft the legal principles that will govern a case:<sup>22</sup> it must decide to what extent it should make those principles sensitive to the particulars of the case, or should instead rely on generalizations.

Now, the choice between averaging and individualization is obviously a matter of degree. There is in effect a continuum stretching from a high degree of individualization to a high degree of averaging. In essence, greater averaging is associated with the use of generalizations drawn from broader categories of cases; the broader the category, the greater the amount of averaging.<sup>23</sup> Observe that pure individualization is, in theory as well as practice, not possible; a court must always resort to some generalizations (for example, in assessing evidence).<sup>24</sup> That observation

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<sup>22</sup>Sometimes the court may be bound by the decision of the legislature or some higher court, in which event the problem we describe befalls those bodies. (For example, the legislature faces the problem of how much to permit courts to shape legal standards to the particulars of a case.)

<sup>23</sup>Thus, on damage issues, for example, one might employ the category of all cases involving identical injuries to individuals with identical occupational backgrounds. Alternatively, one might instead employ the category of all tort cases, period. The latter alternative involves greater averaging, in the sense that it lumps together more disparate claims than does the former.

<sup>24</sup>No matter how much evidence the decisionmaker examines, it must be measured against some external

should not, however, obscure the fact that the decisionmaker can choose the breadth of the generalizations he relies on, and accordingly can choose between greater averaging or greater individualization in decision making.

What turns on the choice of how much averaging to undertake? For our purposes, the central item at stake is *the extent to which factually or legally disparate cases are treated as identical*. Averaging has the effect of suppressing or ignoring such differences among cases; the greater the degree of averaging, the more pronounced this effect becomes. That is, the broader the category of cases a decisionmaker uses from which to draw generalizations, the less sensitive his decisions will be to differences among the cases he decides.

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standard of reliability (not furnished by the evidence itself); and that standard is normally drawn from experience with other cases. As an example, consider eyewitness testimony: the decisionmaker must evaluate the credibility of the witness, which requires drawing, at least implicitly, on generalizations about human behavior and the like.



We can make this point clearer by returning to our malpractice example. Assume that, in a highly individualized system, the value of malpractice claims (their expected recovery) ranges uniformly from zero to \$1 million, depending on the quality of the evidence in the case. One form of averaging would be simply to award every plaintiff \$500,000 — the value of the average case — regardless of the particulars of his case.<sup>25</sup> Another, less extensive form of averaging would involve creating multiple categories according to the quality of the plaintiff's case, and awarding members of each category an amount equal to the value of the average case in that category. The latter course obviously allows for greater differentiation according to case quality; plaintiffs with good evidence are not lumped together with (to receive the same expected amount as) plaintiffs with bad evidence.

## 2. Mandatory vs. Voluntary Averaging

By its nature, the feasibility of averaging depends on whether it is voluntary or mandatory for the parties. As we saw with our earlier mass tort hypothetical, parties with cases whose quality is substantially “above average” will, in general, prefer a high degree of individualization in the legal system's handling of their claims. Precisely because their cases are above average, a system that focuses on the individual properties of their cases will hold out greater rewards<sup>26</sup> than a system that treats them the same as parties in the average case. Hence, any effort to employ a considerable degree of averaging in legal decision making must be mandatory in order to

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<sup>25</sup>We put to one side the point that this would invite frivolous claims, thus driving down the value of the average case. Assume for present purposes that the set of claims is unaffected by the degree of averaging employed.

<sup>26</sup>Greater recoveries if the party in question is the plaintiff; lower recoveries if the party in question is the defendant.

succeed, because parties with substantially above-average cases will not submit to it voluntarily (if they have the option of choosing less extensive averaging).<sup>27</sup>

To be sure, parties with above-average cases may frequently submit voluntarily to certain limited forms of averaging. The best example is settlement out of court and other forms of voluntary alternative dispute resolution, in which a party surrenders his right to a court trial. A party with an above-average case may choose to pursue one of these routes, even though a trial in court would give greater recognition to the above-average quality of his case. (We assume here that the above-average features of his case may not be fully apparent in the alternative proceeding, and so will not receive as much weight as it would at trial.)<sup>28</sup> His rationale for doing so may be to avoid the costs or riskiness of a court trial. However, to be worthwhile, this savings must be at least as great as what he loses as a result of averaging; he will not consent to averaging beyond that point.<sup>29</sup>

The upshot of this is that to work effectively, a system of averaging across cases must generally be compulsory rather than optional for the litigants. Litigants will, if given the chance,

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<sup>27</sup>More precisely, given a certain default regime, movement in the direction of greater averaging than that regime provides for will be resisted by individuals with above-average cases. (Of course, movement in the opposite direction will be resisted by individuals with below-average cases).

<sup>28</sup>For example, suppose a plaintiff's claim is above average because he has evidence that would be exceptionally compelling at trial. In settling the case, the plaintiff may have trouble conveying the full quality of the evidence to the defendant, so that the defendant's settlement offer does not reflect the full value of the plaintiff's case. Similarly, in an arbitration proceeding where less evidence is gathered than at a court trial, the arbitrators' decision may not reflect the quality of the plaintiff's evidence as thoroughly as would a court decision.

<sup>29</sup>A numerical example may make this clearer. Suppose that going to trial in our hypothetical malpractice case costs \$50,000 more than an alternative proceeding (settlement or ADR). Suppose that the value of a given plaintiff's case in court is \$725,000. Suppose further that the average value of the cases of plaintiffs with similar injuries is \$700,000; and that the average value of the cases of all malpractice plaintiffs is \$500,000. If the alternative proceeding will give the plaintiff the amount equal to the average losses sustained by victims with similar injuries (\$700,000), the plaintiff will opt for the alternative proceeding. In contrast, if the alternative proceeding will give him the amount equal to the average value of all malpractice cases (\$500,000), he will prefer to go to trial.

tend to “opt out” of a system that engages in substantial averaging. For example, in our malpractice hypothetical, few litigants would voluntarily submit to a system that awarded \$500,000 (the average value of all malpractice cases), in lieu of a more individualized system. Plaintiffs with cases whose value was substantially above that figure would prefer the more individualized system. Likewise, defendants facing plaintiffs with cases whose value was substantially below that figure would prefer the more individualized system. Hence, moving from a relatively individualized system to one involving a relatively high degree of averaging will normally require compulsion of many parties. The greater the move in the direction of averaging, the more this will be true.

Our interest in the analysis to follow will be on mandatory averaging procedures. That is, we will focus on settings in which a proposed form of averaging is objectionable to some parties, in that those parties would prefer (at the time of the dispute) a greater degree of individualization in the decision process. Thus, we can formulate as follows the problem we will examine: to what extent does justice to the litigants permit an adjudicator to resort to averaging, in spite of the objections of litigants who would prefer a greater degree of individualization?

