

The Litigators: Perceptions of Predictability, Definitions of a Good Outcome, and an Alternative to Mass Tort Trials

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I. INTRODUCTION

A pervasive theme in our understanding of civil legal disputes is the “big case”; that is, the generic mass tort¹ that pits sympathetic clients against shadowy, villainous corporations. In John Grisham’s stories about these cases, a David-and-Goliath legal battle ensues, the parameters of the law shift, the attorneys’ ethics stretch, and the author uses characters to reveal both sides’ deep secrets unwillingly—and sometimes unwittingly.² Ultimately, the case leads to a “win” for one side or the other—either a huge payday for the clients and a large percentage-based fee for the lawyers who stumbled across it, or a corporation that gets away with (sometimes literal) murder and goes back to its business as if nothing happened.³ These cases make for good storytelling because Grisham portrays the resulting jury trials as a rollercoaster ride with an unpredictable outcome, and because everyone assumes the plaintiff’s goals are to seek both revenge on the corporation, by attacking its bank account, and validation through the court system. As such, there is suspense, excitement, and a clear understanding of what victory means in these stories. Most of all, we love the underdog theme that Grisham embedded into these stories,

1. The term “mass tort” is an umbrella term that describes court-consolidated mass tort cases, as well as class action cases.

2. *See generally, e.g.*, JOHN GRISHAM, *THE LITIGATORS* (2011) (in which a two-partner law firm takes on a large pharmaceutical company and secrets and mistakes on both sides are revealed).

3. *See generally, e.g.*, JOHN GRISHAM, *THE RAINMAKER* (1995) (in which a large insurance company avoids paying the judgment despite being responsible for the plaintiff’s death).

and we find ourselves rooting for “the little guy” again and again.⁴ John Grisham’s works and other societal representations of mass torts repeat this theme.

These cases are not just figments of a best-selling author’s imagination. While popular culture dramatizes aspects of these cases in novels, television shows, movies, and other media representations, these cases do reflect, at their core, a real legal framework that attempts to sort through some of the most complex and intricate litigation in the United States. These trials, typically dealing with harms like a cancer pocket,⁵ an environmental disaster,⁶ or a serious problem with a medication,⁷ are fraught with procedural rules and complex testimony that is often incredibly scientific and involves the questioning of dozens of scientists.⁸ These trials get some of the most expansive media coverage that the country sees, save for high profile murder trials.⁹ The complicated backstories, sympathetic plaintiffs, and

4. Cf. Am. Soc’y of Trial Consultants, *What Is it About an Underdog?*, DELIBERATIONS (Jan. 18, 2008), <http://jurylaw.typepad.com/deliberations/2008/01/what-is-it-we-l.html> (stating the reasons people root for the underdog, including the drama involved in witnessing the “big guy” lose).

5. Cf. Calif. Water Boards, *PG&E Hinkley Chromium Cleanup*, CA.GOV, https://www.waterboards.ca.gov/rwqcb6/water_issues/projects/pge/index.html (last visited May 23, 2018) (describing the clean-up efforts related to the hexavalent chromium water supply contamination case in Hinkley, California that the 2000 film *Erin Brockovich* dramatized); cf. also Frank Clifford, *Utility to Pay \$333 Million to Settle Suit*, L.A. TIMES (July 3, 1996), http://articles.latimes.com/1996-07-03/news/mn-20787_1_water-settling-ponds.

6. See, e.g., *Allison v. Exxon Mobil Corp.*, No. 03-C-07-003809, 2012 WL 5962094 (Md. Cir. Ct. January 4, 2012).

7. See, e.g., *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

8. See, e.g., Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 72–74 (1989) (describing the Bendectin mass tort trial proceedings).

9. See, e.g., Eric D. Lawrence, *GM Settles Deadly Ignition Switch Cases for \$120 Million*, USA TODAY (Oct. 20, 2017, 12:56 PM), <https://www.usatoday.com/story/money/cars/2017/10/20/gm-settles-deadly-ignition-switch-cases-120-million/777831001/>.

potential for multi-million-dollar jury awards or settlements lend themselves to popular coverage and stories.¹⁰

These enormous tort trials that have come to define some of the most quintessential jury cases are, in reality, much more unpredictable and unsatisfying than we, as a society, would like to admit. In many cases, the plaintiffs do not recover anything for their losses, are barred from further litigation (even when they were part of the forced consolidation of a case),¹¹ and both parties spend millions in legal fees.¹² Perhaps the most concerning assessment of the mass tort system is that “overall performance of the litigation system in this area has been remarkably poor.”¹³ An alternative to the jury box in these cases may provide more predictability and stability to all of those involved and, more importantly, may provide for a more tailored solution to provide justice to the parties involved in the dispute.

This Essay argues that an alternate dispute resolution theory could improve the current system for mass torts in ways that would better meet the interests of the parties involved in the dispute and the country as a whole. We outline this alternate dispute resolution theory, which could be useful in further exploration of systems that could lead to more “justice,” and further outline some of the reasons why breaking away from the current system may be difficult. Part II will outline the current state of mass tort trials in the American judicial system, with an emphasis on both the big wins *and* big losses that represent the true outcomes of this form of justice. Part III will then dive into the divergence between societal perceptions of mass tort cases, as well as the benefits and flaws of this system as it relates to the interests of the parties involved. Part IV will explore alternatives to the current mass tort system that will better align with the fundamental goals of the

10. Cf. Mark C. Weber, *Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues*, 48 DEPAUL L. REV. 463, 467 (1998) (discussing “the desirability of conducting a mass trial in a mass tort”).

11. See, e.g., Trangsrud, *supra* note 8 (describing that the consolidated plaintiffs in the Bendectin case were excluded from the courtroom).

12. See, e.g., Pete Earley, *Agent Orange Attorney Fees Swell*, THE WASH. POST (Sept. 23, 1984), <https://www.washingtonpost.com/archive/politics/1984/09/23/agent-orange-attorney-fees-swell/bb75fb7b-ed2f-44d9-8376-746b996b1c58/>.

13. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 941 (1995).

system. Finally, Part V will then assess some of the psychology of why we, as a society, are enamored with the current mass tort structure (and John Grisham novels) and how that represents a barrier to exploration of other alternatives. Part VI will conclude.

II. A BRIEF HISTORY OF MASS TORT “WINS” AND “LOSSES”

Prior to 1969, the term “mass tort” did not exist.¹⁴ Mass tort is an area of litigation that is characterized by a large number of plaintiffs and by the type of tort being asserted, which can involve environmental, toxic torts, pharmaceutical torts, products liability litigation, aviation, antitrust, securities litigation, and employment claims, according to the American Bar Association Mass Torts Committee.¹⁵ One commentator has described the mass tort system “as a misnomer, a convenient but fundamentally misleading rubric for academic conferences, journal commentaries, and occasional texts or courses.”¹⁶ This section will run through a number of the major wins and losses within the mass tort realm to give a broader context of the types of cases that fall under the label and provide a sense of the scope of these cases—including what’s at stake for all of the parties involved.

A. Major Wins

No mass tort anthology would be complete without an analysis of asbestos. Asbestos claims over the years have involved “more plaintiffs, more defendants, and higher costs than any other type of personal injury litigation in U.S. history.”¹⁷ As of 2001, the estimated amount spent on these claims totaled \$54 billion, and experts estimate that the total cost of asbestos litigation will be in the range of \$200 to \$265 billion once all claims are exhausted.¹⁸ This litigation has

14. *Id.* at 945.

15. Section of Litigation, *Mass Torts Committee*, AM. B. ASS’N, <https://apps.americanbar.org/litigation/committees/masstorts/about.html> (last visited May 15, 2018).

16. Schuck, *supra* note 13, at 942.

17. Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. ECON. PERSP. 183, 183 (2004).

18. See STEPHEN J. CARROLL ET AL., RAND CORP., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT vii (2002).

spanned decades. One study found that Mississippi courts would treat these cases favorably because: (1) there were no limits on damage awards, and (2) numerous cases could be joined together.¹⁹ Over 730,000 people had filed asbestos claims as of 2002, with cases still being filed yearly.²⁰ These cases were mainly resolved through joinder, where each case was settled individually.

A second famous case is known as the *Agent Orange* litigation.²¹ The United States used Agent Orange, a gas, during the Vietnam War as part of an herbicidal warfare program to destroy vegetative ecosystems in Vietnam.²² Numerous veterans sued seven chemical companies who were involved in the creation of Agent Orange, charging that the agent caused cancer, birth defects, and other negative health outcomes.²³ These seven companies settled the case for \$180 million shortly before jury selection was to start in the case.²⁴ While this seems like a great deal of money, the average payout to veterans or survivors was approximately \$3,800 each.²⁵ The fund closed in 1997 after it disbursed all of the monies.²⁶

Perhaps the most commonly known mass tort case in mainstream media involved Pacific Gas and Electric, a company that caused a cancer cluster in Hinkley, California.²⁷ The case garnered

19. White, *supra* note 17, at 188.

20. *Id.* at 183.

21. See generally *In re* "Agent Orange" Prod. Liab. Litig. MDL No. 381, 818 F.2d 187 (2d Cir. 1987).

22. WILLIAM A. BUCKINGHAM, JR., OPERATION RANCH HAND: THE AIR FORCE AND HERBICIDES IN SOUTHEAST ASIA, 1961–1971, at 11–13 (1982).

23. See generally PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986).

24. Ralph Blumenthal, *Veterans Accept \$180 Million Pact on Agent Orange*, N.Y. TIMES (May 8, 1984), <http://www.nytimes.com/1984/05/08/nyregion/veterans-accept-180-million-pact-on-agent-orange.html?pagewanted=all>.

25. Veterans Benefits Admin., *Agent Orange Settlement Fund*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.benefits.va.gov/compensation/claims-postservice-agent_orange-settlement-settlementFund.asp (last visited Mar. 21, 2018).

