# AGAINST PRIORITY

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Monstrously overcrowded asbestos dockets, some courts[1] and commentators[2] argue, should be controlled by a principle of "the worst should go first." Under this approach, asbestos victims with the worst types of injury are placed on a "rocket docket" for prompt adjudication, in contrast to victims with lesser injuries whose claims are shunted indefinitely to a deferred, inactive docket.[3] While such a priority approach

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1. Many courts agree. Reportedly begun in Massachusetts in 1986, the deferred ("priority") docket approach spread in the 1990's to Cook County, Illinois and Baltimore, Maryland, and thence beyond. *See* Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 514 (2008) (characterizing the priority docket approach as the "Maryland model"). Justice Freedman, who managed possibly twenty-one thousand asbestos claimants in New York, some ninety percent of whom were "functionally 'unimpaired,'" explains that she applied the deferred docket approach, without consent of the parties, to so-called "unimpaired" claimants, persons who are "not really sick." *See id*. The idea was "to restrict the litigation process to individuals who are truly sick, i.e., can demonstrate some objective evidence of functional impairment, or have a malignancy that is related to asbestos exposure by a credible expert or physician." *Id*. at 513.

2. Many commentators agree. Peter Schuck should be credited with this catchy aphorism. *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992). *See also* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to be Turning*, 12 CONN. INS. L.J. 477, 488-93 (2006); Mark A. Geistfeld, *Remarks of Mark Geistfeld* 74 (Jan. 18, 2008) (unpublished transcript on file with the *Southwestern University Law Review*); James S. Lloyd, Comment, *Administering a Cure-All or Selling Snake Oil?: Implementing an Inactive Docket for Asbestos Litigation in Texas*, 43 HOUS. L. REV. 159 (2006); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 31 (2001) ("Courts must be willing to distinguish between the claims of those who are truly sick and those who are not. The adoption of inactive dockets by courts in Illinois, Massachusetts and Maryland is a good example of a method of controlling claims by the unimpaired."); Victor E. Schwartz, Mark A. Behrens & Rochelle M. Tedesco, *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271 (2003). For whatever reason, much of the commentary favoring priority comes from defense counsel and academicians directly or indirectly funded by the asbestos or insurance industries.

3. *See* Schuck, *supra* note 2.

has a certain intuitive fairness appeal, and while it possesses certain administrative benefits, it is fundamentally flawed. Not only may victims with less serious injuries be deprived indefinitely of judicial resolution of their claims, but the practical effect of such delay is likely to deprive them of any shot whatsoever at a shrinking pie of asbestos compensation funds. Such a priority approach is neither logical nor fair.

## I. ASBESTOS AND ITS LEGACY

Once considered a "miracle mineral,"[4] asbestos has served many important uses over the millennia.[5] Possessing extraordinary insulation

4. *See, e.g.*, Charles G. Garlow, *Asbestos—The Long-Lived Mineral*, 19 NAT. RESOURCES & ENV'T 36 (2005). *See also* Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 584-85 (2007) (noting that asbestos was called a "magic mineral" by the Greeks, and chronicling its ancient uses); Suttles, *infra* note 5, at 14 ("miracle fibre").

5. *See* John T. Suttles, Jr., *Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry*, 16 TUL. ENVTL. L.J. 1, 14 (2002):

> Asbestos use, and the documented health hazards associated with its use, pre-dates the Christian era. Well known to Egyptians and Romans, asbestos fibers were woven into flame-retardant fabrics and incorporated as a binder in cementitious construction. Legend tells of Peter the Great impressing rival leaders of his power by throwing a woven asbestos fiber napkin into a raging fire, later retrieving it unscathed.

"In the late 1800s, asbestos found many new uses. Powdered asbestos was especially useful, a superb material wherever tough, fireproof, chemically inert insulation was needed. Asbestos became a big industry." Andrew Alden, *Asbestos in a Nutshell: This Miracle Material Has Taught Us Some Lessons*, *available at* http://geology.about. com/od/nutshells/a/ asbestosnuts.htm (last visited Mar. 1, 2008).

> For centuries, asbestos has been valued because of its flexibility and strength. Moreover, asbestos does not easily burn, conduct [heat] or electricity, and is not easily affected by most chemicals. Today, asbestos is principally used in cement construction materials, such as pipes, siding, and roofing. It is also used in insulation, fireproofing materials, and automotive parts.

