

# NEW FRONTIERS IN TORT LAW AND THE CHALLENGES OF SCIENCE, TECHNOLOGY & INNOVATION: AN INTRODUCTION

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On February 7, 2020, Southwestern Law School hosted a live symposium entitled, *New Frontiers in Torts: The Challenges of Science, Technology, and Innovation*. The Symposium brought together leaders nationally in academia and law practice to discuss the latest developments in technology in law practice, litigation finance, tort litigation, and tort theory. The Symposium was the inaugural event of the Southwestern's Panish Civil Justice Program, endowed by Southwestern alumnus Brian Panish '84. Professor Alan Calnan and I served as Co-Chairs for the event. In this issue, the *Southwestern Law Review* presents the insightful articles and transcripts resulting from the Symposium's stimulating exchange of views.

The Symposium's first panel pertained to *New Technologies and Science in Tort Practice*. Speakers included Michael Green, Bess and Walter Williams Professor of Law at Wake Forest University School of Law;

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\* Associate Dean for Strategic Initiatives, Director of the Civil Litigation and Advocacy Concentration, and Professor of Law, Southwestern Law School, Los Angeles, California; J.D., Harvard Law School; LL.M., Temple University School of Law; B.A., University of Pennsylvania. I thank the participants of the Symposium, *New Frontiers in Torts: The Challenges of Science, Technology, and Innovation* at Southwestern Law School. I particularly wish to thank the late Professor Alan Calnan, with whom I co-chaired the organization of the Symposium, not only for his work on the Symposium, but for the benefit of the past 15 years as his colleague and friend; he is sorely missed. I also thank Southwestern alumnus Brian Panish '84 for his generosity in endowing Southwestern's Panish Civil Justice Program. For their many efforts in assisting the Symposium, I thank Southwestern's Associate Dean for Student Affairs Robert Mena; Associate Dean for Institutional Advancement Debra Leathers; Director of Special Projects Mark Thaler; Chief Communications & Marketing Officer Hillary Kane; and Associate Dean for Career Services and Sharzad Poormosleh, as well as Southwestern Law Review Editor-in-Chief Kelsey Finn, Managing Editor Benjamin Israel, and Special Projects Editor David Zakharian. For his assistance in assembling the Symposium, I also thank Mark Behrens, Co-Chair of the Public Policy Group at Shook, Hardy & Bacon.

Richard Marcus, Coil Chair in Litigation and Distinguished Professor of Law at UC Hastings College of Law; R. Rex Parris, Founding Partner of the Parris Law Firm; and Michael Sander, Managing Director and Founder of Docket Alarm and Director of Fastcase Analytics. Ronald Aronovsky, Professor of Law at Southwestern Law School, served as moderator of the panel.

The Symposium's second panel addressed New Means of Financing Lawsuits and Law Firms. Speakers included John Beisner, Partner and Leader of the Mass Torts, Insurance and Consumer Litigation Group at Skadden, Arps, Slate, Meagher & Flom LLP; Fiona Chaney, Investment Manager and Legal Counsel at Bentham IMF; James Fischer, Professor of Law at Southwestern Law School; and Anthony Sebok, Professor of Law at Yeshiva University Cardozo School of Law. I served as moderator for the panel.

The Keynote Luncheon Discussion focused on Torts: Past, Present, and Future. Discussants included Brian Panish, Founding Partner of Panish, Shea & Boyle LLP; and Victor Schwartz, Co-Chair of the Public Policy Group at Shook, Hardy & Bacon. Catherine Sharkey, Crystal Eastman Professor of Law at New York University School of Law, served as moderator.

The Symposium's third panel explored New Developments in Tort Litigation. Speakers included Mark Behrens, Partner and Co-Chair of the Public Policy Group at Shook, Hardy & Bacon; Manuel Gomez, Associate Dean of International & Graduate Studies and Professor of Law at Florida International University College of Law; Francis McGovern, Professor of Law at Duke University School of Law; and Linda Mullenix, Morris & Rita Atlas Chair in Advocacy at University of Texas at Austin School of Law. Adam Zimmerman, Professor of Law and Gerald Rosen Fellow at Loyola Marymount University Law School Los Angeles, served as moderator for the panel.