26. *Id.*

27. *PG&E Hit with Class Action Lawsuit over Lingering Hinkley Contamination*, SAN BERNARDINO CTY. SENTINEL (Sept. 28, 2013), <http://sbcsentinel.com/2013/09/pge-hit-with-class-action-lawsuit-over-lingering-hinkley-contamination/> [hereinafter *PG&E Class Action Lawsuit*]; see also *supra* note 5.

widespread fame after Julia Roberts starred in a movie about it, detailing the real-life efforts of law clerk Erin Brockovich to levy a mass tort against Pacific Gas and Electric for contaminating a community's groundwater with cancer-causing chemicals.²⁸ Brockovich's firm filed the original lawsuit in 1993 and settled it in 1996 for \$333 million.²⁹ The firm earned over \$100 million in legal fees.³⁰ Only a handful of the plaintiffs received more than \$100,000.³¹

Another large mass tort settlement involved the four largest United States tobacco companies in 1998.³² The attorneys general of forty-six states, five territories, and the District of Columbia brought the case.³³ The parties settled the case for \$206 billion, paid over 25 years, to cover increased state Medicaid costs, an education fund, an enforcement fund for other stipulations of the agreement, and other contributions.³⁴ Although the settlement appears quite large on its face, it is important to remember that the settlement agreement divided the payout between the four tobacco companies, and the agreement divided the approximately \$10 billion in annual proceeds between the fifty-six plaintiffs to support the numerous targeted programs.³⁵ The actual assistance that persons harmed by smoking received is only the small percentage that ends up in state Medicaid programs and other patient-specific programs.³⁶

These cases represent “wins” for mass tort plaintiffs, although many may argue that they are not actually wins. In many of these cases, the plaintiffs' lawyers received large payouts, and the remaining funds, spread over a large number of plaintiffs, resulted in paltry sums

28. See generally ERIN BROCKOVICH (Universal Pictures 2000).

29. *PG&E Class Action Lawsuit*, *supra* note 27.

30. *Id.*

31. *Id.*

32. See generally Master Settlement Agreement (1998), https://web.archive.org/web/20080625084126/http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf.

33. TOBACCO CONTROL LEGAL CONSORTIUM, PUB. HEALTH LAW CTR., THE MASTER SETTLEMENT AGREEMENT: AN OVERVIEW 2 (2015), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf>.

34. See Master Settlement Agreement, *supra* note 32, at 44–45.

35. *Id.* at Exhibit A.

36. *Id.*

for each individual at the end of the day.³⁷ The amounts that some plaintiffs received were, in some cases, obviously too small to cover medical costs and other losses, even without doing any research.

B. Major Losses

While some cases end in multi-million- or multi-billion-dollar settlements, others have a less happy ending for the plaintiffs involved. One such case was *Daubert v. Merrell Dow Pharmaceuticals*.³⁸ The case involved a drug called Bendectin, a treatment for nausea and vomiting during pregnancy.³⁹ The drug became associated with birth defects, and, as of 1989, there were 750 ongoing cases against Merrell Dow with over 1,100 claimants.⁴⁰ *Daubert* was a seminal United States Supreme Court case, establishing a standard for the admissibility of expert testimony by finding that the experts that the plaintiffs had procured were not credible.⁴¹ At the end of the first stage of the trifurcated trial, the court determined that the plaintiffs had failed to prove general liability by a preponderance of the evidence and it decided the case in favor of the defense.⁴²

With a huge range of outcomes, from decent payouts, to minimal payouts, to no financial gain at all, there is a lot of unpredictability in how these cases can resolve. The people whom this unpredictability ultimately affects most are the people with the lowest buying power, who rely the most on the money that comes out of these settlements and lawsuits to afford their medical bills and live.

37. Cf. *supra* text accompanying notes 25–26.

38. 509 U.S. 579 (1993).

39. *Daubert*, 509 U.S. at 582; see also Duchesnay, Inc., *Bendectin History*, BENDECTIN, <https://www.bendectin.com/en/> (last visited Mar. 21, 2018).

40. Duchesnay, Inc., *supra* note 39.

41. See *id.* (“Plaintiffs’ experts, though what was ultimately deemed to be ‘junk science’, [sic] failed to present any study in support of plaintiffs’ theory that Bendectin could cause malformations in human fetuses.”); cf. *Daubert*, 509 U.S. at 589–90 (defining the basis for scientific knowledge a witness must possess to be considered an expert for purposes of the Federal Rules of Evidence).

42. See Trangsrud, *supra* note 8, at 73.

C. *The King of Torts: John Grisham*

*“I’m alone and outgunned, scared and inexperienced,
but I’m right.”*

John Grisham, *The Rainmaker*⁴³

When it comes to the topic of justice, Americans love litigation, and perhaps the only thing Americans love more than litigation is talking about litigation. When big tort cases capture the attention of the public, suddenly all of America becomes the jury. An elderly woman spilled McDonald’s coffee in 1992, suffered burns, and sued McDonald’s.⁴⁴ Over 20 years after the case, updates, debates, and new thoughts on it still capture headlines.⁴⁵ It is no wonder that, in the latter part of the 20th century, when mass tort cases emerged as a new approach to resolving disputes by numerous plaintiffs against a singular entity, media representations of real and fictional cases alike also emerged to meet the public’s insatiable interest in this new type of litigation.⁴⁶ But no individual in this unique genre is more prolific than John Grisham. Grisham boasts a number of works that either directly involve mass tort cases or involve cases that are seen as precursors or test cases to mass litigations.⁴⁷

With prolific representations of mass torts such as Grisham’s works, it is important to understand how the themes in these societal representations reflect the reality of participation in the mass tort

43. JOHN GRISHAM, *THE RAINMAKER* 262 (1995).

44. *Liebeck v. McDonald’s Restaurants*, 1995 WL 360309 (D.N.M. 1994).

45. See, e.g., German Lopez, *What a Lot of People Get Wrong About the Infamous 1994 McDonald’s Hot Coffee Lawsuit*, VOX (Dec. 16, 2016, 10:20 AM), <https://www.vox.com/policy-and-politics/2016/12/16/13971482/mcdonalds-coffee-lawsuit-stella-liebeck>; Hilary Stout, *Not Just a Hot Cup Anymore*, N.Y. TIMES (Oct. 21, 2013), <http://www.nytimes.com/2013/10/21/booming/not-just-a-hot-cup-anymore.html>; Darryl S. Weiman, *The McDonalds’ Coffee Case*, HUFFINGTON POST (Jan. 7, 2017, 9:04 AM), https://www.huffingtonpost.com/darryl-s-weiman-md-jd/the-mcdonalds-coffee-case_b_14002362.html.

46. See, e.g., CLARA BINGHAM, *CLASS ACTION: THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW* (2002); LISA SCOTTLINE, *DEAD RINGER* (2003); ERIN BROCKOVICH (Universal Pictures 2000).

47. See generally JOHN GRISHAM, *THE APPEAL* (2008); JOHN GRISHAM, *GRAY MOUNTAIN* (2014); JOHN GRISHAM, *THE KING OF TORTS* (2003); JOHN GRISHAM, *THE LITIGATORS* (2011); JOHN GRISHAM, *THE RAINMAKER* (1995); JOHN GRISHAM, *THE RUNAWAY JURY* (1996); JOHN GRISHAM, *THE STREET LAWYER* (1998).

system and how they diverge. This understanding is important because, while reality inspires film and literature, the perceptions that film and literature portrayals create can, in turn, shape understandings of and expectations when engaging in real systems.

III. DIVERGENCE BETWEEN REPRESENTATIONS AND REALITY OF PARTICIPATION IN THE MASS TORT SYSTEM

Academic literature on the current system of mass tort cases largely focuses on the system's impact on the larger justice system, generally in terms of efficiency and questions of law and procedure.⁴⁸ Indeed, these considerations are real benefits and shortcomings to analyze in the design and critique of a conflict resolution process within the legal system, but it is safe to assume that the reader who grins at the end of *The Runaway Jury* or the person who agrees to join a massive class action did not flock to this system because of its impact on the efficiency of our legal system, nor was she overly concerned

48. See generally, e.g., Alberto Cassone & Giovanni Ramello, *The Simple Economics of Class Action: Private Provision of Club and Public Goods*, 32 EUR. J.L. & ECON. 205 (2011) ("Class action has the potential to recreate, in the judicial domain, the same effects that individual interests and motivations, governed by the perfect competition paradigm, bring to the market."); see also Bruno Deffains & Dominique Demougin, *Class Actions, Compliance and Moral Cost*, 7 REV. L. & ECON. 481 (2011) ("We study the effects of introducing class action lawsuits into a competitive environment where some firms have an intrinsic motivation to implement efficient care. . . . Overall, the average care level increases."); Max I. Raskin, *Shop 'Til You Drop: Forums and Federalism in New York's Class Action Procedure*, 2014 N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 121, 122 (2014) ("[T]his article argues that the optimal policy with no uniformity [between New York's class action certification statute and Federal Rule of Civil Procedure 23] is preferable, even if it means that New Yorkers who do not meet the requirements of federal jurisdiction will be precluded from bringing certain claims in federal court."); Andrew C. Rose, Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180, 1188 (1983) ("In discussing [Federal Rule of Civil Procedure 23], this Comment will demonstrate that certain subsections of the statute are particularly well suited for the disposition of common damage and liability issues which typically exist in the mass tort context."); Shrey Sharma, Note, *Do the Second Circuit's Legal Standards on Class Certification Incentivize Forum Shopping? A Comparative Analysis of the Second Circuit's Class Certification Jurisprudence*, 85 FORDHAM L. REV. 877 (2016) ("Ultimately, this Note evaluates the notion that the Second Circuit's legal standards incentivize attorneys to file there to get class certification.").

with the choice of law questions that manifest. She likely was not satisfied or upset by an outcome because of these high-level considerations. Many of the individual benefits of participation in mass tort actions map onto the second-hand satisfaction that audiences get when reading or watching a representation of such a case.⁴⁹ However, there are also a number of flaws in the treatment of individuals in our current system. Because societal representations emphasize the perceived benefits of the current system while not showing the system's flaws, representations and reality diverge.