Eileen S. Mazo, Note, *Taxing Our Way to a More Polluted Environment*, 6 FORDHAM ENVTL. L.J. 357, 359-60 (1995) (citing 1 ASBESTOS 45-64, 73 (Leslie Michaels & Seymour S. Chissick eds., 1979); Brooke T. Mossman et al., *Asbestos: Scientific Developments and Implications for Public Policy*, 247 SCIENCE 294, 294-95 (1990)).

One ancient use of asbestos was for an altar stone which held a sacred flame, discovered among the ruins of Atlantis near the center of the Earth by the celebrated Lindenbrook Expedition, begun in Iceland in 1880, comprised of Edinburgh professor, Sir Oliver S. Lindenbrook (James Mason), Alec McEuen (Pat Boone), Carla Göteborg (Arlene Dahl), their guide, Hans Belker (Peter Ronson), and Han's pet goose, Gertrude (played by herself), until eaten by the villainous Count Saknussen (Thayer David). Using the large, dish-like asbestos stone to escape certain doom from giant monsters and other perils lurking at the center of the Earth, the Expedition sat in their asbestos vessel which served as a protective heat shield as it was propelled atop a plume of molten lava upward through a bore hole in a volcano in Stromboli, Italy (an island near Sicily's Mt Etna), spewing the explorers safely into the Mediterranean Sea (and one, quite naked, into a tree). *See* JOURNEY TO THE CENTER OF THE EARTH (Twentieth Century Fox 1959), based on JULES VERNE, VOYAGE AU CENTRE DE LA TERRE (1864).

characteristics, the long, strong, flexible fibers of asbestos can be woven into fabrics, such as fireproof suits that allow humans to walk unscathed into raging infernos.[6] During World War II, asbestos products served to insulate boiler rooms on naval ships.[7] Yet, despite its substantial virtues, few products rival asbestos for the widespread human harm and suffering this mineral has caused people who have inhaled its lethal fibers floating in the air.[8] Deborah Hensler well explains this yin and yang:

> Asbestos is a wonderful but harmful natural substance. It is plentiful, it has amazing fire-retardant qualities, and it can be formed into a variety of products that perform useful functions in ships, factories, and office buildings, other commercial and public facilities, and homes. Unfortunately, exposure to asbestos-containing products can also kill people. Asbestos exposure causes mesothelioma, a dreadful cancer that is always fatal. . . . Asbestos exposure also causes a variety of other cancers, including lung cancer [and] . . . also causes non-malignant respiratory disease, termed asbestosis. Victims of asbestosis have difficulty breathing, and severe asbestosis is fatal.[9]

Not only has asbestos led to massive human suffering, but no product has wreaked such havoc on American courts nor has been responsible for ruining a couple of industries and savaging several others. Since the 1970s, nearly one million persons have filed asbestos injury claims against nearly 10,000 separate defendants.[10] Beginning most prominently with Manville in 1982, almost all American producers of asbestos products—now numbering at least 80—have filed for bankruptcy, and every American industry, in almost every state, has experienced at least one bankruptcy from the explosive asbestos litigation.[11] George Priest opines that estimates

6. *See, e.g.*, Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 588 (1996) ("It is a heavy, fireproof, heat resistant, virtually indestructible, fibrous mineral—properties that make it ideal for insulation. It can be manufactured as a fabric. Asbestos insulation can be found in the whole range of buildings and other products that require insulation, including: factories, residences, offices, schools, cars, refrigerators, trucks, and ships." (citation omitted)).

7. Johnstone v. Am. Oil Co., 7 F.3d 1217, 1223 (5th Cir. 1993) (approving jury finding that asbestos was not defective on proof that its effectiveness as heat insulator on Navy ships during World War II helped to win the war).

8. The hazards of inhaling asbestos were well known to the Romans. *See* Suttles, *supra* note 5, at 14.

9. Deborah Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 256-57 (2006).

10. *See* STEVEN J. CARROLL ET AL., ASBESTOS LITIGATION xxiv-v (RAND Institute for Civil Justice 2005) [hereinafter RAND].