#### B. Some Current Examples of the Problem

This problem is at the core of present debates over the design of the civil process. In essence, these debates concern the degree to which the legal system may depart from the traditional model of civil litigation. That traditional model encompasses a number of familiar elements, including the right to an individual trial in court; substantial litigant control over the litigation, including choice of forum, choice of representative, choice of what evidence to present, the choice of whether to settle, and so forth; rules of decision that instruct the court to

focus in large part on the particular circumstances of the case (whether this defendant caused this plaintiff's injury, what the plaintiff's losses were, and so forth). In a number of settings, the legal system has grappled with the question of how far it may properly depart from this model. In each of these settings, the departure in question involves greater resort to averaging procedures.<sup>29</sup>

1. Aggregative Proceedings

A much discussed instance of the problem is the use of aggregative procedures in mass tort litigation. Such litigation frequently involves thousands or even millions of claimants pitted against dozens of defendant firms. At the heart of these cases is the question of how much, on the one hand, the legal system should strive for individualized, case-by-case claim resolution, in which the outcome of a given claim is tailored to the specific features of claimants' cases; or how much, on the other hand, it should employ techniques that submerge differences among cases, giving identical treatment to factually diverse claims. Let us give some major examples.

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<sup>29</sup>Additional examples are discussed in Kaplow, *supra* note \_\_\_, at 332-38, 362-65.

Class Action Treatment. — The central controversy in mass tort today is over the appropriateness of consolidating individual actions into a class action. Traditionally courts have been reluctant to permit class treatment on the grounds that “individual issues predominate” in such actions — that is, differences in the circumstances of individual claims (evidence of causation, defenses such as contributory negligence, damages, and so on) are substantial, and class treatment creates a risk that such differences will be ignored. In recent years courts have become more willing to employ the class action format. Some observers contend that this inevitably tends to lead to averaging, even if courts attempt to permit consideration of individual claim properties.<sup>31</sup> For example, two commentators hold that “[j]uries tend to see and treat plaintiffs alike, regardless of individual circumstances, so that aggregated strong claims strengthen weak claims and vice versa, resulting in an 'averaging effect.'”<sup>32</sup> And this implicit averaging is, in the eyes of many, often compulsory in effect: even if plaintiffs are given the right initially to opt out of the class they will, in critics' view, frequently lack the ability to intelligently exercise this right.

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<sup>31</sup>A typical strategy of courts is to have a class trial on so-called common issues, while permitting individual trials on so-called individual issues.

<sup>32</sup>Barry F. McNeil and Beth L. Fancsali, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 491 (1996).

Mass Settlements. — One explicit averaging device in mass tort litigation is the classwide settlement of individual claims. For example, the *Amchem* settlement, referred to above, establishes a compensation scheme that would provide for specified damage awards to victims of various asbestos-related diseases. Roughly speaking, the settlement gives approximately the same amount to all claimants in a given disease category, regardless of differences in individual claim that would have led to substantial variation in outcomes of individual trials or settlements. In particular, the settlement would largely ignore factual and evidentiary differences among claims within a given disease category — such as evidence of causation, contributory or comparative fault, individual losses, and compliance with the applicable statute of limitations.<sup>33</sup> The settlement sharply circumscribes an individual claimant's ability to contend that, because of factual or legal elements peculiar to his claim, he is entitled to recover more than the other claimants in his disease category. Critics of the settlement argue that class members are unfairly being deprived of the right to an individualized adjudication on the particular factual and legal merits of their claims.<sup>34</sup>

Trial Procedures. — Another explicit averaging device is the use of sampling techniques in lieu of individual trials in the adjudication of class actions. Consider the well known *Cimino* case,<sup>35</sup> involving a class action brought on behalf of about 3,000 victims of asbestos-related

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<sup>33</sup>In addition, it would ignore differences in states' laws regarding many issues concerning liability rules and damage measures.

<sup>34</sup>Other issues in the case, not all of which are endemic to mass tort class actions, include the following: whether the case presents a justiciable controversy; whether the applicable Federal Rules of Civil Procedure permit the use of the class action device in the posture the case appears in; whether the plaintiffs were properly represented in the case. We take no position on these matters. Our purpose is to use Georgine as a vehicle for discussing the problem of averaging across plaintiffs with disparate claims.

<sup>35</sup>*Cimino v. Raymark Industries*, 751 F. Supp. 649 (E.D. Tex. 1990), rev'd in part sub nom. In re

injuries against a number of defendants. The trial court ordered individual trials in a small sample of these cases; based on these trials, the jury would be asked to decide such matters as the percentage of plaintiffs exposed to each defendant's products; the percentage of claims barred by statutes of limitations, adequate warnings, and other affirmative defenses; and the total losses sustained by the plaintiffs. These findings would then be used to compute the damages to be paid to each of the plaintiffs in five disease categories. This arrangement, criticized for “award[ing] average rather than individualized verdicts,”<sup>36</sup> was struck down on appeal on the ground that it improperly ignored the disparities among individual claims.

Rules of Decision. — Still another explicit averaging device is found in modified substantive rules of liability in mass tort cases. One example is the adoption of “market share” liability and damage rules in cases in which a number of manufacturers are sued for marketing a defective generic product.<sup>37</sup> In place of the traditional inquiry into whether a particular manufacturer caused a particular victim's injuries, the rule holds each manufacturer liable in proportion to its share of the market for the injurious product. The effect of the rule is to suppress evidentiary differences among cases regarding proof of causation, thus achieving a sort of averaging among firms.<sup>38</sup> The rule has been criticized for denying parties the right to present

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Fibreboard Corporation, 893 F.2d 706 (5th Cir. 1990).

<sup>36</sup>Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 *Vand. L.Rev.* 561, 564-65 (1993).

<sup>37</sup>See, for example, *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069, cert. denied, 493 U.S. 944 (1989), which adopts the rule, and *Case v. Fibreboard Corp.*, 743 P.2d 1062 (Okla. 1987), which rejects it.

<sup>38</sup>Often the particularized evidence of causation varies among firms; for some firms the evidence of causation is relatively strong, while for others it is relatively weak. (For example, in a pharmaceuticals case, some manufacturers' pills may be more recognizable than others.) Under traditional causation rules, the exposure of firms

individualized evidence on the causation issue in their own cases.<sup>39</sup>

Another example is the use of choice-of-law rules that suppress differences among states' laws. In multistate class actions, different states' laws may vary on a host of questions concerning the elements of liability, defenses, and damage measures. Rather than attempt to hold separate trials for the residents of each state, some courts have adopted a uniform rule of decision that would ignore such variation.<sup>40</sup> The result is a sort of averaging across legal rules, which might be condemned on the ground that it frustrates the legal rights a litigant enjoys under the law of his own state.<sup>41</sup>

## 2. Alternative Dispute Resolution

To relieve court congestion and expedite dispute processing, various measures have been proposed or adopted to compel litigants to submit their cases to some form of alternative dispute resolution (ADR) proceeding, such as arbitration or mediated settlement negotiations. Such

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facing strong evidence would be disproportionately high in relation to their market share, while the exposure of firms facing weak evidence would be disproportionately low in relation to their market share. The market share rule has the effect of averaging out these differences.