This Section explores, focusing on the works of John Grisham, how societal representations of mass tort cases and the reality of participation in this system diverge. Through this analysis, this Section will explore the system's benefits to participants, as well as risks of engaging in a mass tort case, and the shortcomings in the system's ability to meet the interests of participants.

A. *Benefits of Participation in the Justice System*

By participating in the current mass tort system, individual plaintiffs and defendants are able to reap the psychological and tangible benefits of having gone through the justice system. The benefits include achieving consistent results,⁵⁰ a unified and uniform outcome for the numerous participants,⁵¹ attaining a verdict that sets precedent for future cases,⁵² and gaining external validation of assertions and experiences through a verdict.⁵³ Societal representations of mass tort cases often explicitly and implicitly emphasize these benefits.

The consolidation of claims into a single case leads to consistency.⁵⁴ By consolidating numerous individual cases into a mass tort claim, a single decision-maker can apply the same legal principles

49. See *infra* Section III.A.

50. Weber, *supra* note 10, at 468.

51. *Id.*

52. See *id.* at 468–69.

53. See, e.g., Bobbi-Jean MacKinnon, *Dennis Oland's Guilty Verdict "Validation" for Police, Says Chief*, CBC NEWS (Dec. 19, 2015, 7:24 PM), <http://www.cbc.ca/news/canada/new-brunswick/oland-guilty-police-chief-1.3373255>.

54. Weber, *supra* note 10, at 468–69.

and factual conclusions in the same manner to all persons involved, rather than the inconsistency that would occur if all were decided as individual cases in front of many, unique decision-makers.⁵⁵ When cases are consolidated, and courts achieve consistent results for all individual plaintiffs, potential plaintiffs, and the defendant, this consistency can contribute to both the “real and perceived fairness in the justice system.”⁵⁶

In addition to achieving consistent results regarding the issue at hand, participation in a mass tort case has the potential to attain a verdict that sets a clear, singular precedent for future cases. By participating in the justice system, litigants have the opportunity not only to shape their own results, but also to have a lasting impact by influencing future decision-makers through the creation of precedent. Furthermore, consolidating claims into a single case issues one clear verdict.⁵⁷ If litigants brought claims as individual cases, verdicts in various courts may conflict with each other and cause legal confusion and forum shopping. As such, the verdict in a mass tort trial not only provides consistency for all claims involved in the current matter, but also consistency for future cases emerging from other matters.

Through a verdict, participants in mass tort cases also have the opportunity to gain external third-party validation of their assertions and experiences. A verdict in support of the plaintiffs gives a clear “you were right, and your pain and suffering matters.” This validation by the court can provide important psychological satisfaction for plaintiffs, especially those who feel they were deeply impacted by the actions, or lack thereof, of the defendant.⁵⁸ On the other hand, a verdict for the defense provides a decision that “you are not at fault, and you have not wronged the plaintiff.” In addition to providing personal psychological satisfaction for individuals who are part of the defendant entity, the court’s declaration that the defendant is not responsible for

55. *Id.*

56. *Id.* at 468.

57. *See id.*

58. *See* U.S. ATTORNEY’S OFFICE, MIDDLE DIST. OF PA., U.S. DEP’T OF JUSTICE, VICTIM IMPACT STATEMENTS: KNOW YOUR RIGHTS 2 (2012), <https://www.justice.gov/sites/default/files/usao-mdpa/legacy/2012/01/17/Impact%20Statements%20restitution.pdf> (“Many victims also find it helps provide some measure of closure to the ordeal the crime has caused.”).

the plaintiffs' harm may save the defendant's public reputation and stock stability.

Societal representations of mass tort cases emphasize these benefits. In *The Litigators*, the small-time lawyers of Finely & Figg are enamored by the opportunity to achieve simultaneous justice—and a hefty commission—for not only all individuals who have suffered at the hands of the drug Krayoxx, but also all individuals who have been harmed by any of the products produced by the major pharmaceutical company Varrick Labs.⁵⁹ In *The Runway Jury*, local attorney Wendall Rohr pilots a test case against cigarette companies, and the story assumes that if this case succeeds, the verdict will also obtain consistent results in a future cases.⁶⁰ In fact, Grisham describes Rohr's strategy as “[w]in the first one, then sit back and wait for the stampede.”⁶¹ In practice, this stampede of cases would likely result in a consolidated case, either through a mass tort claim or a class action lawsuit. And the tobacco companies in the book feared the certification of a class action suit as a “doomsday scenario.”⁶² *The Appeal* highlights the power of the external validation of the court in satisfying the plaintiff—who lost her husband and son to illness, allegedly due to Krane Chemical's pollution of the local water supply—as well as the immense negative impact the loss has on the defendant, whose stocks plummet and the floodgates to further claims open.⁶³ The only solution the defendant has is to reverse the decision in an appeal, thus achieving external validation for itself and eliminating the plaintiff's validation.⁶⁴ The benefits of participation in the justice system that Grisham's works emphasize rely on several assumptions that highlight the divergence between representation of mass tort cases and reality: the only possible outcome in a case is a verdict and consistency is always positive.

In Grisham's world, settlement is a highly unlikely outcome. For instance, in *The Runaway Jury*, the case against the tobacco company was

59. See generally JOHN GRISHAM, *THE LITIGATORS* (2011).

60. See generally JOHN GRISHAM, *THE RUNAWAY JURY* (1996).

61. *Id.* at 22.

62. *Id.* at 271.

63. See generally JOHN GRISHAM, *THE APPEAL* (2008).

64. See *id.*

the fifty-fifth of its kind. Thirty-six had been dismissed for a multitude of reasons. Sixteen had gone to trial and ended with verdicts in favor of the tobacco companies. Two had ended in mistrials. None had been settled. Not one penny had ever been paid to a plaintiff in a cigarette case.⁶⁵

The vast majority of tort cases, however, including mass tort cases, settle and never reach trial in reality.⁶⁶ Only an estimated 2–3% of civil cases make it to trial, while settlement primarily resolves the rest, though other outcomes such as mistrials and dismissals are not abnormal.⁶⁷ This is far different than the perception that literature and film promulgate to the public.⁶⁸ The assumption of a verdict occurring in representations of consolidated cases over-accentuates the potential benefits of engaging in the system. Without a verdict, there is no external validation of assertions and experiences, no precedent to impact future matters, and no guarantee of consistent results. With only 2–3% of cases making it to trial,⁶⁹ there is an even smaller chance that the verdict—and thus validation, precedent, and consistency—will be in the participant’s favor.

Societal representations, including Grisham’s works, generally reflect consistency in a positive light, a goal that the justice system should seek. “[J]ustice is furthered only when the decision of the court in the consolidated trial proceeding is consistently correct.”⁷⁰ The consolidation of cases, however, can result in compounding errors. Consolidated case results are indisputably more complicated than cases with a singular plaintiff.⁷¹ And increased quantity and complexity of issues in a case compounds the risk of legal error occurring.⁷² If error does occur, the high cost of mass tort cases may

65. JOHN GRISHAM, *THE RUNAWAY JURY* 22 (1996).

66. See John Barkai et al., *A Profile of Settlement*, 42 J. AM. JUDGES ASS’N 34, 34 (2006).

67. *Id.*

68. See generally JOHN GRISHAM, *GRAY MOUNTAIN* (2014); JOHN GRISHAM, *THE LITIGATORS* (2011); JOHN GRISHAM, *THE RUNAWAY JURY* (1996).

69. See Barkai, *supra* note 66.

70. Weber, *supra* note 10, at 468.

71. See *id.*

72. *Id.* at 470.

deter an appeal.⁷³ Furthermore, if an appeal does occur, appellate courts may be more likely to succumb to the pressure of looming expensive new trial and uphold the verdict.⁷⁴ Some scholars speculate that the avoidance of such costs caused the Second Circuit to affirm the lower court's approval of settlement in the *Agent Orange* litigation.⁷⁵

Participants may also seek the consistency that consolidated cases offer because of the unwise assumption that they will win. In Grisham's works, the villain is clear—for example, the sleazy tobacco company⁷⁶ or a law firm evicting the poor.⁷⁷ Despite the countless plot twists along the way, the villain never wins. It is unlikely that participants, particularly plaintiffs, enter into a claim assuming that they will lose, or that they are the villains. Instead, an assumption that they are right, and that they will prevail, likely drives litigation forward. Moreover, it is probable that few consider the true impact that a loss could have, and losing a mass tort case can be disastrous. The mass tort case regarding Bendectin consolidated 750 separate claims with over 1,100 claimants into a single case.⁷⁸ The jury ruled in favor of the company, and courts upheld the decision on two appeals.⁷⁹ In a single trial, over 1100 claimants lost their ability to recover. Some legal scholars believe that many of these claimants would have fared better if their claims had not been consolidated.⁸⁰ Moreover, the judge ordered the Bendectin claims consolidated into a mass tort; the plaintiffs had no choice.⁸¹ If we assume that some plaintiffs would have succeeded in their claims individually, we must see the fallacy in the assumption—which societal representations promote—that the villains will always fail. Instead, the system forever

73. *See id.*

74. *Id.*

75. *Id.*

76. *See generally* JOHN GRISHAM, *THE RUNAWAY JURY* (1996).

77. *See generally* JOHN GRISHAM, *THE STREET LAWYER* (1998).

78. Weber, *supra* note 10, at 465 n.12.

79. Duchesnay, Inc., *supra* note 39; *see also* Trangsrud, *supra* note 8, at 81.

80. *See generally* Trangsrud, *supra* note 8, at 73–74, 82 (discussing the outcome of the Bendectin case).