11. *See* A PUBLIC POLICY MONOGRAPH: OVERVIEW OF ASBESTOS CLAIMS ISSUES AND TRENDS 32, ref. list 2 (American Academy of Actuaries 2007), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf [hereinafter MONOGRAPH]. Judge Jack Weinstein has

of eventual claims totaling two to four million are "vast underestimates," and he predicts that "the asbestos litigation phenomenon will never end."[12] Whether one concurs with such dire predictions,[13] no one can doubt that the asbestos conflagration continues to rage across the nation and, increasingly, the world.[14] All too closely, the litigation morass that has followed asbestos mirrors its etymological origin from the Greek: "inextinguishable."[15]

## II. LIMITED FUNDS AND JUDICIAL RESOURCES: THE PRIORITY "SOLUTION"

At last count, $70 billion in asbestos claims had been paid by asbestos defendants and their insurers,[16] and future costs of asbestos litigation could amount to another $200 to $265 billion.[17] Now that almost all producers of asbestos products are bankrupt,[18] plaintiffs' counsel have searched for other,

opined that "[i]t is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy." Victor E. Schwartz, Mark A. Behrens, & Phil S. Goldberg, *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. BANKR. L. & PRAC. 61, 63 n.19 (2005).

12. George L. Priest, *The Cumulative Sources of the Asbestos Litigation Phenomenon*, 31 PEPP. L. REV. 261, 269 (2003).

13. *Cf.* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to be Turning*, 12 CONN. INS. L.J. 477, 478 (2006) ("[A]fter years of downward spiral, the asbestos litigation tide finally may be turning.").

14. *See, e.g.*, Haynsworth v. Corp., 121 F.3d 956, 960 (5th Cir. 1997) (noting the "massive excess losses sustained by Names in the late 1980's and early 1990's—by [Lloyd's of London's] estimate, something in the neighborhood of $22 billion"); Paige J. Brock, *A Change in the "Trade-Winds:" World Trade Organization Places Human Health Before Free-Trade*, COLO. J. INT'L ENVTL. L. & POL'Y, Yearbook 2000, at 86 (examining conflicting approaches to asbestosis regulation in Canada and Europe); Suttles, *supra* note 5.

15. More fully:

> [A]sbestos, 1387, fabulous stone, which, when set afire, would not be extinguished; from O.Fr. *abeste*, from L. *asbestos* "quicklime" (which "burns" when cold water is poured on it), from Gk. *asbestos*, lit. "inextinguishable," from a- "not" + *sbestos*, verbal adj. from *sbennynai* "to quench," from PIE base **gwes-* "to quench, extinguish" (cf. Lith. *gestu* "to go out," O.C.S. *gasо*, Hittite *kishtari* "is being put out"). Meaning "mineral capable of being woven into incombustible fabric" is from 1607; earlier this was called *amiant* (1420), from L. *amiantus*, from Gk. *amiantos* "undefiled" (so called because it showed no mark or stain when thrown into fire). Pliny was the first to make the error of calling this *asbestos*. Supposed in the Middle Ages to be salamanders' wool. Prester John, the Emperor of India, and Pope Alexander III were said to have had robes or tunics made of it.

Online Etymology Dictionary, *Asbestos*, *available at* http://www.etymonline.com/index.php?search=asbestos&searchmode=none (last visited Mar. 1, 2008).

16. RAND, *supra* note 10, at xxvi.

17. MONOGRAPH, *supra* note 11, *Executive Summary*. Estimates vary widely, and RAND projects that future costs could total $130 billion to $195 billion. *Id.* at 106.

18. On asbestos bankruptcy litigation, see, e.g., Francis E. McGovern, *Filings by Companies With Asbestos Liabilities*, DELAWARE LAWYER, Winter 2006/2007, at 18; Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L.

more solvent defendants with ever more remote connections to asbestos—"peripheral defendants"—such as manufacturers of paper, textiles, and food produced in factories insulated with asbestos which eventually circulated in the air.[19] Peripheral defendants appear now to be bearing the largest burden of damage assessments in asbestos litigation,[20] but claims against them typically are weaker in terms of causation, apportionment, and defensive challenges to the foreseeability of the risk. What all this means is that the aggregate pot of available resources in asbestos litigation appears to be increasingly insufficient to cover the many tens of thousands of new claims, piled on top of hundreds of thousands of existing claims, made upon the resource pot each year. Thus, a major aspect of the asbestos problem is one of limited funds.