To be sure, another effect of the market share rule in some cases may be to expand the liability of all firms, none of whom could be held liable under the traditional causation rule. (If all of the firms have a tiny market share, none of them could be shown to have more likely than not caused a given plaintiff's injury.) We leave aside this complexity. For purposes of this discussion, it suffices to say that the market share rule sometimes has the effect of averaging out across cases the liability that would otherwise be incurred by individual firms.

<sup>39</sup>In particular, the rule is said to be unfair to defendants who wish to provide particularized proof that they did not cause a given plaintiff's injury. Likewise, it is said to be unfair to plaintiffs because a given defendant's liability is limited to its market share, even if the evidence against that defendant is particularly strong. See *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487 (1989) (Mollen, J., dissenting in part).

<sup>40</sup>See *In re Rhone-Poulenc Rorer, Inc.* 51 F.3d 1293 (7th Cir. 1995); *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690 (E.D.N.Y. 1984); *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 861 (2d Cir. 1984). This was also done implicitly in the *Amchem* litigation, discussed above.

<sup>41</sup>This averaging has also been challenged on federalism and separation-of-powers grounds. See *In re*



proceedings are often likely to have an averaging effect across cases. For example, in an arbitration proceeding, the parties often are able to gather and present less evidence than they would in ordinary civil litigation. As a result, arbitrators, having less particularized information about the case than ordinary courts, must make the greater resort to generalizations in order to fill in the gaps.<sup>42</sup> Perhaps in part for that reason, mandatory ADR has received widespread criticism for giving litigants “second class justice.”<sup>43</sup>

### 3. Accident Compensation Systems

Related concerns arise in connection with proposals to replace the fault-based tort system with compensation schemes designed to streamline recoveries and reduce litigation costs. A hallmark of many such proposals is that, on questions of liability, they would do away with certain criteria — proof of negligence, affirmative defenses, and the like — that serve to differentiate cases under the conventional tort system. Another hallmark is that on questions of damages, they tend to employ strict damage schedules that discourage or bar individualized inquiries into the losses of a given victim. Generally speaking, the effect of such proposals is to give some individuals a smaller expected award, and others a greater expected award, than they

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Rhone-Poulenc Rorer, Inc. 51 F.3d 1293 (7th Cir. 1995).

<sup>42</sup>A similar argument can be made about mediated settlement. For example, a court that “encourages” parties to settle has less particularized information about the case than it will at trial. Not knowing which cases are above or below average, the court will tend to encourage each case to settlement for an amount approximating the value of the average case.

<sup>43</sup>The, for example, Judicial (Mis)Use of ADR? A Debate, 4 U. Toledo L. Rev. 885, 888 (1996)(quoting Charles Allen Wright). This may be linked to the apparently widespread concern that arbitrators frequently tend to “split the difference” (a sort of averaging) in cases. See, for example, Thomas Metzloff, The Unrealized Potential of Malpractice Arbitration, 31 Wake Forest L. Rev. 203, 221 (1996).

would receive in the tort system. For this reason, such proposals encounter the objection that they “shift awards away from 'deserving victims” — those who would do relatively well in the conventional civil process — “in order to compensate 'less deserving victims.”<sup>44</sup>

#### 4. Procedural Due Process

Another context presenting similar problems is that of adjudication by administrative agencies. Modern cases on administrative due process have grappled with the issue of what kind of inquiry agencies must make — in particular, whether and when they must give the individual a hearing, whether and when they may employ irrebuttable presumptions, and so forth — in determining an individual's eligibility for governmental benefits and the like. A core question raised by these cases is the extent to which the agency must permit the affected individual to present information about the particulars of his case, and the extent to which the agency can instead rely on “generalizations that ignore personal and situational differences.”<sup>45</sup> Recent trends in this jurisprudence are often criticized on the ground that agencies have too much leeway to rely on generalization of this type, without inquiring into the circumstances of individual cases.

#### 5. Rules of Decision

A final instance of the problem is the use of averages and generalizations in the design of

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<sup>44</sup> Walter J. Blum and Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem: Auto Compensation Plans* 34 (1965). “Less deserving” simply means that the individual would recover less in the tort system — whether because of the absence of defendant negligence, the presence of plaintiff contributory negligence, smaller damages, or whatever. See *id.*

<sup>45</sup> Jerry L. Mashaw, *Due Process in the Administrative State* 40 (1985). See, for example, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

substantive or rules of decision. Consider, for example, the well-known choice between, on the one hand, rules that provide for uniform treatment of cases falling into a given category, and on the other hand, standards that invite consideration of the “totality of the circumstances.”

Similarly, consider the familiar choice of the level of generality to resort to in defining objective standards of care and the like.<sup>46</sup> To a considerable degree, these choices boil down to deciding on the permissible extent of averaging in rule construction.

### C. The Terms of Debate

At stake in each of these debates over the civil process, then, is the extent to which the legal system may take steps in the direction of compulsory averaging across cases. Broadly speaking, debate over this question typically has the following structure: compulsory averaging is criticized on the ground that it hurts some litigants who would be benefitted by greater individualization; the response given is that compulsory averaging is necessary to protect the interests of other litigants or society generally. The normative issue is to what extent the rights or interests of the litigant who is disadvantaged by compulsory averaging must “give way” to other concerns.

In these debates there is seeming consensus that, generally speaking, compulsory averaging is something the legal system should avoid, on grounds of individual justice. This consensus reflects that view that compulsory averaging is at odds with respect for the litigant as an individual. On this view, protecting the autonomy and dignity of the individual litigant

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<sup>46</sup>See our earlier discussion of the malpractice example.

require the legal system to give substantial attention and weight to the particular circumstances of his case. As a result, movement in the direction of compulsory averaging — in particular, adopting compulsory averaging in place of the traditional model of individualized adjudication — infringes these values, and is for that reason normally to be avoided.

This consensus rests, it appears, on two fundamental premises. The first turns on notions of individuals' substantive entitlements under law. This premise holds that an individual is in a sense entitled to the tangible treatment he would get (for example, the expected recovery he would obtain as a plaintiff) in a system of individualized adjudication. Under compulsory averaging, parties with above-average cases<sup>47</sup> have a property-like entitlement taken away from them — namely, the tangible value attaching to the above-average portion of their case.<sup>48</sup>

The second premise is more process-oriented. It turns on notions of self-determination, participation, and the right to be heard — familiar strands of the concept of due process of law. The core of this concept is that individuals should have some say in the processes by which their legal fates are determined. Compulsory averaging systems tend to marginalize the individual by lumping him together with many others, rendering the circumstances of his case (and whatever he may have to say) largely irrelevant.