81. *Id.* at 72 (referring to joinder over the objections of plaintiffs involved in the Bendectin cases).

barred countless plaintiffs with just claims for birth defects caused by Bendectin from getting justice.

B. Definitions of “Success”

The current mass tort system offers plaintiffs and defendants a clear and singular understanding of what constitutes a successful outcome for participation in the system. If the case proceeds to trial, the parties enter a zero-sum game. One will win, and one will lose. This clear understanding of success can be exceptionally satisfying. Participants know whether they achieved their goal, and, if they win, they have the added benefit of knowing that their adversary did not. Even if the case settles, the current mass tort system defines “success” in limited ways: maximizing monetary gains for the plaintiff and limiting monetary losses for the defendant. Although one can assess success with less certainty during settlement as opposed to trial, a monetary outcome still defines “success.”

Knowing that money means success also lends itself well to literature and films. The audience knows exactly what the “good side” needs to defeat the “bad side.” In *Gray Mountain*, readers long for the coal miners to receive payments from the big coal companies to account for the black lung they suffer, and, along with the book’s protagonist lawyer Samantha, readers may even consider bending the law to achieve that success.⁸² In *The Street Lawyer*, success for the unlawfully evicted, poor tenants means a hefty settlement from the shady law firm that evicted them.⁸³ Stepping outside of the works of Grisham, the award-winning and widely popular film *Erin Brockovich* told the true story of Erin Brockovich, a law clerk leading her small-town community in a class action suit against Pacific Gas and Electric for cancer-causing water contamination, hoping to achieve consistent justice for her whole town through a substantial settlement.⁸⁴ In the final scene of the movie, as Ms. Brockovich held that check in her

82. See generally JOHN GRISHAM, *GRAY MOUNTAIN* (2014).

83. See generally JOHN GRISHAM, *THE STREET LAWYER* (1998).

84. See ERIN BROCKOVICH (Universal Pictures 2000); *Erin Brockovich*, IMDB, <http://www.imdb.com/title/tt0195685/> (last visited May 15, 2018) (describing the film’s plot, ratings, and awards); see also *supra* note 5.

hand, audiences knew that justice had been served and success has been achieved.⁸⁵

Is success truly this monolithic? Is achieving justice defined by dollar amounts? According to John Grisham books, other societal representations, and the mass tort system, the answer is “yes.” However, many scholars and practitioners disagree. Judge Jack B. Weinstein, who heard the *Agent Orange* case and oversaw its settlement said:

Steps should be taken to ensure that courts provide individual justice, even in a mass context. . . . How can we provide each plaintiff and each defendant with the benefits of a system in mass torts that treats him or her as an individual person? How can each person obtain the respect that his or her individuality and personal needs should command in an egalitarian democracy such as ours?⁸⁶

Judge Weinstein’s questions begin to posit that there are metrics beyond money that determine what justice or a successful case means for individuals in mass torts. As with any dispute resolution process, individuals have specific interests that the system must satisfy before they will consider the system successful. Interests are the needs, concerns, fears, desires, and hopes that motivate an individual to engage in a dispute resolution process. And interests encompass far more than just money.

The University of Michigan Health System overhauled its nearly twenty-year-old claims-management model after realizing that claimants’ interests spread far beyond revenge-through-trial and monetary payouts. While their previous system jumped straight from claims being received to assigning counsel and proceeding with litigation, its new system involves a rigorous assessment of the claims, an internal investigation as to what happened, engaging with the former patient, and sharing their findings.⁸⁷ If the internal

85. ERIN BROCKOVICH (Universal Pictures 2000).

86. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 2–3 (1995).

87. Michigan Medicine, *The Michigan Model: Medical Malpractice and Patient Safety at UMHS*, UNIV. OF MICH., <http://www.uofmhealth.org/michigan-model-medical-malpractice-and-patient-safety-umhs> (last visited May 15, 2018).

investigation finds a medical error, the medical staff will say so, apologize, and explain any clinical quality improvements that they intend to make based on this incident.⁸⁸ If the investigation finds no medical error, the staff will explain the investigation process and findings to the claimant.⁸⁹ Simply by engaging with individuals, providing more information, and if appropriate, apologizing and explaining how policies and actions will change in the future, the University of Michigan Health System reduced the number of pre-suit claims and pending lawsuits from 260 in 2001 to just over 100.⁹⁰

The experience of the University of Michigan Health System demonstrates that claimants have a variety of interests in engaging in litigation. Some claimants want an explanation for what happened. Some need to hear an apology. Some are satisfied when they know that a perceived wrongdoer is taking precautions so that people in the future will not suffer the same harm. When there are hundreds of cases consolidated into one mass tort case, and only a few representatives who will ever be heard in the courtroom or ever meet with the defendant, there is no way to satisfy all of these interests. Mass torts are “procedural devices for combining many claims to obtain efficiency and allow suits that might not otherwise be heard; they are not otherwise devices for doing justice on a mass scale.”⁹¹ As such, the interests of the plaintiffs often suffer.

The justice system can often satisfy the simplest of interests: exercising autonomy and being heard. In general lawsuits, plaintiffs and defendants are able to, with the advice of counsel, make decisions about the case, offers, settlement, and proceedings.⁹² While they may not have had control or autonomy in the events and circumstances that led to the case, the justice system affords them that opportunity. Plaintiffs and defendants are also able to be heard in the general lawsuit context. If they do not settle and proceed to trial, a judge, and in some cases a jury, will hear about the parties’ claims, beliefs, and experiences. Even if a party loses the verdict, she was able to satisfy

88. *Id.*

89. *Id.*

90. *Id.*

91. Scott Fruehwald, *Individual Justice in Mass Tort Litigation: Judge Jack B. Weinstein on Choice of Law in Mass Tort Cases*, 31 HOFSTRA L. REV. 323, 323 (2002).

92. MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2018).

the basic interest of exercising autonomy and having her story heard. Mass tort cases take away even this most basic satisfaction of interest.

Judges may involuntarily consolidate individual plaintiffs' claims or certify a matter as a class action without the plaintiffs' consent.⁹³ The court strips the individual's ability to exercise autonomy to control their own tort claim from them.⁹⁴ Once a claim is consolidated, individual plaintiffs then have little to no decision-making ability.⁹⁵ They also often lose their ability to be heard by or to hear the other side.⁹⁶ Similarly, defendants may find themselves suddenly facing a singular trial that represents hundreds of plaintiffs, and they now have no ability to sort out a resolution with those plaintiffs individually or offer them any information or explanation.⁹⁷

While rare in ordinary tort litigation, in mass tort cases, courts will often bifurcate or trifurcate proceedings.⁹⁸ In such trials, even the lead or representative plaintiffs often have no opportunity to express their story, experiences, or pain before the matter is already decided.⁹⁹ The plaintiffs often do not testify until the damages stage, so if the fact-finder sees no liability in the expert-heavy liability stage, then the trial will not proceed to the damages stage, and the plaintiffs are never heard.¹⁰⁰ The separation of issues "inevitably leads to the sterile trial of technical issues related to causation divorced from the fact of the plaintiff's injury and a full account of the defendant's role in the tragedy."¹⁰¹ In fact, on appeal from an involuntarily bifurcated trial, the Sixth Circuit ordered a retrial for a mass tort case regarding the Beverly Hills Supper Club fire because, as the court noted, there "is a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury circumstances and atmosphere of the entire cause of action . . . replacing it with a sterile or laboratory atmosphere

93. See, e.g., Trangsrud, *supra* note 8, at 72–73.

94. *Id.* at 74–76.

95. *Id.* at 74–75. See also Weber, *supra* note 10, at 469.

96. See Trangsrud, *supra* note 8, at 80–82, 87–88 (focusing on the individual plaintiff's ability to present their case to a jury, not the other party; but plaintiffs necessarily present their case to the other party when presenting it to a jury).

97. *Id.*

98. *Id.* at 80–82.

99. *Id.* at 80–82, 87–88.

100. *Id.* at 80–82.

101. *Id.* at 80.

in which causation is parted from the reality of injury.”¹⁰² Although this finding is not the norm, the Sixth Circuit recognized an inherent interest of the plaintiffs in having their voices heard. The infamous Bendectin case¹⁰³ regarding a prenatal drug and birth defects was trifurcated, with general causation tried first, followed by liability, and then damages.¹⁰⁴ During the twenty-one-day assessment of general liability, ten experts testified for the plaintiffs and nine for the defense.¹⁰⁵ No plaintiffs under the age of ten or who were visibly deformed were even allowed in the courtroom.¹⁰⁶ At the end of the first stage of the trifurcated trial, the court determined that the plaintiffs had not proven general liability by a preponderance of the evidence, and 1,100 claimants lost their ability to recover damages without a single plaintiff having been heard, and with most plaintiffs tucked away from sight and unable to even watch the proceedings.¹⁰⁷

It is easy to assume that success in a lawsuit is directly and exclusively related to money. And it makes for satisfying and straightforward storytelling. But it does not make for a satisfactory justice system, and currently the system of mass torts does not allow for the identification of the interests of the plaintiffs or the defendants. Monetary gain or loss alone do not define justice, and society should not view success in the mass tort system only through this limited, incomplete lens.

IV. INDIVIDUALIZED JUSTICE AND ALTERNATIVES TO THE CURRENT SYSTEM

“If you’re not willing to go into the lion’s den and confront the emotion and the hurt, you shouldn’t do it.”
Kenneth Feinberg, speaking to *The New York Times*¹⁰⁸

102. *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 217 (6th Cir. 1982); *see also* Trangsrud, *supra* note 8, at 80.

103. *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 300 (6th Cir. 1984).

104. Trangsrud, *supra* note 8, at 73.

105. *Id.*

106. *Id.*

107. *Id.*

108. John Schwartz, *For Kenneth Feinberg, More Delicate Diplomacy*, N.Y. TIMES (July 16, 2010), <http://www.nytimes.com/2010/07/17/us/17feinberg.html>.