But another, enormous dimension to the asbestos problem is the havoc that asbestos litigation has wreaked on the courts compelled to deal with all these cases.[21] In an effort to manage the vast numbers of asbestos claims fairly and efficiently in a world of limited judicial resources and limited funds, courts have been turning to a variety of docket control techniques that accord priority to the most seriously injured asbestos victims. In particular, some courts have divided their dockets in two: an expedited docket ("rocket docket") for the most serious claims, and a deferred docket ("inactive docket" or "pleural registry") for less serious claims. Such docket divisions have an appearance of fairness, justice, and administrative practicality that, at first glance, looks positively genius. The underlying priority principle, as previously mentioned, is that "the worst should go first."

What this type of special docket treatment means for more seriously injured ("worse-off") victims—those with mesothelioma,[22] lung cancer,[23]

163 (2006). *See also* Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005); Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002).

19. RAND, *supra* note 10, at xxv; *see* MONOGRAPH, *supra* note 11, at 3 (describing peripheral defendants as including such parties as Campbell's Soup, Gerber's baby foods, and Sears Roebuck).

20. *See* MONOGRAPH, *supra* note 11, at 3.

21. With the shift of many traditional asbestos defendants into bankruptcy, bankruptcy courts inherited many of the problems that continue to confound judges in civil litigation. While many problems and solutions in the two contexts are similar, many are different, and the discussion here is directed principally to the civil justice system. Hundreds of articles have been written on asbestos litigation. *See, e.g.*, Symposium, *Asbestos Litigation & Tort Law: Trends, Ethics, & Solutions*, 31 PEPP. L. REV. 1 (2003); Symposium, *Asbestos Litigation*, 44 S. TEX. L. REV. 839 (2003). For recent overviews of asbestos litigation, *see* Carrington, *supra* note 4; Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SUR. AM. L. 525 (2007); Hensler, *supra* note 9; RAND, *supra* note 10; MONOGRAPH, *supra* note 11.

22. Mesothelioma caused 81,790 deaths from asbestos in selected industries from 1965-2004

gastrointestinal and other cancers,[24] and severe asbestosis[25]—is that courts adjudicate their claims quite quickly, giving them substantial pieces of a relatively modest, very probably shrinking, compensation pie. What it means for less seriously injured ("better-off") victims—those with milder asbestosis, pleural scarring (plaques and thickening), and pleural effusion[26]—is at least three-fold: first, their claims are officially filed, so that a statute of limitations or repose can never bar their claims; second, their claims are placed indefinitely in limbo, such that their access to the justice system is indefinitely delayed; and, third, unless they eventually prove malignancy, permitting them to transfer to the active docket (a remote eventuality),[27] they may expect ultimately to receive no access to the justice system at all, and no piece whatsoever of the compensatory pie.[28]

In short, under docket priority schemes based on the severity of asbestos injuries, more seriously injured claimants win,[29] as do the courts;[30] but less seriously injured claimants lose.[31]

and is predicted to cause another 50,770 from 2005-2029. RAND, *supra* note 10, at 16 (citing Nicholson study). A more recent study (Price and Ware, 2004) estimates about 90,000 mesothelioma cases from 2005-2049. RAND, *supra* note 10, at 17.

23. 179,870 deaths from 1965-2004, and 54,580 predicted from 2005-2029. *Id.* at 16.

24. 50,720 deaths from 1965-2004, and 14,735 predicted from 2005-2029. *Id.*

25. "Asbestosis is a chronic lung disease resulting from inhalation of asbestos fibers that can be debilitating and even fatal." *Id.* at 13. Pulmonary asbestosis is characterized by decreased lung capacity, though some persons diagnosed with the disease have mild symptoms, or none whatsoever. *Id.* at 13. In 1968, NIOSH reported 77 deaths from asbestosis, a number that had increased to 1,265 in 1999. *Id.*

26. Pleural scarring is damage to the pleura, a membrane that lines the outside of the lungs and the inside of the chest wall. Pleural effusion is marked by the collection of liquid in the pleural space. *Id.* at 14.

27. Transfers of this type reportedly are rare. Justice Freedman reports that, among the thousands of asbestos cases she transferred to an inactive docket in New York, she can recall only three transferred from the inactive docket to the active docket. Helen E. Freedman, *Remarks of Helen E. Freedman* 34 (Jan. 18, 2008) (unpublished transcript on file with the Southwestern University Law Review).