The Symposium's fourth panel discussed New Ventures in Tort Theory. Speakers included Alan Calnan, Professor of Law at Southwestern Law School; Gregory Keating, Maurice Jones, Jr. – Class of 1925 Professor of Law and Philosophy, University of Southern California Gould School of Law; Christopher Robinette, Professor of Law and Director, Advocacy Certificate Program, Widener University Commonwealth Law School; and Kenneth Simons, Chancellor's Professor of Law, UC Irvine School of Law. Dov Waisman, Vice Dean and Professor of Law at Southwestern Law School, served as moderator for the panel.

The Symposium concluded with a capstone session on Surveying the New Frontiers of Tort Law: Quick Takes, Questions and Answers. Professor Calnan and I began the session by offering our reactions to the symposium presentations, and then turned to other speakers for their reactions to the

day's presentations. Thereafter, Professor Calnan and I moderated a discussion session involving symposium speakers from throughout the day and symposium attendees.

This issue presents twelve articles and transcripts from the presentations at the Symposium. The first article presented is Professor Alan Calnan's *Holistic Tort Theory*.<sup>1</sup> Eschewing established theories of torts based on corrective justice, civil recourse, deterrence, and compensation, his holistic theory views torts as a "system of complex systems" that is produced by individual human decisions, social influences, and biological effects. Accordingly, to understand torts, he urges scholars to consider insights from the humanities, social sciences, and natural sciences. Drawing upon systems theory, he analogizes tort law to the various systems within the human body that regulate themselves and serve various functions, together producing homeostasis and supporting life. He suggests the homeostatic systems supporting human life and stability include an array of emotional and social behaviors, such as fairness, reciprocity, loyalty, respect for authority, peaceful coexistence, and aversion to lying, cheating, and harm. These interpersonal inclinations and practices ultimately coalesce into institutions and law. He argues that law's regulatory systems also inform and update the law, and in turn, that law influences broader cultural values and norms. With regard to tort law in particular, he states that a tort lawsuit by a grievant conveys a signal that an imbalance may have occurred among the relationships of individuals in society and that a legal remedy may be required to restore systemic equilibrium. Suggesting the universality of legal systems, he points to transcultural studies showing that legal systems around the globe have developed generally similar laws of property, contracts, crimes, and torts. In addition, he traces the evolution of the human brain from selfish drives to social coordination, with rational thinking to balance conflicting urges, and argues that tort law and the court system similarly rationally balance the selfish urges of litigants with legal and social desires for justice, prosperity, and harmony. Within tort law, he charts the gradual growth of liability for intentional torts, strict liability, and negligence, and their protection of basic human norms. Furthermore, he explores several anomalies in a holistic conception of tort law, including the disconnect between analytic reasonableness in tort and the feelings-based reasoning employed by humans generally; the mismatch of tort's approach to personal wrongdoing and our moral intuition; and the rejection by jurors of tort law's atomistic approach to a claim's elements for liability.

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1. Alan Calnan, *Holistic Tort Theory*, 49 SW. L. REV. 362 (2021). The late Alan Calnan was Professor of Law at Southwestern Law School.

The next article presented is *Rendering Justice in Key Areas of Tort Law in the Next Decade*, by Victor Schwartz.<sup>2</sup> He presents three areas in which he argues that judges should act to ensure that liability is not imposed on parties who have no responsibility. First, he suggests that judges serve as active gatekeepers to ensure that expert testimony is grounded in science, not conjecture. Second, he urges judges not to undertake “deep pocket jurisprudence” that places liability on solvent parties who have no responsibility for harm. For example, he cites courts’ application of innovator liability, in which a company that developed a drug is sued by a plaintiff who was injured by another company’s generic production of the drug that is required by federal law to carry the same warning label as the branded drug. Another example provided is the use of a public nuisance theory to sue an available defendant, such as gun or lead paint manufacturers, rather than to bring suit against the person he views as the real wrongdoer, such as the criminal that fired the gun or the landlord who let the paint fall into disrepair. Third, he argues that judges should resist “regulation through litigation,” under which he states that judges alter tort law and disregard precedent because of their belief that executive and legislative branches of government are not fulfilling their public policy function properly. In particular, he argues that climate change litigation seeks to usurp the responsibilities of Congress and the Environmental Protection Agency (EPA). In addition, he points out that litigation against gun manufacturers in Connecticut following the 2012 Sandy Hook mass shooting may lead to additional claims that avoid the protection of gun manufacturers in the federal Protection of Lawful Commerce in Arms Act. Moreover, he suggests that the Roundup litigation is contrary to the findings of numerous regulatory bodies, including the EPA, which have determined that Roundup is not carcinogenic. Furthermore, he sees further regulation by litigation in the use of public nuisance in opioid litigation and in data privacy, as well as pharmaceutical litigation involving failure to warn for FDA-approved labels. He also sees litigation by localities, often with hired private contingent-fee plaintiffs’ lawyers, as inappropriately pursuing regulation by litigation, rather than deferring to the state’s Attorney General.