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<sup>47</sup>That is, parties who would have above-average cases in an individualized system.

<sup>48</sup>Implicit in this view is the notion that individuals' legal entitlements are defined by reference to what they would get under a relatively individualized adjudicatory system. This assumption contains a familiar internal tension. If the adjudicator has the power to eliminate an element altogether, why can he not take the lesser step of keeping the element and resorting to averaging? For example, if the adjudicator could eliminate the requirement of negligence entirely (thus adopting a regime of strict liability), it is arguable that this implies he can take the lesser step of retaining a negligence rule but deciding the negligence issue in each case by reference to averages. More generally, it might be argued that the legal system — to the extent it can define the elements of a claim (or define what is relevant) — can, without doing injustice to anyone, simply “redefine” the elements of a claim in such a way that every litigant receives the same, averaged treatment regardless of differences among cases.

From these premises, the consensus view appears to draw the practical conclusion that on most issues affecting either the likelihood or amount of recovery in a given case, the legal system should be reluctant to resort to averaging over litigant objections. Thus, for example, if the law conditions liability on the behavior of defendants (as in a negligence regime), justice to the parties in a given case requires some examination of the defendant's actual conduct, rather than simple resort to generalizations about how most defendants behave; in particular, both parties should be permitted, if they choose, to present evidence on the particulars of the defendant's conduct, and to have the tribunal give weight to that evidence. So too for most elements of the case bearing on either liability or the amount of recovery.

Proponents of the averaging devices described above do not dispute this view. They simply argue that constraints on adjudicatory resources sometimes make it a necessary evil. The argument typically takes one of two forms: first, individualizing beyond a certain point makes impossible or unacceptable demands on public resources; the legal system must limit the amount it devotes to individualized justice (perhaps because it is forced to by finite capacity). Second, there is the question of fair distribution of judicial resources: the more that is devoted to individualized inquiry in one litigant's case, the less that is left for another's case; for any given overall resource allocation, courts must limit each litigant's ability to insist on an inquiry into the particulars of his case.

This is, in large part, the principal argument advanced in favor of each of the forms of compulsory averaging described above. For example, in the mass tort context, the principal argument advanced in favor of compelling an individual to submit to aggregative proceedings is that attempting individualized trials would make impossible demands on the judicial system, and

would be unfair to other individuals whose right to relief would (because of delay or limited defendant funds) be impaired as a result. Similarly, the argument advanced for imposing mandatory (as opposed to optional)<sup>49</sup> ADR on a given individual is that it is needed to relieve docket pressure and give other individuals greater access to adjudicatory resources. Likewise, the consideration adduced in favor of limiting individualized adjudication in agencies is the need to conserve resources and enhance agency effectiveness in carrying out their missions.

Both proponents and opponents seem to agree, therefore, that these compulsory averaging devices are an “evil” from the standpoint of individual justice; they simply disagree on whether it is a necessary one. That is, they all agree that, all else being equal, it is generally a bad thing to force a given litigant to submit to a regime of compulsory averaging, when that litigant would prefer to present (and have the legal system give weight to) particularized information about the circumstances of his case. In particular, under this view, the “ideal” legal system — if there were no constraints on adjudicatory resources — would frequently strive for a fairly high degree of individualization in the adjudicatory process.

#### D. A Different Perspective

Our purpose in what follows is to reexamine the problem of compulsory averaging from

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<sup>49</sup>There are of course many arguments to the effect that ADR is preferable, from a given litigant's standpoint, to ordinary civil litigation. That argument obviously supports giving him the option of going to ADR; it is less clear how it supports *compelling* him to do so. (A response might be that individual litigants are ill-informed about the benefits of ADR; but that concern can be addressed by providing the individual with information, while leaving the choice up to him.)

the standpoint of individual justice. To do this, we will adopt a perspective that is largely missing from existing debates. Existing debates over compulsory averaging adopt, implicitly if not explicitly, a temporal frame of reference in which litigants are relatively well informed about the quality of their case. The perspective we adopt, in contrast, is that of individual litigant choice under conditions of uncertainty about the properties of his case. In essence, we ask the following question: suppose a prospective litigant, uncertain about the nature of his case, were asked to choose between an individualized system of adjudication and a system of compulsory averaging. Which would he choose ?

In approaching this question, we treat the protection of litigant autonomy and welfare as a central objective in the design of the civil process. This, indeed, is our reason for focusing on what litigants would choose for themselves. In addition, we do not challenge the premises underlying the consensus view described above: that is, we do not challenge the propositions that compulsory averaging deprives litigants of a property-like entitlement, or that it frustrates certain important process-related litigant desires. We do claim, however, that prospective litigants may nonetheless be willing — under conditions of uncertainty about the quality of their cases — to accept these burdens in exchange for the benefits conferred by compulsory averaging.

### III. ANALYTICAL FRAMEWORK

The point of departure for our analysis is the observation that the individual attributes of a case are, from the standpoint of the prospective litigant, largely the product of chance. Consider once again, for example, the factors bearing on the quality of a plaintiff's malpractice case. The evidence on the issues affecting liability may be strong or weak; her damages may be great or

small; the applicable law may be relatively favorable or unfavorable; and so forth. These factors a to a considerable extent, though of course not completely, beyond the plaintiff's control.

Whether she winds up with a relatively good or bad (above or below average) case is, to that extent, a matter of luck. For that reason, the employment of an individualized system of justice — on in which the individual attributes of a case determine the outcome — has an important element of randomness to it.

Notice that this observation has nothing to do with the notion that the legal system operates in an arbitrary or unpredictable fashion. It is commonly charged, for example, that litigation resembles a gamble because juries behave capriciously. That charge, whether or not true, is beside the present point. Even if the legal system operates perfectly (in the sense of applying rules of decision in a consistent and accurate manner), the quality of a given litigant's case is still a matter of luck from the litigant's standpoint. Thus, in our malpractice example, suppose the legal system could determine with perfect accuracy whether the elements of liability were satisfied, what the plaintiff's damages were, and so forth. Even then, a prospective plaintiff (before her accident occurred, if not afterward) would face a gamble, in the sense that she would be uncertain about what the attributes of her own case would be.

To analyze a prospective litigant's stance toward compulsory averaging in such conditions of uncertainty, we will employ the following very simple conceptual model. Imagine a legal setting in which there are two types of claim, which we will call “strong” and “weak.” These claims differ in some attribute or set of attributes, which we will not specify at this point. It might be, for example, that strong claims have good evidence of liability, while weak claims have bad evidence; or it might be that strong claims involve large damages, while weak claims



involve small damages. It makes no difference for present purposes, though we will later need to take up this question.