If the current mass tort system yields benefits for few participants and does not satisfy the actual interests of litigation, is there a feasible alternative? Recognizing that trial delay, backlog, and costs are real and unavoidable issues, is it possible to construct a system that offers mass solutions but also individualized justice? The work of Kenneth Feinberg in the design and implementation of the September 11th Victim Compensation Fund and the Gulf Coast Claims Facility suggests that such a system is possible.

The September 11th Victim Compensation Fund (“the Fund”) was the first of its kind.¹⁰⁹ After the terrorist attacks on the World Trade Center, the Pentagon, and the crash of United Airlines Flight 93 on September 11, 2001, Congress established the Fund to offer compensation to the family members of persons who died in, and to persons who suffered physical injuries due to the attacks.¹¹⁰ In exchange for accepting monetary compensation from the Fund, participants would waive their right to seek a traditional tort remedy against airline companies or other potential defendants.¹¹¹ While Congress envisioned the Fund as a mechanism to rescue the airline industry from bankruptcy, with the skillful designed and implementation of the Fund by Feinberg—based on his robust experience in alternative dispute resolution—it offered compassion to injured and grieving people and creative solutions to satisfy interests.¹¹²

The procedural parameters for the Fund that Congress designed were fairly simple. The United States Treasury would provide compensation to eligible victims and relatives on a no-fault basis.¹¹³ To administer the fund and assist in the promulgation of regulations, the Attorney General would appoint a Special Master, who would

109. KENNETH R. FEINBERG ET AL., U.S. DEP’T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001: VOLUME I at iv (2004), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/September-11-Victim-Compensation-Fund-Final-Report-Volume-I-1.pdf>.

110. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 137 (2005).

111. *Id.* at 143–144.

112. *See id.* at 137.

113. *See id.* at 143.

determine for each eligible claimant: “(i) the extent of harm to the claimant, including any economic and noneconomic losses; and (ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.”¹¹⁴ Claimants had to file for relief within two years of the formation of the Fund,¹¹⁵ and the fund would make determinations on individual claims within 120 days of filing.¹¹⁶ Claimants had the right to present evidence¹¹⁷ and be represented by an attorney.¹¹⁸ Determinations by the Special Master were “final and not subject to judicial review.”¹¹⁹ The Attorney General appointed Feinberg, an alternative dispute resolution expert and former Special Master in the disbursement of damages in the *Agent Orange*,¹²⁰ *DES*,¹²¹ and *Dalkon Shield*¹²² cases, as the Special Master for the Fund.¹²³

In total, the Fund distributed over \$7.049 billion to the survivors of 2,880 persons killed in the September 11th attacks, with the average award exceeding \$2 million, and to 2,680 individuals who were injured in the attacks or in the rescue efforts, with the average award around \$400,000.¹²⁴ Participation rates were also exceptionally high, with 97% of the families of deceased victims participating in the Fund, rather than potentially opting for litigation.¹²⁵ Of those who opted out, only seventy families filed lawsuits and about thirty families elected to

114. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(1)(B), 115 Stat. 230, 238–39 (2001) (codified as amended at 49 U.S.C. § 40101) [hereinafter ATSSSA]; Ackerman, *supra* note 110, at 144.

115. ATSSSA § 405(a)(3); Ackerman, *supra* note 110, at 144.

116. ATSSSA § 405(b)(3); Ackerman, *supra* note 110, at 144.

117. ATSSSA § 405(b)(4)(B); Ackerman, *supra* note 110, at 144–45.

118. ATSSSA § 405(b)(4)(A); Ackerman, *supra* note 110, at 144–45.

119. ATSSSA § 405(b)(3); Ackerman, *supra* note 110, at 145.

120. *In re “Agent Orange” Prod. Liab. Litig.* MDL No. 381, 818 F.2d 187 (2d Cir. 1987).

121. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984).

122. *In re A.H. Robins Co. “Dalkon Shield” IUD Prod. Liab. Litig.*, 406 F. Supp. 540 (J.P.M.L. 1975).

123. Ackerman, *supra* note 110, at 147.

124. FEINBERG ET AL., *supra* note 109, at 1.

125. *Id.*

make no claims at all.¹²⁶ In addition to monetary payouts, the Fund was able to satisfy other interests of claimants, providing a more robust view of justice and success. The administrators of the Fund personally contacted each claimant and provided them with information about the process and their claim.¹²⁷ In-person informal meetings and formal hearings were available to every claimant so that they could be heard, express their pain, and give their thoughts on how the Fund should decide their claim.¹²⁸ The Fund also offered closure to the victims and a set timeline for a decision.¹²⁹

Feinberg personally conducted 1,500 individual hearings.¹³⁰ Further evidencing the impact of the non-monetary interests of claimants, Feinberg has reflected that, during these hearings, few claimants spoke about money or disputed the calculation of compensation.¹³¹ Instead, they spoke about the loved ones they had lost, who those people were, what they were like, and how much they were missed.¹³² The claimants came to be heard. And often, being heard was enough.¹³³ This is a crucial piece of justice that the current mass tort system is missing. Claimants also retained autonomy. They had the power to choose between the alternative dispute resolution mechanism and pursuing traditional tort litigation. They had the power to request either an in-person meeting or a formal hearing. Claimants maintained decision-making power in their dispute resolution process.

Years later, the government again commissioned Feinberg to administer a special fund after the Deep Horizon Oil Spill in 2010, which decimated the water and shores of the Gulf Coast.¹³⁴ The Gulf Coast Claims Facility (“GCCF”) had notable differences than the Fund in its establishment and procedures, but overall it offered the same

126. Myriam Gilles, *Public-Private Approaches to Mass Tort Victim Compensation: Some Thoughts on the Gulf Coast Claims Facility*, 61 DEPAUL L. REV. 419, 444 (2012).

127. FEINBERG ET AL., *supra* note 109, at 1.

128. *Id.*

129. *Id.*

130. Kenneth Feinberg, *Transparency and Civil Justice: The Internal and External Value of Sunlight*, 58 DEPAUL L. REV. 473, 475 (2009).

131. *Id.*

132. *Id.*

133. *See id.*

134. Gilles, *supra* note 126, at 427–28, 433.

genre of individualized justice as the Fund.¹³⁵ The GCCF was a \$20 billion private fund established by British Petroleum Oil & Gas (“BP”), with Presidential approval, to compensate Gulf Coast residents without admitting any wrongdoing or negligence.¹³⁶ Individuals whose property or income the oil spill had adversely affected were eligible for compensation, and, if they participated in the GCCF, they were foreclosed from litigation.¹³⁷

In the administration of the GCCF, Feinberg duplicated many of his initiatives from the Fund, such as town hall meetings and individual outreach programs.¹³⁸ The GCCF also offered flexibility to prove losses.¹³⁹ Recognizing that many claimants ran all-cash businesses, it was sufficient for claimants to prove their losses through various other means, such as tax returns, profit-and-loss statements, checkbooks, check stubs, and even a priest of boat captain’s vouching for those losses.¹⁴⁰ Although numbers on exact payouts are less available than in the Fund, which was a governmental effort, the GCCF established a baseline payment of \$250,000 for any eligible claimant.¹⁴¹ Like the Fund, the GCCF offered claimants individualized justice, the opportunity to be heard, and autonomy in the dispute resolution process.

Years before Feinberg successfully administered the Fund and the GCCF, he wrote, “[i]n the complex world of mass torts, [alternative dispute resolution] can play a valuable pre-litigation role in narrowing areas of dispute and encouraging alternative methods of resolution.”¹⁴² In this article, he proposed that courts mandate engagement in pre-trial settlement negotiations, as opposed to making it voluntary, and appoint a court mediator to facilitate settlement negotiations between the

135. *See id.* at 421.

136. *Id.* at 420.

137. *Id.* at 420, 427–28, 433.

138. Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Revolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 821 (2011).

139. Schwartz, *supra* note 108.

140. *Id.*

141. Gilles, *supra* note 126, at 443.

142. Kenneth R. Feinberg, *Resolving MASS Tort Claims: The Perspective of a Special Master*, 53 DISP. RESOL. J. 10, 12 (1998) [hereinafter Feinberg, *Resolving MASS Tort Claims*].

parties.¹⁴³ He further envisioned the role of a Special Master as distributing individualized awards and hearing the concerns of claimants who disagreed with their award allocation.¹⁴⁴

Ideas to redesign the mass tort system by using alternative dispute resolution mechanisms to preserve individualized justice have circulated for decades.¹⁴⁵ The Fund and the GCCF demonstrated that these methods can result in satisfied claimants who retain autonomy, the opportunity to be heard, and provide for efficient, timely decision-making and disbursement of funds. In addition to satisfying non-monetary interests, claimants participating the Fund and the GCCF also received notably higher payouts than plaintiffs in many mass tort cases. Claimants participating in the Fund received an average award of \$400,000 if they had been injured in the attacks or rescue efforts, and the survivors of persons killed received average awards of over \$2 million each.¹⁴⁶ The GCCF had a baseline payment of \$250,000 for claimants.¹⁴⁷ This is a stark contrast from only a few plaintiffs in the Erin Brockovich-led case against Pacific Gas and Electric receiving over \$100,000,¹⁴⁸ and even more so when considering that the average payout to veterans or survivors effected by Agent Orange was approximately \$3,800 each.¹⁴⁹

These ADR system models have shown that they can satisfy both monetary and non-monetary interests on mass scales better than the current mass tort system. However, there has been no notable movement in the legal or policy community to resign the current system. The reasons why society is so attached to the current mass tort system may not be far off from why audiences so enjoy the works of John Grisham.

143. *See id.* at 10.

144. *Id.* at 12.