The next article is *Outgunned No More?: Reviving a Firearms Industry Mass Tort Litigation*, by Professor Linda Mullenix.<sup>3</sup> She examines the

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2. Victor Schwartz, *Rendering Justice in Key Areas of Tort Law in the Next Decade*, 49 SW. L. REV. 378 (2021). Victor Schwartz is Co-Chair of the Public Policy Group of Shook, Hardy & Bacon LLP.

3. Linda S. Mullenix, *Outgunned No More?: Reviving a Firearms Industry Mass Tort Litigation*, 49 SW. L. REV. 390 (2021). Linda Mullenix is Morris & Rita Atlas Chair in Advocacy at University of Texas at Austin School of Law.

possibility of firearms industry litigation following the approach taken by plaintiffs following the 2012 Sandy Hook elementary school shooting. She notes that the Connecticut Supreme Court held that the federal Protection of Lawful Commerce in Arms Act did not preempt plaintiffs' claims under state law against firearms manufacturers, because of the "predicate statute" exception to immunity, and that the United States Supreme Court in 2019 denied certiorari on appeal from the Connecticut Supreme Court. She then reviews the history of litigation against the firearms industry. Thereafter, she examines the development of mass tort litigation generally, inquiring as to the reasons why certain litigation develops into mass torts, while other litigation does not. Among the insightful indicators for a mass tort she details are the following:

- (1) [D]evelopments or changes in the law, (2) regulatory recall, alert, or notice of a defective product, (3) establishment of a track record of litigation victories and settlements, (4) rise in the interest of the plaintiffs' bar in pursuing litigation, (5) emergence of a critical mass of similarly-situated claimants, (6) docket congestion, (7) judicial reception toward aggregating and managing multiple claims litigation, (8) discovery of underlying facts and public dissemination of discovery materials, (9) development of underlying science or expert testimony in proof of claims, (10) the interest of states' attorneys general in pursuing relief on behalf of their citizenry, (11) agile, strategic lawyering in response to changing litigation developments, and (12) the willingness of putative defendants and their insurers to come to the negotiation table.<sup>4</sup>

She then turns to contemporary litigation against the firearms industry and assesses whether such litigation might develop into a mass tort litigation. After applying the factors for mass tort litigations to firearms industry litigation and finding that two factors favor a firearms industry mass tort while the others do not or are not currently relevant, she concludes that firearms industry litigation is at most a newly born mass tort.

The next article presented is *The Rule of Science and the Rule of Law*, by Mark Behrens and Andrew Trask.<sup>5</sup> They address the problem of courts admitting questionable expert evidence on the grounds that the related scientific disputes concern the weight of evidence, rather than the reliability of the proposed scientific evidence. Msrs. Behrens and Trask highlight the concern that once admitted to trial, unreliable scientific evidence might lead a jury to engage in a *post hoc* fallacy, believing that because one thing

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4. *Id.* at 409.

5. Mark A. Behrens & Andrew J. Trask, *The Rule of Science and the Rule of Law*, 49 SW. L. REV. 436 (2021). Mark Behrens is Co-Chair of the Public Policy Group at Shook, Hardy & Bacon in Washington, D.C., and Andrew Trask is Of Counsel at Shook, Hardy & Bacon in Los Angeles, California.