Let us suppose that there are two possible systems for resolving these claims, which we will refer to as an individualizing system and an averaging system. The individualizing system sorts claims according to their relative strength. In particular, under the individualized system, the parties have the opportunity to demonstrate to the court the relative strength of the plaintiff's claim. When the parties undertake such a demonstration, strong claims generate a greater expected recovery than weak claims.<sup>50</sup> In contrast, the averaging system gives the same amount to holders of strong and weak claims, regardless of whether the parties demonstrate to the court the relative strength of the claim. The amount awarded is determined by computing *the average expected recovery plaintiffs (would) get in the individualized system*.<sup>51</sup>

Using this model, we will examine the choice a prospective litigant would make between these two systems, if he knew nothing about the strength of his own claim. Despite its simplicity, this model usefully captures the essential structure of our problem. The two systems may be thought of as two points on the averaging-individualization continuum. What we say about the choice between these two hypothetical systems can reasonably be expected to apply to the choice between any two points on that continuum.<sup>52</sup> In addition, our focus on two claim

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<sup>50</sup>The difference in expected recovery may be due to a difference in the likelihood or amount of recovery, or both.

<sup>51</sup>Thus, for example, suppose that in the individualizing system strong claims generate an expected recovery of \$300; weak claims generate an expected recovery of \$100; and there is an equal number of each type of claim. Then the average claim's expected recovery in the individualizing system is \$200. The averaging system would then simply award every plaintiff \$200.

<sup>52</sup>In particular, the considerations favoring one or the other point will be present, to a greater or lesser degree, in the choice between any two points.

types does not affect the generality of the analysis. Our conclusions would not be materially changed if the model included (more realistically) multiple claim types.<sup>53</sup> In addition, it will be evident that the analysis is easily extended to defendants.

For clarity of exposition, we will make two simplifying assumptions. First, we assume that the total number of claims, as well as the relative distribution of strong and weak claims, are unaffected by the choice between the two systems. This assumption may not hold if the choice between the systems has an effect on deterrence of injurious behavior; but it is reasonable as a first approximation.

Second, we assume that the plaintiff is concerned primarily with the tangible relief he recovers in the litigation system. We recognize that this is not his only concern; the opportunity to be heard, apart from any tangible relief he receives, may be of great importance to him. However, we think it is clear that maximizing tangible returns is a substantial concern in most cases; to see this, it suffices to observe that a hearing alone, with no impact on the probability or amount of relief, would scarcely satisfy most litigants. This is particularly true in high-stakes cases involving grievous personal injuries. Hence our focus on tangible relief.

#### IV. ANALYSIS OF PARTY CHOICE UNDER UNCERTAINTY

##### A. The Rough Equivalence of Averaging and Individualization

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<sup>53</sup>Indeed, the analysis would be unchanged if each claim were unique, so that there were as many “types” as there are claims.

Let us begin by noting that the two systems offer the same expected recovery to the plaintiff who is uncertain about the nature of his claim. That is, consider the expected award a plaintiff obtains under each system, without regard for process costs or risk considerations. By definition, the expected value of his recovery in the individualized system is equal to the *average* recovery in that system.<sup>55</sup> An averaging system, then, simply gives the litigant the expected value his claim would have in the individualizing system. As a result, his expected award is the same under both systems.

A simple example illustrates the point. Suppose that in the individualizing system, strong claims win \$300 and weak claims win \$100; and suppose that a given claim has an equal likelihood of being strong or weak. Then a given plaintiff's expected recovery in the individualizing system is \$200. But that is precisely the amount each plaintiff would win in an averaging system, since it is (or would be) the average recovery in the individualizing system. Hence, a plaintiff's expected award is \$200 under either system.

The upshot is that if a prospective plaintiff were concerned only with his expected recovery, without regard for process or risk considerations, he would simply be indifferent between the two systems. Critical to this result, of course, is the assumption that he is uncertain about the strength of his claim. Once he learns that his claim is strong — that his claim is above average — then he will prefer the individualizing system. But under conditions of uncertainty, when he has no reason to think his claim is above average, the two systems are interchangeable

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<sup>55</sup>A basic result in probability theory is that the *expected value* of a probability distribution is equal to the *mean* (or average) of the distribution. See, for example, William Mendenhall et al., *Mathematical Statistics with Applications* 84-85 (4th ed. 1990).

in terms of the expected relief they give him.

In this regard, the prospective litigant's situation resembles that of a player in a lottery. This fundamental point has not, in our view, been sufficiently appreciated in discussions of the averaging problem. From the prospective litigant's standpoint, the allocation of claims is a lottery; whether he winds up with a strong claim or a weak claim is a matter of luck. An individualizing system pays him, if you will, the face value of his "ticket" (claim). An averaging system, in contrast, pays him an amount equal to the expected value of his ticket. Before he knows the face value of his ticket, he has no reason to prefer one system over the other.

#### B. Cost and Risk Considerations

An exclusive focus on expected recoveries ignores two additional factors that would bear on the prospective litigant's choice. These are litigation costs and risk. Let us consider these in turn.

##### 1. Litigation Costs

By its nature, an individualizing system imposes certain costs on litigants that are saved under an averaging system. This is because under an individualizing system, the parties have an incentive to invest resources (time, energy, attorneys' fees, and so forth) in establishing the relative strength of the plaintiff's case;<sup>56</sup> this incentive is lacking when averaging is employed.

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<sup>56</sup>This incentive is particularly obvious if we employ a more realistic model in which there is a range of claim types. For example, suppose there is a spectrum of claim types ranging from very weak to very strong. Any plaintiff whose case is above the "bottom" level has an incentive to invest resources to demonstrate this fact, lest her case be mistaken for one that is even weaker. (This incentive is particularly pronounced when the defendant is investing resources to show that the claim is very weak.)

As a result, when these costs are taken into account, a prospective plaintiff's net expected recovery is lower under the individualizing system than it is under the averaging system.

A modification of our earlier numerical example will illustrate the point. Suppose the process of establishing the relative strength of his claim costs the plaintiff \$50.<sup>57</sup> The plaintiff who knows he has a strong claim is happy to incur this expense (rather than submit to averaging), because it is more than offset by the increased relief he gets under the individualizing system.<sup>58</sup> Yet before he knows what type of claim he has, that same plaintiff's net expected recovery is only \$175 under the individualizing system, as compared to \$200 under the averaging system.<sup>59</sup> The intuition here is that (as we saw above) the expected relief is the same under both systems, yet individualizing generates costs that he avoids under averaging.

## 2. Risk Aversion

So far we have focused on the net expected recovery plaintiffs earn under the two systems. Risk averse plaintiffs would also be concerned, however, with the variance in outcomes associated with the two systems. Which system is the less risky for the prospective plaintiff? To

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<sup>57</sup>We assume in this example that the plaintiff with a weak claim does not bother investing to establish the strength of his claim.