145. *See generally, e.g.,* Kenneth R. Feinberg, *Do Mass Torts Belong in the Courtroom?*, 74 JUDICATURE 237 (1991); *see also* WEINSTEIN, *supra* note 86, at 2–3; Feinberg, *Resolving MASS Tort Claims*, *supra* note 142, at 12.

146. FEINBERG ET AL., *supra* note 109, at 1.

147. Gilles, *supra* note 126, at 443.

148. *Id.*

149. Veterans Benefits Admin., *supra* note 25.

V. PSYCHOLOGICAL BARRIERS TO THE EXPLORATION OF OTHER
OPTIONS

A. *The Psychology of Winning*

The idea of winning is pervasive in our society. For many of us, even the word itself conjures up images of competition and against-the-odds wins. This obsession manifests in numerous areas of our lives and is hard to escape. From applications to competitive colleges and jobs,¹⁵⁰ to the multi-billion-dollar sports industry,¹⁵¹ to large legal payouts that dominate a news cycle,¹⁵² reminders of competition, winning, and losing bombard us daily. Reading about winning has also risen in popularity in our society. A book with the same title as this section, published in 1979, has sold over 100 million copies to date.¹⁵³ Other books on the topic, such as the aptly named *Winning* by Jack and Suzy Welch, former CEO of General Electric and his partner, offers “how-to” advice on winning and similarly dominate best-seller lists.¹⁵⁴

The real question to ask is why we’re obsessed with winning. The obvious answer is that it feels good to win at anything. Whether

150. See generally, e.g., Anemona Hartocollis, *Greater Competition for College Places Means Higher Anxiety, Too*, N.Y. TIMES (Apr. 20, 2016), <https://www.nytimes.com/2016/04/21/us/greater-competition-for-college-places-means-higher-anxiety-too.html>.

151. See PWC SPORTS OUTLOOK, PRICEWATERHOUSECOOPERS, AT THE GATE AND BEYOND: OUTLOOK FOR THE SPORTS MARKET IN NORTH AMERICA THROUGH 2021 at 3 (Dec. 2017), <https://www.pwc.com/us/en/industry/entertainment-media/publications/assets/pwc-sports-outlook-2017.pdf> (valuing the sports industry at approximately \$78 billion by 2021).

152. See *supra* Sections IA–IB.

153. DENIS E. WAITLEY, *THE PSYCHOLOGY OF WINNING: TEN QUALITIES OF A TOTAL WINNER* (1979); see also Philippe Shock Matthews, *The Psychology of a Winner – An Exclusive Interview with Dr. Denis Waitley*, THE PHILIPPE MATTHEW SHOW, <http://thepmshow.tv/channel/personal-development/the-psychology-of-a-winner-an-exclusive-interview-with-dr-denis-waitley/> (last visited May 15, 2018).

154. JACK WELCH AND SUZY WELCH, *WINNING* (2005); see also Geraldine Fabrikant, *Just Hold the Memoir and Pass the Advice*, N.Y. TIMES (Oct. 3, 2005), <http://www.nytimes.com/2005/10/03/business/media/just-hold-the-memoir-and-pass-the-advice.html>.

it's a board game,¹⁵⁵ or an Olympic sport,¹⁵⁶ we get a thrill from winning—and a thrill from watching those for whom we cheer eventually winning. Digging deeper, the answer lies in how our brains are wired. The culprits? Hormones that reward some behavior over others.

While testosterone is most commonly known as the primary male sex hormone, increased testosterone also heavily correlates with feelings of dominance, competition, and power.¹⁵⁷ The relationship between testosterone and winning has been the subject of a great deal of research over the last few years. Here's what we know. Levels of this hormone increase when people win in athletic and non-athletic circumstances, even when they mistakenly think they're winning.¹⁵⁸ These increases occur in both men and women.¹⁵⁹ However, it is not just winning that results in these increased testosterone levels.

155. See, e.g., Monopoly.

156. See, e.g., *Curling*, OLYMPIC GAMES, <https://www.olympic.org/curling> (last visited May 15, 2018).

157. Angela Grippo & Brad Sagarin, *The Biological Basis for the "Thrill of Victory"*, PSYCHOLOGY TODAY (Jan. 25, 2013), <https://www.psychologytoday.com/blog/the-wide-wide-world-psychology/201301/the-biological-basis-the-thrill-victory>.

158. See generally Alan Booth et al., *Testosterone, and Winning and Losing in Human Competition*, 23 HORMONE BEHAVIOR 556 (1989) (finding, in a study of tennis players, that testosterone rose before matches, rose even more after matches for winners, and that rising testosterone was positively correlated with elevated mood); see also Allan Mazur et al., *Testosterone and Chess Competition*, 55 SOCIAL PSYCHOLOGY QUARTERLY 70–77 (1992) (“We find that winners of chess competitions show higher [testosterone] levels than do losers. Also, in certain circumstances, competitors show rises in [testosterone] before their games, as if in preparation for the contests.”); Alicia Salvador et al., *Anticipatory Cortisol, Testosterone and Psychological Responses to Judo Competition in Young Men*, 28 PSYCHONEUROENDOCRINOLOGY 364, 364 (2002) (“[O]ne group of subjects did display [testosterone] increases, higher [cortisol] levels, and higher motivation to win scores than the other group. Furthermore, this group also obtained a better outcome.”).

159. Raquel Costa & Alicia Salvador, *Associations Between Success and Failure in a Face-to-Face Competition and Psychobiological Parameters in Young Women*, 37 PSYCHONEUROENDOCRINOLOGY 1780, 1780, (2012) (“[W]omen who became winners presented greater [testosterone levels] and positive mood increases . . . than those who lost.”).

Testosterone levels increase through the act of competition itself.¹⁶⁰ They also decrease when watching your “team” lose.¹⁶¹ It seems clear that elevated testosterone levels, giving people increased feelings of dominance and power, is one of the “rewards” of engaging in competition, watching competition, and winning.

Testosterone isn’t the full story. Other hormones that regulate our moods are also important to consider when thinking about this human drive to “win” that has led to systemic competition in our society. One of the most important, when it comes to competition and winning, is dopamine. Dopamine regulates our bodies’ reaction to positive stimuli and closely relates to our feelings of reward and pleasure.¹⁶² While scientists know that there is a strong link between dopamine and the pleasure centers of the brain, exactly *what* causes that high is a topic of much research and debate.¹⁶³ That being said, the literature discusses a release of dopamine during competition, success, and winning as a key driver that gives us that “thrill” of winning.¹⁶⁴ Further, researchers deeply explored dopamine as a

160. Leander van der Meij et al., *Testosterone Responses to Competition: The Opponent’s Psychological State Makes It Challenging*, 84 *BIOLOGICAL PSYCHOL.* 330, 330 (2010) (“[I]rrespective of outcome, the competition led to increases in heart rate and [testosterone] levels.”); *see also* Alicia Salvador, *Coping with Competitive Situations in Humans*, 29 *NEUROSCIENCE & BIOBEHAVIORAL REVS.* 195, 195 (2005), (“More important than winning or losing is the coping pattern displayed by the subject, which determines the hormonal changes experienced when facing competition and its outcome.”).

161. Steven J. Stanton et al., *Dominance, Politics, and Physiology: Voters’ Testosterone Changes on the Night of the 2008 United States Presidential Election*, 4 *PLOS ONE* 1, 1 (Oct. 21, 2009), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0007543> (finding that male Obama voters has stable testosterone after the 2008 election, whereas McCain voters suffered a testosterone drop).

162. *See generally* Wolfram Schultz, *Neuronal Reward and Decision Signals: From Theories to Data*, 95 *PHYSIOLOGICAL REVS.* 853 (2015).

163. *See* Susan Krauss Whitbourne, *The Lure of the Unpredictable Lover*, *PSYCHOLOGY TODAY* (Nov. 13, 2012), <https://www.psychologytoday.com/blog/fulfillment-any-age/201211/the-lure-the-unpredictable-lover>.

164. *See, e.g.*, Mark Lukens, *How to Tap into the Neuroscience of Winning*, *FAST COMPANY* (Oct. 29, 2015), <https://www.fastcompany.com/3052754/how-to-tap-into-the-neuroscience-of-winning>; Eugene Sheely, *The Winner Effect: How Success Affects Brain Chemistry*, *GAMIFICATION* (Feb. 21, 2014),

hormone that motivates us to act; the positive feelings associated with a dopamine release are a key factor in what motivates us to do things.¹⁶⁵

A further complicating factor that comes into play when talking about mass tort systems is that plaintiffs hope for large final payments and settlements. *Prospect Theory*, the seminal paper of behavioral economics, a field which has led to a Nobel Prize for both Daniel Kahneman (in 2002) and Richard Thaler (in 2017),¹⁶⁶ theorizes that, while people are generally risk-averse when evaluating the probability of gains,¹⁶⁷ when gains are extremely improbable—as they generally are when dealing with the likelihood of a favorable and large verdict in a mass tort trial—the same people become risk-seeking.¹⁶⁸ This could be part of the reason why individuals pursue these trials even when alternatives to a trial may better meet their overall interests. The lure of a large payout may trump traditional considerations, such as the expected value of the payout when factoring in the probability of success and ideas around things like sunk costs at different decision points that one would go through during an extended trial.

This research review, while not even close to exhaustive, gives us the means to hypothesize that our desire to compete and win is biologically driven and, as a result, we put ourselves in situations that expose us to the release of these “feel-good” hormones. These offer a biological explanation for why we compete to win across various parts of society. While the most quintessential examples of competition in our society involve sports, we have established that competition can take many forms, and that all sorts of competition and viewing opportunities increase levels of testosterone and dopamine. These hormonal responses to competition motivate us to compete further and,

<http://www.gamification.co/2014/02/21/the-winner-effect/>. See also generally IAN H. ROBERTSON, *THE WINNER EFFECT: THE NEUROSCIENCE OF SUCCESS AND FAILURE* (2012) (describing the impact that success and winning has on the brain).