followed another, then the first occurrence must have caused the second. In particular, Msrs. Behrens and Trask point to a weakening of the rule of science in mass torts in the low-dose asbestos exposure litigation and the Roundup cancer trials in California, as well as in the talcum-powder litigation involving allegations of ovarian cancer. In the asbestos litigation, Msrs. Behrens and Trask critique the “any exposure” theory of causation, under which any exposure to asbestos is deemed a cause of injury, regardless of dose. In the Roundup Litigation, Msrs. Behrens and Trask criticize certain courts’ decisions to admit expert testimony that Roundup causes cancer, based on a report of the International Agency for Research on Cancer of the United Nations’ World Health Organization, notwithstanding the determination of the United States Environmental Protection Agency that the Roundup ingredient glyphosate poses no risks to human health. Msrs. Behrens and Trask highlight the filing in the talcum-powder litigation of numerous cases and admission of scientific expert testimony on causation prior to a January 2020 article in the *Journal of the American Medical Association* found no statistically significant association between talcum powder and ovarian cancer. Notwithstanding the *JAMA* article, Johnson & Johnson subsequently removed its talcum powder from the market and announced it would pay \$100 million to settle related lawsuits, according to Msrs. Behrens and Trask.

They also suggest several reforms to improve the treatment of scientific expert testimony in courts. First, Msrs. Behrens and Trask raise the possibility of amending Federal Rule of Evidence 702 to address its inconsistent application. Second, they suggest that practitioners consider challenging trial courts’ rulings under the abuse-of-discretion standard on appeal.

The following article presented is *Brave New World: Technology and Tort Practice*, by Professor Richard Marcus.<sup>6</sup> He focuses on several topics relating to procedure and tort. First, he addresses e-discovery, noting the growing prevalence of social media, smart phones, mobile apps, and the “Internet of Things.” Second, he discusses the effects of technology in online interactions between lawyers and prospective clients, and online juror research. Third, he considers the use of digital information such as virtual-assistant smart speakers as proof in court. Fourth, he notes the enormous growth of federal multidistrict litigation, raising potential concerns from individually represented plaintiffs’ attorneys about court-appointed lead counsel and attorneys’ fees, as well as concerns from defendants about

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6. Richard Marcus, *Brave New World: Technology and Tort Practice*, 49 SW. L. REV. 455 (2021). Professor Marcus holds Coil Chair in Litigation and is Distinguished Professor of Law at UC Hastings College of Law.

questionable claims in multidistrict litigation. Last, he highlights the growth of litigation finance and related proposals for the Federal Rules of Civil Procedure.

The next article presented is *Incorporating an Actual Malice Exception to Section 230 of the Communications Decency Act*, by Professor Christopher Robinette and Shannon Costa.<sup>7</sup> Under section 230 of the Communications Decency Act of 1996, they state that interactive computer services have broadly benefitted from civil immunity for the statements of their users. Professor Robinette and Ms. Costa note that the basis for this provision was concern that the companies' republishing of its users' defamatory statements would lead to liability for the companies. Professor Robinette and Ms. Costa observe that under section 230, courts have protected interactive computer services for numerous cases involving defamatory statements, sex trafficking, and catfishing impersonation schemes. As a result of concern particularly regarding sex trafficking, Professor Robinette and Ms. Costa observe that Congress enacted the Fight Online Sex Trafficking Act to remove immunity for services used to promote or facilitate the prostitution of another person. They relate that others have proposed the full repeal of section 230 or a notice-and-takedown approach to address concerns of defamatory statements and catfishing impersonation on interactive computer services. In contrast, Professor Robinette and Ms. Costa suggest a complete repeal of section 230 would be unduly burdensome on interactive computer services. Professor Robinette and Ms. Costa state that even if the interactive computer services were treated as distributors (such as bookstores or libraries) rather than publishers, the interactive computer services would be subject to liability as distributors if they know or have reason to know of defamatory material. Professor Robinette and Ms. Costa note that companies such as Facebook and Twitter have billions or hundreds of millions of users, making it untenable for the companies to determine whether they had reason to know of posted defamatory material. Moreover, Professor Robinette and Ms. Costa argue that in the absence of section 230, interactive computer services might face a moderator's dilemma, under which they would be held liable as publishers of defamatory comments if the companies exercised editorial control over content, leading them to refrain from undertaking any content moderation. While Professor Robinette and Ms. Costa find notice-and-takedown reform proposals appealing, they remain concerned that such

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7. Christopher Robinette & Shannon N. Costa, *Incorporating an Actual Malice Exception to Section 230 of the Communications Decency Act*, 49 SW. L. REV. 462 (2021). Professor Robinette is Professor of Law and Director of the Advocacy Certificate Program, Widener University Commonwealth Law School. Ms. Costa is a member of the Widener University Commonwealth Law School class of 2021.