<sup>58</sup>He gets \$100 more (\$300 rather than \$200) under the individualizing system.

<sup>59</sup>His net expected recovery under the individualizing system is  $(.5)(\$300 - \$50) + (.5)(\$100) = \$175$ . Kaplow, *supra* note \_\_\_, at 321 n.35, also emphasizes that transaction costs would lead a claimant to prefer averaging.

examine this issue, let us put process costs (and benefits) to one side, and focus exclusively on the relief plaintiffs recover under the two systems.

Averaging is the less risky system, provided that the strength of a plaintiff’s claim is independent of his (pre-compensation) wealth. That is: suppose a plaintiff with a strong claim is neither more nor less in need of compensation than a plaintiff with a weak claim.<sup>60</sup> Then individualization exposes him to a sort of lottery: at the end of the day, plaintiffs with strong claims wind up wealthier than plaintiffs with weak claims. In contrast, averaging ensures that all plaintiffs wind up equally well off at the end of the day. Hence, averaging is less risky in this scenario. (See Table 1.)<sup>61</sup>

TABLE 1  
 VARIANCE IN END STATES WHEN PLAINTIFFS WITH STRONG CLAIMS HAVE THE SAME WEALTH AS PLAINTIFFS WITH WEAK CLAIMS<sup>†</sup>

System	Plaintiff's post-compensation wealth	
	Strong claim	Weak claim
Individualizing	$W + \$300$	$W + \$100$
Averaging	$W + \$200$	$W + \$200$

<sup>60</sup>That is, they have the same “marginal utility of wealth.” On this concept and its significance for compensation, see Steven Shavell, *Economic Analysis of Accident Law* 228-35, 245-54 (1987).

<sup>61</sup>Table 1 indicates the end states (after plaintiffs have obtained their recovery) under the two systems, where a plaintiff is assumed to begin with wealth  $W$ . As the table makes clear, there is greater variance in outcomes under the individualization alternative than under the averaging alternative.

<sup>†</sup> Plaintiffs are assumed to have pre-compensation wealth  $W$ , regardless of the strength of their claim.

However, individualization may be less risky if a plaintiff with a strong claim is in greater need of money than a plaintiff with a weak claim. For example, suppose that a prospective plaintiff expects to be \$200 poorer (pre-compensation) if he has a strong claim than if he has a weak claim.<sup>62</sup> Then the individualizing system eliminates this differential,<sup>63</sup> leaving all plaintiffs equally wealthy at the end of the day. In contrast, the averaging system leaves the wealth differential intact, because plaintiffs are paid the same amount regardless of the strength of their claim. Hence, in this example the individualizing system is less risky. (See Table 2.)

TABLE 2  
VARIANCE IN END STATES WHEN PLAINTIFFS WITH STRONG CLAIMS ARE \$200 POORER THAN PLAINTIFFS WITH WEAK CLAIMS<sup>†</sup>

System	Plaintiff's post-compensation wealth	
	Strong claim	Weak claim
Individualizing	$W + \$100$	$W + \$100$
Averaging	$W$	$W + \$200$

<sup>62</sup>In other words, plaintiffs with strong claims are, before receiving their relief, \$200 poorer than plaintiffs with weak claims.

<sup>63</sup>Plaintiffs with strong claims get \$200 more than plaintiffs with weak claims. (The former get \$300, the latter \$100.)

<sup>†</sup> Plaintiffs with weak claims are assumed to have pre-compensation wealth  $W$ ; plaintiffs with strong claims have pre-compensation wealth  $W - \$200$ .

In determining the relative riskiness of the two systems, then, the critical question is how the strength of a given plaintiff's claim is correlated with his pre-compensation wealth.<sup>64</sup> If the two are negatively correlated — if having a strong claim is associated with greater need for compensation — then averaging is the riskier alternative for prospective plaintiffs. Normally, we would expect this condition to obtain when the difference between strong and weak claims lies in the amount of losses sustained by the plaintiff. Plaintiffs who have sustained substantial losses are (all else being equal) poorer than other plaintiffs. In such a setting averaging is relatively risky; all else being equal, prospective plaintiffs would want their recovery to be tied to their need for compensation.

If, however, plaintiff wealth and claim strength are independent of each other — if having a strong claim is not associated with greater need for compensation — then individualization is the riskier alternative. We would expect this condition to obtain when the difference between strong and weak claims turns on something other than the severity of the plaintiff's losses. An example would be evidence supporting liability: suppose that the difference between strong and weak claims is that the former have stronger evidence of negligence. All else being equal, a

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<sup>64</sup> Another way of putting the point is to ask whether strong claim holders have the same “marginal utility of wealth” as people with weak claims. That is: at the margin, does another dollar paid in compensation give as much satisfaction or utility to somebody with a weak claim as to somebody with a strong claim? If the answer is yes — that is, if they have the same marginal utility of wealth — then in general risk aversion favors averaging. On the other hand, if people with strong claims have a greater degree of utility of wealth — that is, they need money more than people with weak claims — then risk aversion will typically favor individualization.



plaintiff with good evidence is no poorer than one with bad evidence. As a result individualization is the riskier alternative; all else being equal, prospective plaintiffs would want to receive the same recovery regardless of the strength of their evidence.<sup>64</sup>

This analysis suggests that on most issues in litigation, averaging exposes prospective plaintiffs to less risk than individualization. This is because on most issues, the quality of a plaintiff's claim is independent of his wealth; plaintiffs with strong claims are no more in need of compensation than plaintiffs with weak claims. Hence, this consideration would (all else being equal) favor averaging on virtually all issues relating to liability, as well as damage measures unrelated to economic loss.

### C. Assessment

We can summarize this discussion as follows. If a prospective plaintiff were concerned only with his expected recovery in litigation, he would simply be indifferent between the systems because they offer him the same expected recovery under conditions of uncertainty about his claim. Adding litigation expenses to the picture, averaging becomes strictly preferable: because these expenses are greater under individualization, averaging offers the greater net expected return to the prospective plaintiff.

Risk aversion considerations reinforce this conclusion, provided that a claim's strength is unrelated to a plaintiff's pre-compensation wealth. Because that condition obtains as to most elements affecting claim strength, it follows that prospective plaintiffs in this model should have a strict preference for the averaging system. Matters are more complicated, however, when the

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<sup>64</sup>A similar point is developed in Kaplow, *supra* note \_\_\_, at 321 n.34.

difference between strong and weak claims is tied to plaintiffs' economic losses. In such settings, cost considerations favor averaging, while risk considerations favor individualization. There is no way of knowing a priori which will outweigh the other.