165. See, e.g., John D. Salamone & Mercè Correa, *The Mysterious Motivational Functions of Mesolimbic Dopamine*, 76 NEURON 470 (2012), [https://www.cell.com/neuron/pdf/S0896-6273\(12\)00941-5.pdf](https://www.cell.com/neuron/pdf/S0896-6273(12)00941-5.pdf).

166. See John Cassidy, *The Making of Richard Thaler’s Economics Nobel*, THE NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/john-cassidy/the-making-of-richard-thalers-economics-nobel>.

167. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 264, (1979).

168. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 342 (1984), <http://psycnet.apa.org/record/1985-05780-001>.

over time, develop systems that encourage competition for competition's sake, as opposed to looking at the underlying interests and desires of the parties that are involved in the competition.¹⁶⁹ Whether these competitions manifest within sports, politics, or battles of the mind, our physiological draw to and enjoyment of the competitive process, and our feeling like we or our team “won,” is a process worth evaluating to determine whether this process to which we have all subscribed—the mass tort litigation scheme—is more beneficial to our overall affect.

Big wins and big losses may draw us to engage in a high-stakes mass tort system and see ourselves or the “team” that we support participating in that competition. Although alternative dispute resolution processes may offer outcomes that better satisfy the participants' interests, we are wired to create and seek out systems that are zero-sum, not win-win.

B. Why We Love John Grisham

John Grisham is one of the best-known authors of our generation. There are over 300 million copies of his books in more than 40 languages circulating around the world.¹⁷⁰ Nine of his books have become movies.¹⁷¹ He also received the Peggy V. Helmerich Distinguished Author Award, the Galaxy British Lifetime Achievement Award, the Library of Congress Creative Achievement

169. A recent example of this is in the recent irrefutable evidence that playing football at the professional level leads to traumatic brain injuries. See Jesse Mez et al., *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, 318 J. AM. MED. ASS'N 360, 360–69, (2017), <https://jamanetwork.com/journals/jama/fullarticle/2645104>. The sports community has been slow to acknowledge these results and implement changes to protect players while football viewership surges. See, e.g., Ta-Nehisi Coates, *The NFL's Response to Brain Trauma: A Brief History*, THE ATLANTIC (Jan. 25, 2013), <https://www.theatlantic.com/entertainment/archive/2013/01/the-nfls-response-to-brain-trauma-a-brief-history/272520/>; Jill Martin, *NFL Acknowledges CTE Link with Football. Now What?*, CNN (Mar. 16, 2016), <http://www.cnn.com/2016/03/15/health/nfl-cte-link/index.html>.

170. *Biography*, JOHN GRISHAM, <http://www.jgrisham.com/bio/> (last visited May 15, 2018).

171. *Id.*

Award for Fiction, and the Harper Lee Prize for Legal Fiction (twice).¹⁷²

His popularity as an author is undeniable. What interests us is *why* he's so popular. His books are engaging and thrilling, the type of book that you "can't put down," a perfect lazy Sunday afternoon read. But why? What exactly is it that pulls us in and creates that sort of effect on us? Acknowledging that there are many reasons why a book may be engaging, we're going to try to establish a link between John Grisham novels and the psychology of winning to determine why we, as a society, love Grisham novels.

1. The Thrill of Unpredictability

John Grisham is a master of the legal thriller.¹⁷³ His novels, many of which we read throughout the course of our research for this Essay, take the reader on an adventure with many twists and turns, dead-ends, and cliff-hangers. The reader spends the entire book wondering what will happen next, and the results are not always predictable. In some cases, the sympathetic plaintiff whom we've grown to love prevails over the caricatured villain.¹⁷⁴ In others, the reader feels disappointed after the clear villain of the story comes out ahead, usually through some sort of systemic manipulation, lie, or

172. See *Tulsa Library Trust's The Peggy V. Helmerich Distinguished Author Award: Award Winners*, TULSA LIBRARY TRUST, <http://helmerichaward.org/winners.php> (last visited Mar. 21, 2018); *Grisham Scoops Major Book Award*, METRO NEWS (Mar. 28, 2007), <http://metro.co.uk/2007/03/28/grisham-scoops-major-book-award-233940/>; *2009 Library of Congress Creative Achievement Award*, LIBRARY OF CONGRESS, <https://www.loc.gov/about/awards-and-honors/fiction-prize/john-grisham/> (last visited Mar. 21, 2018); Allen Pusey, *John Grisham Wins First Harper Lee Prize for Legal Fiction*, AM. B. ASS'N J. (Jul. 28, 2011), http://www.abajournal.com/news/article/john_grisham_wins_first_harper_lee_prize_for_legal_fiction/; *Harper Lee Prize for Legal Fiction Archive 2014*, UNIV. OF ALA., <https://www.law.ua.edu/programs/harper-lee-prize-for-legal-fiction/archive-2015/> (last visited May 15, 2018).

173. A "thriller" is "a work of fiction or drama designed to hold the interest by the use of a high degree of intrigue, adventure, or suspense." *Thriller*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/thriller> (last visited May 15, 2018).

174. See, e.g., JOHN GRISHAM, *THE RUNAWAY JURY* (1996).

coercion.¹⁷⁵ In others still, there is no clear “winner”; Grisham leaves readers without a clearly defined “winner,” and they must instead settle for a more neutral conclusion.

What are these books doing to us that keep drawing us in? A number of researchers have explored this question over the years with respect to both thriller and horror novels and movies.¹⁷⁶ One researcher who has looked deeply into this question is Margie Kerr.¹⁷⁷ Kerr argues that feelings of fear and dread release “go hormones” into our bodies.¹⁷⁸ These hormones include adrenaline, endorphins, dopamines, serotonin, and oxytocin, which produce a high arousal state in us.¹⁷⁹ These feelings can come from watching scary situations, as well as actually being in them.¹⁸⁰ This theory also translates to thrillers. Dr. Sam Fraser, a clinical psychologist, has stated that:

The thriller (or indeed the thrill itself) can be viewed as a lever /stimulus on certain key areas of the brain, i.e. the buzz, drug. Hence the idea that we cannot put a book down, i.e. like an addict, we need another “hit”. [sic] The thrill centres of the brain are termed the reward pathways and are mediated by the flow and release of dopamine—the same neurotransmitters that are affected by cocaine and other drugs.¹⁸¹

175. See, e.g., JOHN GRISHAM, *THE APPEAL* (2008).

176. Stephen King, *Why We Crave Horror Movies*, *PLAYBOY*, Jan. 1981, at 150.

177. See generally MARGEE KERR, *SCREAM: CHILLING ADVENTURES IN THE SCIENCE OF FEAR* (2015) (outlining the science of fear and how it impacts our bodies and minds).

178. Jason Bailey, *The Psychology of Scary Movies*, *FLAVORWIRE* (Oct. 27, 2016), <http://flavorwire.com/592727/the-psychology-of-scary-movies>.

179. *Id.*

180. *Id.* See also Thomas Straube et al., *Neural Representation of Anxiety and Personality During Exposure to Anxiety-Provoking and Neutral Scenes from Scary Movies*, 31 *HUMAN BRAIN MAPPING* 36, 36 (2009), <http://onlinelibrary.wiley.com/wol1/doi/10.1002/hbm.20843/abstract> (“These results support models predicting cerebral hypoactivation in high sensation seekers during neutral stimulation, which may be compensated by more intense sensations such as watching scary movies.”).

181. Rebecca Whitney, *What’s Behind The Allure of the Thriller?*, *HUNGER TV* (Feb. 16, 2015), <http://www.hungertv.com/feature/whats-behind-allure-thriller/>.

Others agree.¹⁸² The release of hormones like dopamine pulls us in and keeps us turning pages well past when we should have gone to sleep. Further, the rush of dopamine is tied to the uncertainty of outcomes: chasing a result that we're not sure we will ever achieve results in a dopamine surge when that result comes to pass, whereas a predictable "win" does not create nearly the same effect.¹⁸³ The rush we feel from reaching a thriller may explain in part how a master author like John Grisham keeps us engaged.

2. The Underdog Effect

A second element that pervades Grisham's novels is the underdog effect. Since the story of David and Goliath,¹⁸⁴ the underdog effect and the victory of the perceived underdog over a larger and more powerful opponent has captured the hearts and minds of society.¹⁸⁵ Authors have taken advantage of this trope for centuries, with many prominent examples including timeless classics like J.R.R. Tolkien's *The Hobbit*¹⁸⁶ and *The Lord of the Rings* trilogy,¹⁸⁷ J.K. Rowling's

182. See, e.g., Jenni Ogden, *Our Love Affair with Thrillers and Suspense*, PSYCHOLOGY TODAY (Oct. 28, 2015), <https://www.psychologytoday.com/blog/trouble-in-mind/201510/our-love-affair-thrillers-and-suspense> ("Our brains release neurotransmitters like dopamine, and oxytocin when we are intensely emotional (intensely happy as well as scared, or horrified) and these can serve to consolidate memories, and even strengthen bonds between us and others sharing the same experience.").

183. See generally David H. Zald et al., *Dopamine Transmission in the Human Striatum During Monetary Reward Tasks*, 24 J. NEUROSCIENCE 4105 (2004), <http://www.jneurosci.org/content/jneuro/24/17/4105.full.pdf> ("These data indicate: . . . (2) the complex and regionally specific influence of [variable ratio reward] schedules on dopamine transmission.").

184. 1 *Samuel* 17.

185. See, e.g., L. Jon Wertheim & Sam Sommers, *The Eternal Appeal of the Underdog*, N.Y. TIMES (Mar. 15, 2016), <https://www.nytimes.com/2016/03/15/opinion/the-eternal-appeal-of-the-underdog.html>.

186. J.R.R. TOLKIEN, *THE HOBBIT* (1937).

187. J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* (1954); J.R.R. TOLKIEN, *THE TWO TOWERS* (1954); J.R.R. TOLKIEN, *THE RETURN OF THE KING* (1955).