proposals would result in a heckler's veto because companies would be subject to a large number of requests to remove material, and companies would generally remove objected-to material to avoid liability. Instead, Professor Robinette and Ms. Costa look to the actual malice standard, under which a defendant is liable for publishing a defamatory statement relating to a public figure's conduct, fitness, or role in that capacity, if the defendant knew the statement was false or published the statement in reckless disregard of the truth. They propose that courts apply an actual malice standard for alleged torts by interactive computer services acting as distributors of content, suggesting that this approach would well address concerns of defamatory statements and catfishing impersonation schemes.

Thereafter, the issue presents several transcripts of presentations by speakers at the symposium. The first two transcripts presented stem from the luncheon discussion between Brian Panish and Victor Schwartz on Torts: Past, Present, and Future. In *Torts: Past, Present, and Future—Presentation of Brian Panish*,<sup>8</sup> Brian Panish argues that the civil justice system is superior to other regulatory and administrative approaches to protecting consumers, because governmental agencies have insufficient resources and are subject to political pressure. He points to automobile manufacturers' failure to adopt seatbelts for many years, even though the technology was available. In contrast, he asserts that courtrooms provide a level playing field for plaintiffs and corporate defendants. He relates that in one accident case against General Motors Corporation in which he was involved, he discovered that General Motors could have fixed an automobile's design to prevent a rear collision with its gas tank for \$8.20. He also determined that General Motors declined to do so because of a cost-benefit analysis that weighed the cost of fixing the problem against the amount that General Motors had been paying out in lawsuits.

Turning to the pharmaceutical industry, he raises concerns about industry and political pressure for preemption of state tort lawsuits, closing courthouse doors to injured plaintiffs. He also argues that damage caps in tort lawsuits prevent plaintiffs from exercising their Seventh Amendment right to a trial by jury. In addition, he suggests that public nuisance lawsuits serve to deter widespread abuses, particularly focusing on litigation by California school districts against Altria for its advertisements and the use of its Juul vaping product by children in schools. He also maintains that the opioid litigation is an appropriate setting for public nuisance claims to enable the

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8. Brian Panish, *Torts: Past, Present, and Future—Presentation of Brian Panish*, 49 SW. L. REV. 478 (2021). Brian Panish is founding partner at Panish Shea & Boyle LLP in Santa Monica, California.

government to hold companies responsible for the opioid epidemic in the United States.

In the following transcript presented, *Torts: Past, Present, and Future—Presentation of Victor Schwartz*,<sup>9</sup> Victor Schwartz draws upon his article published earlier in this issue and discusses three areas that might lead to liability for defendants who have not committed any torts. First, he discusses how judges do not seriously engage in their roles as evidentiary gatekeepers when scrutinizing proposed expert witness testimony. He offers Bendectin as an example of a drug where science did not support causation to harm, but where judges nevertheless admitted such testimony, leading to the removal of a useful drug from the marketplace. Second, he discusses “deep pocket jurisprudence” as blaming somebody else with money, when the defendant who committed the wrong cannot be sued. As an example, he suggests that blaming the manufacturer of a branded drug for injuries caused by a product caused by a generic competitor with the same label required under federal law is inappropriate. Third, he addresses regulation through litigation as a means by which judges seek to forward in the courtroom a public interest agenda that was unable to pass the legislature. He suggests that gun litigation and climate change litigation are examples of “regulation through litigation.” He argues that regulation through litigation violates the tenets of democracy and the roles of separate branches of government.

The next transcript presented is *New Developments in Tort Litigation: Presentation of Francis McGovern*.<sup>10</sup> Professor McGovern relates the origins of his idea for the “negotiation class action.” He notes that his professional role was generally to try to settle cases and conveys that in the opioid litigation, defendants wanted closure as part of settlement, but tens of thousands of governmental plaintiffs were suing across the country. He recalls that when he had earlier worked on a case involving a flood from a lake in Hawaii, he proposed that all the property-owner plaintiffs decide how to allocate the money and also all agree to accept a settlement offer if a supermajority of them voted in favor of it. He reveals that he developed the same idea for the governmental plaintiffs in the opioid litigation but proposed that the process be accomplished through a class action. The allocation of the opioid settlement was accomplished through class notice, according to

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9. Victor Schwartz, *Torts: Past, Present, and Future—Presentation of Victor Schwartz*, 49 SW. L. REV. 483 (2021).