A key lesson of this analysis is that a litigant's stance toward compulsory averaging depends on the information he has about his case. This point is worth emphasizing. We have looked at matters from the perspective of a plaintiff who knows nothing about the strength of his claim. The choice between the two systems looks very different once a plaintiff knows he has a strong claim. On the one hand, individualization becomes more appealing in terms of the expected recovery it offers; on the other hand, one of the two factors favoring averaging — risk — disappears, precisely because he knows the strength of his case. Hence, we should not conclude, from the fact that parties prefer individualization once they know the quality of their case, that they will have the same preference under conditions of uncertainty.

On the contrary. Litigants' ex post preference for individualization is not only consistent with, but is a reason for, their having ex ante preference for mandatory averaging. The fact that individuals, once they know the quality of their case, find the individualizing system to their advantage is the source of that system's costliness and riskiness; for it means that claims will be sorted according to their relative strength, with the attendant costs of that process.<sup>65</sup> The upshot is that a prospective plaintiff, uncertain of her case, may strictly prefer the averaging alternative, though she would have the opposite preference if she knew she had a strong claim.

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<sup>65</sup>When the plaintiff has a strong claim, he prefers the individualizing system; when the plaintiff has a weak case, the defendant prefers that system.

#### IV. INDIVIDUAL JUSTICE AND LITIGANT CHOICE

Suppose we are correct that in a significant fraction of cases, prospective litigants would choose the averaging alternative in our model. It might be asked: so what? How does it follow that compulsory averaging is consistent with individual justice in such cases? We take up that issue in this part.

##### A. Honoring Individual Preferences

Let us begin by considering a simple hypothetical. Suppose we could identify a discrete group of prospective plaintiffs whose claims have not yet materialized. (They might, for example, be future accident victims.) Assume the following conditions are satisfied: (1) These prospective plaintiffs unanimously prefer the averaging alternative in our model. (2) Once their claims have materialized, averaging will be disadvantageous to plaintiffs with strong claims. (3) Transaction costs prevent them, before their claims have materialized, from entering into an agreement specifying the system that will be used to resolve claims. What legal rule best protects their interests?

Given the first two conditions, the prospective plaintiffs would, if they could, all agree to a system of mandatory averaging. That is: suppose the default rule were one that permitted parties to insist (at the time of the litigation) on an individualized determination of the strength of the plaintiff's claim. If transaction costs permitted, these prospective plaintiffs would unanimously agree to replace that rule with one of compulsory averaging. The reason, as we have seen, is that they cannot effectuate their preference for averaging without making it compulsory: the default rule will inevitably lead to individualization, because in each case one of

the parties will (once the quality of the plaintiff's case is known) find averaging disadvantageous.<sup>66</sup>

The third condition, however, prevents the prospective plaintiffs from entering into an agreement. Then the default rule will remain in place, unless the legal system imposes a rule of mandatory averaging. If the legal system is concerned with protecting the interests of these individuals, then we submit that it should choose the averaging alternative, because that is what the individuals would choose for themselves. The goal of respecting an individual's autonomy and welfare is not advanced by compelling him to live under a legal rule he would not choose for himself.

Accordingly it would, in our view, be misguided for a court to invoke protection of the individual as a basis for refusing to adopt a rule of mandatory averaging in this setting. Leaving the default rule of individualization in place harms each of these individuals, by exposing them to costs and risks they would prefer to avoid. It is no answer to say that some of them will later be glad that a rule of individualization was maintained. The fact remains that maintaining that rule disregards their present welfare and preferences.

#### B. The Significance of Choice under Uncertainty

It might be asked, however, why we should focus on the preferences of prospective litigants rather than present litigants. That is: why should the legal system adopt the vantage

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<sup>66</sup>If all the plaintiffs with strong claims insist on an individualized determination, then defendants facing plaintiffs with weak claims will do the same.

point of the individual who is uncertain about the strength of his claim? Why not instead adopt the point of view of the litigant whose case has materialized?

The reason is that a forward-looking perspective is the appropriate one for creating rules to handle future cases. In designing the rules to govern cases that have not yet materialized, the natural issue to focus on is: what rules would the affected individuals choose for themselves? For prospective litigants whose claims have not yet materialized, there is considerable uncertainty (for reasons we have seen) about the quality of the case they will have. To the extent that the legal system is concerned with designing rules to satisfy these litigants' desires, the appropriate focus therefore is on what they would choose under these conditions of uncertainty.

To be sure, there may be transitional problems with employing this approach to today's cases. That is, if the default rule is one of individualization, it may upset litigants' expectations to apply a rule of compulsory averaging to cases in the present. That concern should not, however, prevent the adoption of averaging rules to govern cases that have not yet materialized. If such rules effectuate the preferences of those who will be affected by them, then we believe there can be no objection grounded on notions of protecting the individual's interests.

## V. IMPLICATIONS FOR LEGAL POLICY

We now consider some interpretations of and qualifications to the analysis.

### A. General Lessons of the Model

Because the model we have employed is abstract in character, it is worth fleshing out a bit more its general practical import.

#### 1. Defensible Forms of Compulsory Averaging

Our central conclusion stated as follows. Consider any set of cases that would normally (in the existing regime) be differentiated according to some criterion or criteria. Suppose that the expected recoveries in that set of cases varies (at the time of the litigation), but that the *average* expected recovery is some amount *A*. Then, our model suggests, it would be permissible, from the point of view of individual justice, for the legal system to adopt, on a prospective basis, an alternative procedure that generates a compulsory expected recovery of *A* in *every* case in that set.<sup>67</sup> Thus is, even if a given litigant's expected recovery, at the time of the litigation, would be higher or lower than *A*, the legal system may in effect give everyone *A*. (Such averaging may be objectionable on other grounds, such as its effect on deterrence; our point is that there is no objection based on individual justice to the litigants.)

In general, this averaging may take the form of adjusting the probability or amount of recovery, or both. If the cases vary in the probability of recovery, our analysis suggests that the legal system could adopt a rule that gave all litigants the same probability of recovery as that enjoyed by the average litigant.<sup>68</sup> If they vary in the amount of recovery, the legal system could adopt a rule that gave all successful litigants in the set the amount that would have been recovered by the average litigant. Finally, the legal system could simply give each litigant an amount equal to the expected recovery (probability times amount) that would have been obtained by the average litigant.

Once again, this conclusion depends on the assumption that parties with relatively strong

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<sup>67</sup>This statement assumes that the alternative procedure would be cheaper, and subject to less variance, from the point of view of prospective litigants.

<sup>68</sup>Here we assume that the probability and amount of recovery are independently distributed.

cases are not systematically poorer (pre-judgment) than parties with relatively weak cases. If that assumption does not hold, then risk averse prospective parties might prefer to avoid compulsory averaging. When the assumption does hold, however, risk and cost considerations would make compulsory averaging preferable from the standpoint of the prospective litigant.

## 2. Some Examples

Let us give some examples, drawn from the tort context, of the types of averaging this analysis would support.