Harry Potter series,¹⁸⁸ and C.S. Lewis's *The Chronicles of Narnia*.¹⁸⁹ Grisham furthers this trend as well. In many of the stories he tells, the sympathetic protagonist is horribly outmatched by his or her opponent, whether that's a giant and shadowy corporation, a large law firm with seemingly unlimited resources, or the monolithic government of the United States.¹⁹⁰

This is no accident. To add to our love of competition and winning, we as a society absolutely love the underdog. A series of four studies published in 2008 found that participants rooted for the underdog in athletics, in business, and in artistic competitions.¹⁹¹ This phenomenon went even further: in one of these studies, people were likely to sympathize with and identify with struggling *geometric shapes*, as well as with humans.¹⁹² We can't help but identify with the underdog in any sort of competitive settings; we argue that this also applies to trials. The picture Grisham paints in several books—the

188. J.K. ROWLING, HARRY POTTER AND THE PHILOSOPHER'S STONE (1997); J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS (1998); J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (1999); J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE (2000); J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX (2003); J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE (2005); J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (2007).

189. C.S. LEWIS, THE LION, THE WITCH, AND THE WARDROBE (1950); C.S. LEWIS, PRINCE CASPIAN (1951); C.S. LEWIS, THE VOYAGE OF THE DAWN TREADER (1952); C.S. LEWIS, THE SILVER CHAIR (1953); C.S. LEWIS, THE HORSE AND HIS BOY (1954); C.S. LEWIS, THE MAGICIAN'S NEPHEW (1955); C.S. LEWIS, THE LAST BATTLE (1956).

190. *See generally* JOHN GRISHAM, THE RAINMAKER (1995); JOHN GRISHAM, THE RUNAWAY JURY (1996); JOHN GRISHAM, THE STREET LAWYER (1998); JOHN GRISHAM, THE KING OF TORTS (2003); JOHN GRISHAM, THE APPEAL (2008); JOHN GRISHAM, THE LITIGATORS (2011); JOHN GRISHAM, GRAY MOUNTAIN (2014). We have grouped these sources and kept them generic in order to preserve the element of mystery and unpredictability in these books for readers who haven't had the pleasure of diving into this entire list of novels.

191. *See generally* JongHan Kim et al., *Rooting for (and Then Abandoning) the Underdog*, 38 J. APPLIED SOC. PSYCHOLOGY 2550 (2008), <http://onlinelibrary.wiley.com/doi/10.1111/j.1559-1816.2008.00403.x/full>.

192. *Id.* In one of the examples, researchers animated geometric shapes to make it seem like some of the shapes moving around the screen were struggling to move around, simulating an "underdog." *Id.* at 2559. People identified and sympathized more with those shapes. *Id.* at 2563.

outmatched attorney or plaintiff against the big, bad corporation or government—is a trope, but a very effective one. It is no coincidence that the classic pieces of fiction cited earlier are all world-famous. We enjoy the underdog story, and it is plausible that this enjoyment also translates to our views of mass tort trials in real life. Seeing a group of plaintiffs who are terribly outmatched by the legal department of a large corporation motivates us to root for the plaintiffs, perhaps at the expense of questioning whether the competition that the plaintiffs and defense engage in is the best thing for the parties involved.

Following a theme that our readers are familiar with by now, there are reasons embedded in the way that we think and act as flawed human beings that account for these tendencies. We identify with underdogs because we empathize with their stories and because we are concerned about fairness. When we perceive unfairness in a situation, we root for the underdog in order to balance the scales.¹⁹³ These tendencies are ingrained in our hormonal makeup, and scientists have found a hard-wired preference for altruism that leads to this effect.¹⁹⁴

3. Victory and Validation

Lastly, at least some of the time, at the end of a Grisham novel we find that the protagonist has persevered and that we have, in effect, “won.” Finding out that the person that we have been rooting for has succeeded feels good, namely due to the hormonal releases of things like testosterone and dopamine that are released into our bodies. Dopamine also motivates us to chase that feeling further, which leads to us pursuing more and more books that give us a chance to “win.” This addicting nature is likely a cause behind the idea of a “page-turner,” as we race to find out whether the character or team for whom we root ends up succeeding. If they do, we experience a rush of hormones that feel good, and the cycle continues.

193. See generally Scott T. Allison & Jeni L. Burnette, *Fairness and Preference for Underdogs and Top Dogs*, in SOCIAL DECISION MAKING: SOCIAL DILEMMAS, SOCIAL VALUES, AND ETHICAL JUDGMENTS 291 (Roderick M. Kramer et al. eds., 2010); see also Kim et al., *supra* note 191.

194. See generally PAUL J. ZAK, *THE MORAL MOLECULE: THE SOURCE OF LOVE AND PROSPERITY* (2012) (outlining the theory of moral behavior).

C. Creating a New Normal

Many legal scholars have written about the many flaws of mass tort systems, some of which we have described in this paper. Our aim here is not to be exhaustive but to provide a new perspective to the debate about how to best handle these types of cases and to give light to some of the barriers that will prevent society from moving forward on these ideas. The reality of the outcomes that we have discussed here is simply that the current system is not protecting the most vulnerable members of our society, and while the headlines make it seem that defendants are making huge payouts, the plaintiffs who receive those payouts are actually getting very little of that money—certainly not enough to pay for many of the medical expenses that they must endure as a result of the harm suffered.

The barriers that we have discussed in this section are vast and particularly hard to combat, given that they come down to biological processes over which we have little control. Whatever system we derive, we will need to keep in mind that we are wired for competition and embracing systems that may end up doing more harm than good. Remembering this will allow us to design systems that don't ignore these intricate parts of our physiology, but instead embrace them in a way that is productive and just for all individuals involved in these suits.

While determining how to proceed, it is important to also remember that definitions of “winning” are not as monolithic as we may wish they were. The cases that we have discussed in this Essay all had outcomes that were solely financial. While financial compensation in order to help individuals pay for the harm they have endured may be part of a system, money is not always the final answer, nor should it be the only part of settlement agreements that defendants make to compensate for harms done. Sometimes all a plaintiff needs to right a wrong is an apology.¹⁹⁵ Sometimes they need more. By delving into the interests of individuals and finding out what is really important to them in these cases, we can create systems that meet those needs directly, rather than using money as an imperfect process for making an individual whole. The mass tort system can take guidance from the ADR systems designed to provide those killed, injured, or

195. See *Michigan Medicine*, *supra* note 87 and accompanying text.

otherwise harmed during September 11th and by the Deep Horizon Oil Spill. In both of these processes, no entity admitted defeat, and no side won the title of victor. But the claimants had the opportunity to choose to participate in the system, which provided them with interest-meeting outcomes: the opportunity to be heard, timely and efficient decision-making and disbursement of funds, and higher rates of compensation than is usually seen in mass torts. Moreover, claimants had autonomy—they could choose to participate in the compensation funds or instead proceed with individual tort litigation. Very few claimants chose the latter option. For instance, while the Fund fulfilled the claims of over 5,500 individuals, only seventy eligible claimants instead decided to file individual lawsuits.¹⁹⁶ Additionally, in neither the Fund, which Congress publicly established, nor the GCCF, which BP privately established, did the compensating entity have to admit any fault or guilt. This opportunity for face-saving may also encourage potential defendants to opt into such a system. Establishing a system to address mass torts that mirrors ADR-based mass claimant systems may overall provide more satisfying justice for all of the parties involved. And it can do so without eliminating the option of individual litigation for the few potential plaintiffs who opt out of the compensation systems and instead proceed with individual torts. Designing an ADR-based mass tort system eliminates the process that forces hundreds or thousands of nameless, faceless plaintiffs to bank their claims solely on either a decision to settle or a verdict determined without their input, consent, or opportunity to be heard.

VI. CONCLUSION

Throughout this Essay, we have walked through the current mass tort system framework, some alternative theories for how to approach these cases, and why we as a society have bought and continue to buy into this system, despite evidence that it is not serving its goal of “administering justice” for many of the participants and for society as a whole. In the quintessential current mass tort case, a group of plaintiffs band together to challenge a corporation who has done some sort of harm to them as a group—typically a pervasive harm, such as creating a cancer pocket or disseminating false information

196. FEINBERG ET AL., *supra* note 109, at 1.

about a dangerous product. We theorized that part of the reason why John Grisham has become such an icon in our society is his use of these types of cases—cases that by their very nature are thrilling—in his stories. John Grisham’s novels give us a paradigm through which we can view the mass tort system to identify the elements of this system that we could improve to afford plaintiffs more access to the justice and fairness that the system should uphold.

John Grisham has also given us material that we can examine to theorize as to why his books are so popular and, through that, theorize about why mass tort systems in general may be the dominant method of dealing with these types of claims. We have argued that the competitive nature of these trials, the high dollar figures in “wins,” and the emotional highs and lows of such a process allow us to succumb to hormonal releases in our bodies that activate the pleasure centers of our brains—making these systems seem like the best driver of outcomes given our proclivities for competition and a “showdown” in court.

These effects are pervasive throughout Grisham’s novels, and we have extrapolated those examples to explain societal expectations and perceptions of mass tort systems more broadly. While this system is currently the normal route to pursue justice for systemic misdeeds that impact a large number of people, it does not always engage with plaintiffs and defendants in ways that drive towards the most amount of fairness and justice in those proceedings. In some of the cases that we have discussed, this system did not meet very evident interests of both parties, and the complicated and structured nature of these proceedings meant that actors would never have their interests met.

We have proposed alternatives to this system that are worth exploring in more detail to see if they will do a better job at fulfilling the ultimate goals of a justice system. A measured analysis of the motivations behind our current preferences within the justice system, and smart design of a system that takes into account those preferences while also working towards justice as perceived by the parties affected, will be paramount to a more just and fair system going forward.