10. Francis McGovern, *New Developments in Tort Litigation: Presentation of Francis McGovern*, 49 SW. L. REV. 487 (2021). The late Francis McGovern was Professor of Law at Duke University School of Law. We are honored to publish Professor McGovern’s remarks, delivered shortly before his unexpectedly passing away. His remarkable career as professor and special master in so many multidistrict litigation cases is unparalleled. He is one of the most important figures in the history of mass tort litigation in the United States.

Professor McGovern, and the class agreed to accept a settlement if 75% voted in favor of the settlement. He notes that out of 34,000 governmental plaintiffs receiving class notice, 500 opted-out of the class. He also conveys that for some time, he had been trying to think of multidistrict litigation not just as a vehicle for settlement, but also as a process that would select certain cases for trial and strategically remand cases. He argues that this approach would enable defendants to try cases without being inundated by thousands of trials. He acknowledges, however, that adopting such an approach would require judges in multidistrict litigation to change their mindset that their job was to reach a global settlement. At the end of his remarks, a discussion on selecting and remanding multidistrict cases for trial continues in the transcript between him, Mark Behrens of Shook, Hardy & Bacon LLP, John Beisner of Skadden Arps Slate Meagher & Flom LLP, and Brian Panish of Panish Shea & Boyle LLP.

Thereafter, in *The Education of the Judiciary: The Sciences Addressing Disease Causation*, Professor Michael Green traces the development over a century of the judiciary's use of biomedical sciences in tort litigation.<sup>11</sup> Although case law in the early twentieth century primitively used statistical evidence to address toxic causation, he notes that epidemiology did not fully develop until after World War II and that the biosciences were not used in case law or legal scholarship until the 1960s. He states that scientific evidence was then addressed according to the *Frye* standard, under which courts generally deferred to the opinions of appropriately credentialed experts. Focusing on Judge Weinstein's 1985 opinion in the *Agent Orange* litigation, dismissing class opt-outs for lack of causation, Professor Green highlights Judge Weinstein's careful review of epidemiology and statistics to assess causation and find inadmissible the opinions of certain plaintiffs' expert witnesses. Professor Green also details the Bendectin litigation's resulting in the landmark *Daubert* Supreme Court decision in 1993, holding that the *Frye* approach was supplanted by the Federal Rules of Evidence and required federal courts to scrutinize the methodology and reliability of experts' scientific opinions. He relates that one year after *Daubert*, the Federal Judicial Center published its Reference Manual on Scientific Evidence to assist judges in assessing scientific evidence. He credits the Manual, which has been updated in subsequent editions, for courts' more informed modern approach to epidemiology and toxicology.

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11. Michael Green, *The Education of the Judiciary: The Sciences Addressing Disease Causation*, 49 SW. L. REV. 493 (2021). Michael Green is Bess and Walter Williams Professor of Law at Wake Forest University School of Law.

The next transcript presented is *New Means of Financing Tort Lawsuits and Law Firms: Presentation of Anthony Sebok*.<sup>12</sup> Professor Sebok discusses third-party finance of litigation. He relates that, historically, support for litigation has come from friends, family, and the community, as well as insurance. He also conveys that strangers have become involved in lawsuits through assignment of claims. Maintenance of lawsuits, he observes, has been permitted historically, especially when friends and family members help pay for a lawsuit. He notes that under champerty, a third-party provides maintenance to a lawsuit in return for a profit. Similarly, he points to factoring, a term he uses for the assignment particularly of as-yet unearned legal fees.

Turning to mass tort and consumer litigation, he focuses on the problem of negative value claims, in which the small value of a claim is not sufficient to support individual lawsuits, leading to a lack of deterrence of wrongdoers. He suggests that class actions offer a solution for efficiently bringing such small-value claims, but that problems may occur in meeting the requirements for class certification. Even if a class action is certified, he notes that class actions may also involve principal-agent problems. He offers that another solution for bringing negative value claims might be multidistrict litigation. In addition, he observes that consumer contracts increasingly require one to pursue individual arbitration, although he raises that the cheaper costs and potential fee shifting in arbitration might theoretically enable arbitration to effectuate the bringing of otherwise negative value claims.