Liability for Injury. — Consider the typical set of prerequisites for recovery in the tort system — issues such as the defendant's conduct, the plaintiff's conduct, and causation of injury. In terms of our model, a strong claim would be one in which the evidence of causation, and also the evidence concerning the defendant's conduct (negligence, knowledge of the risk, and so forth), are substantial, and in which the evidence against the plaintiff (contributory negligence, assumption of the risk and the like) are insubstantial. Conversely, a weak claim would be one in which the evidence against the defendant is insubstantial, and the evidence favoring the plaintiff insubstantial.

We conjecture that, in general, there is no systematic correlation between the wealth of plaintiffs in the tort system and the strength of the evidence establishing liability. In other words, if we hold constant the amount of losses sustained by plaintiffs, and look simply at variations in evidence on the question of liability, there is no reason to suppose strong evidence is either positively or negatively correlated with wealth. As a result, our analysis would suggest that

prospective plaintiffs would normally prefer averaging on questions relating to liability.<sup>67</sup>

Thus, returning to our earlier example, suppose that a group of plaintiffs have each suffered \$500 in losses. Assume that half of the plaintiffs have a 60 percent chance of recovering their losses, and the other half have a 20 percent chance of recovering their losses.<sup>69</sup> Our analysis would support a procedure that gives all of these plaintiffs a 40 percent chance of recovering their losses. Alternatively, it would support a procedure that gives all of them an amount equal to 40 percent of their losses (that is, \$200).

Amount of Recovery. — Now consider variations in the amount of damages claimed. Assume that a group of plaintiffs differ only in the amount of losses they have sustained;<sup>70</sup> strong claim holders have suffered larger losses than weak claim holders. Are plaintiffs who have suffered large losses poorer (in greater need of money) than plaintiffs who have suffered smaller losses? Regarding medical expenses, the answer is presumably yes, so the case for averaging is weakest here. Regarding pain and suffering, the answer is probably no, so the case for averaging is stronger. As for lost wages, the answer is sometimes yes and sometimes no;<sup>71</sup> the case for averaging varies accordingly.

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<sup>67</sup>A conclusion also reached by Kaplow, *supra* note \_\_\_\_.

<sup>69</sup>These figures imply an expected recovery of  $(.6)(\$500) = \$300$  and  $(.2)(\$500) = \$100$ , respectively.

<sup>70</sup>Thus, the probability of prevailing on the question of liability is assumed to be identical for all plaintiffs.

<sup>71</sup>On the one hand, if the plaintiffs are in similar wage categories, then wealth is negatively correlated with losses; the plaintiff with high lost earnings is (by reason of that fact) poorer than his counterpart with low lost earnings. (Thus, if two plaintiffs have identical jobs, the one who is put out of work for two years will (as a result) be poorer than the one who is put out of work for only one year.) An example is furnished by occupational injuries: if workers earn the same, giving the same award to the severely and the mildly injured would transfer from the relatively poor to the relatively wealthy.

On the other hand, if the plaintiffs are in different wage categories, then wealth may be positively correlated with losses: for a given injury, the high wage earner will lose more earnings, but (because he is a higher wage earner) is wealthier than the low wage earner. In this situation, averaging has progressive distributive effects. An example is



## B. Further Considerations on Litigant Choice under Uncertainty

### 1. Intangible Benefits of Individualization

Our analysis made the simplifying assumption that litigants are concerned primarily with the tangible relief awarded in the legal system. It might be objected that the plaintiff gets some benefit from the process of individualization, *apart* from the tangible relief he wins. He may, for example, derive moral satisfaction from the fact that the quality of his case is being recognized.<sup>72</sup> This factor would offset to some extent the disadvantages of individualization to the prospective litigant.

We lack the information that would tell us whether, in the eyes of the prospective litigant, this factor would outweigh the cost and risk considerations favoring compulsory averaging. Once again, we cannot deduce this from the actions or preferences of litigants who have above-average claims, because for them individualization offers a greater tangible recovery than averaging; that alone would justify their preference for individualization.<sup>73</sup> Hence it is an open question how much weight a prospective litigant, who has nothing tangible to gain from individualization, would place on intangible benefits. We call attention, however, to two points.

First, we suspect that the psychic rewards attaching to individualization are often reaped

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furnished by product liability law: individualized awards give the most money to the relatively wealthy.

<sup>72</sup>Here we mean to include expressive and participatory benefits.

<sup>73</sup>If individuals with below-average claims insist on individualization, this would be evidence that the intangible benefit of individualization is strong indeed. We know of no such evidence, however.

primarily in the event the plaintiff turns out to have an above-average case.<sup>74</sup> If so, the prospective litigant will discount this psychic reward to the extent he is uncertain whether he will in fact have a strong case. Second, the psychic rewards individualization confers on those with strong claims may be offset to some extent by demoralization suffered by those with weak claims. (Consider, for example, the situations of one tort victim who has good evidence of causation and another who has bad evidence of causation. The satisfaction experience by the former under an individualized system may be counterbalanced by the dissatisfaction experienced by the latter.) To that extent, the prospective litigant will further discount the intangible rewards of individualization. For these reasons, we think it is plausible that the cost and risk disadvantages of individualization would often outweigh these rewards from his perspective, though we cannot say just how often.

## 2. Behavioral Effects of Averaging

Another qualification to the analysis relates to the possible behavioral effects of averaging. Averaging rules may in certain settings reduce the incentive to take precautions against injury and the like. In addition, it may have the effect of encouraging the filing of very weak or nonmeritorious claims. These effects may reduce the desirability of compulsory averaging in the eyes of the prospective litigant. In principle, however, a considerable degree of averaging is possible without substantially reducing deterrence of harmful behavior, and eligibility criteria may be used to screen out insubstantial claims. Hence, while these concerns

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<sup>74</sup>Averaging is much less likely to be demoralizing to the plaintiff with a below-average case.

place a limit on the degree of compulsory averaging a prospective litigant would agree to, that limit may be very generous.

### C. The “Burden of Proof”

The central consequence of this analysis for legal policy is, in our view, to relax the “burden of proof” regarding compulsory averaging in the civil process. For reasons we have indicated, courts and commentators have, on individual justice grounds, in effect constructed a presumption against compulsory averaging. If our analysis is correct, this presumption is misplaced. It may be that compulsory averaging should be pursued, not avoided, on grounds of individual justice, because it is arguably what prospective litigants would prefer. In addition, to the extent prospective litigants are indifferent on the matter, courts should probably have greater freedom to employ compulsory averaging methods in pursuit of other goals, such as resource conservation.

## VI. CONCLUSION

We close by emphasizing the speculative character of this essay. We have made no effort here to examine the workings of any actual averaging devices; our analysis should be understood as creating a framework for the assessment of such devices. Much work remains to be done in examining and evaluating the operation of compulsory averaging rules and institutions. If individual justice is the criterion by which these are to be judged, we believe the proper focus is on the choices that would be made by the prospective litigants themselves.