He then turns to the potential role of third-party financing for addressing the negative-value problem. First, he suggests that class actions might be brought by assigning the claims or by receiving third-party investment in the class's recovery. Second, he notes that law firms frequently factor their fees after settlement and suggests that perhaps law firms should also be able to do so prior to settlement. With regard to factoring fees prior to settlement in class litigation, he raises the question of when that factoring agreement would be disclosed to the court, either at appointment of class counsel, or at the fee petition stage. Third, in multidistrict litigation, he states that other than personal injury claims, claims could generally be assigned. In addition, for personal injury claims, he suggests that the proceeds of the claims might be assigned. Moreover, he raises legal ethics questions in connection with lawyers in a multidistrict litigation who connect claimants with non-lawyer third-party financiers, referencing for example, concerns of potentially unnecessary medical care in the TVM cases paid for through funds from

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12. Anthony Sebok, *New Means of Financing Tort Lawsuits and Law Firms: Presentation of Anthony Sebok*, 49 SW. L. REV. 505 (2021). Anthony Sebok is Professor of Law and Co-Director, Jacob Burns Center for Ethics in the Practice of Law, Benjamin N. Cardozo School of Law.

third-party litigation finance. Furthermore, he addresses the concern of fee-splitting under Rule 5.4(a) of the Model Rules of Professional Conduct. Last, he observes that assignment is also possible for arbitration claims.

The final transcript presented is *New Means of Financing Tort Lawsuits and Law Firms: Presentation of James Fischer*.<sup>13</sup> He discusses the growth of artificial intelligence in law, including document review, e-discovery, and other lawyer tasks. In addition, he mentions the use of non-lawyers to adjudicate smaller disputes in the Civil Resolution Tribunal in British Columbia, Canada. Moreover, he points to the growth of on-site lawyer offices in Walmart stores in the United States, enabling them to more easily reach clients. He then turns to recent changes proposed to the California Rules of Professional Conduct. He observes that the California Bar Board of Trustees now includes not just lawyers, but also non-lawyer members of the public, and that lawyer members today are more politically connected than in the past, when lawyer members were more likely to have been known and selected for their respected trial or transactional work in legal practice. He also points to the composition of the California Task Force on Access Through Innovation of Legal Services, whose substantial non-lawyer membership might be seen to suggest that lawyers are not themselves sufficient to protect the public interest. He notes that negative comments on the recommendations of the Task Force came from lawyers, again highlighting a potential disconnect between the interests of lawyers and the public. He addresses a recommendation of the Task Force to allow non-lawyer ownership of law firms in certain circumstances. Under the recommendation's first proposed alternative, he observes that a law firm's sole purpose must remain as providing legal services to clients, and that non-lawyers must assist the lawyer in providing legal service and not direct or control the lawyer's professional judgment. He argues that the complexity of the rules of professional conduct prove challenging for lawyers, much less non-lawyers who have not had training in legal ethics. He also notes that the alternative would not require that lawyers remain a majority of the combined firm, raising the possibility that non-lawyers would possibly constitute a vast majority of the enterprise. He relates that the Task Force's second proposed alternative would eliminate the ban on fee-splitting in California, subject to informed consent in writing from the client. As a result, he observes that oddly a client would need to consent to fee-splitting under alternative two, but that a client need not be informed about non-lawyer ownership of the firm under alternative one—even though the non-lawyer would in effect be

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13. James Fischer, *New Means of Financing Tort Lawsuits and Law Firms: Presentation of James Fischer*, 49 SW. L. REV. 511 (2021). James Fischer is Professor of Law at Southwestern Law School.

splitting fees with lawyers as co-owners of the firm under alternative one. He argues that opposition to non-lawyer ownership of firms and fee-splitting is based on a concern about the lawyer's independent judgment to the client, and that the concern was traditionally deemed so significant as to be able to be subject to informed consent by a client.

In sum, the twelve articles and transcripts in this issue well represent the many themes of our Symposium, *New Frontiers in Torts: The Challenges of Science, Technology, and Innovation*. We are delighted to present them to you, and we hope you enjoy the ideas, conversations, and insights that animated our Symposium on February 7, 2020.