28. *See* Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 SANTA CLARA L. REV. 1, 11 (2004).

29. Such claimants get much quicker review of their claims and, partially as a result, get a bigger piece of the limited pie.

30. *See* Freedman, *supra* note 1, at 514 (reporting that her adoption of a deferred docket may have reduced the active docket by 80 percent).

31. "Under the traditional inactive docket, unimpaired plaintiffs are actually barred from bringing their claims unless and until they meet the impairment requirements. This system accomplishes more than simply prioritizing the claims; it actually prevents unimpaired claimants from litigating their claim unless and until they are impaired." Anderson & Martin, *supra* note 28, at 10-11.

## III. OBJECTIONS TO PRIORITY

The idea that society should give priority to persons in greater need over persons in lesser need reflects a spirit of charitable, communal solidarity that has deep roots in jurisprudential and political thought. In a world of limited funds for asbestos victims, where the severity of asbestos injuries varies from death to minor lung scarring with no loss of function, and where courts have long and valiantly struggled with vastly overcrowded dockets, how can one quarrel with a priority principle that accommodates the worst first? Objections to priority rest on two pillars—one logical, the other moral.

### *A. The Logical Frailty of Priority*

The premise of priority approaches to dividing the limited pie of asbestos funds from litigation is that persons suffering the worst types of asbestos injuries, being more needy, are more deserving of compensation than persons suffering less serious injuries. Conventional priority schemes, familiar to tort law observers, posit that highest priority is accorded to human life, and then, in decreasing order of importance, to more serious injury, less serious injury, emotional distress, property damage, and, at the bottom of the priority pole, pure economic loss.[32] In the asbestos context, such a priority scheme starts with victims of mesothelioma, who invariably die within one or, possibly, two years; followed by other cancers; severe asbestosis; less serious asbestosis; pleural thickening, scarring, and effusion; fear of contracting asbestos disease; property damage; and pure economic loss, such as the costs of removing asbestos insulation from buildings.[33] The idea of using some such priority scheme in the distribution of limited judicial and economic resources is based on need—the most seriously injured victims, particularly those suffering from mesothelioma, should be given first priority because their losses are the greatest and they therefore have the greatest need.[34]

Putting aside the moral frailty of denying equal respect to persons holding preexisting legal entitlements of lower economic magnitude, a problem examined in the next section, the delivery of legal redress and defendant resources first to victims of mesothelioma and other terminal

32. *See infra* notes 56 and 57, and accompanying text.

33. *See, e.g.*, Freedman, *supra* note 1, at 517-18; Geistfeld, *supra* note 2, at 74; Francis E. McGovern, *Asbestos Legislation I: A Defined Contribution Plan*, 71 TENN. L. REV. 155, 164-67 (2003) (describing a claim processing system where malignant claims are given priority).

34. *See* McGovern, *supra* note 33, at 164-65.

asbestos injuries fails to deliver on its promise of providing funds to victims in greatest need. The reason for this failure, if tragic, is simple: even if placed on a "rocket docket," these asbestos victims normally are dead before their cases can be resolved by the litigation system.[35] Assuming dubiously that a mesothelioma victim upon diagnosis proceeds immediately to a lawyer, the lawyer must investigate and otherwise prepare the case in order to ascertain the defendants and their respective shares of damages, to evaluate the various legal issues, to ascertain the plaintiff's damages, and, since mesothelioma invariably is quickly fatal, how damages should be divided between claims for survivorship and wrongful death. These are complex matters of moment that take considerable time for even an experienced, well-organized plaintiff's lawyer to resolve sufficiently to file a complaint. Thereafter, even with accelerated dockets, defendants must be provided sufficient time to investigate the claims and organize their defenses. And, after judgment, appeals of such serious claims, partially because of the probability of large awards, are likely.

So, proceeding from the premise that full-fledged litigation rarely provides asbestos dollars to victims of mesothelioma, to whom do such dollars in fact eventually flow? Typically, of course, such dollars ultimately go to a victim's estate, which normally means the victim's family. No doubt a victim's spouse, usually a wife, is often needy and deserving of compensation for prematurely losing her husband. But, with a latency period for this disease of up to sixty years,[36] even if there is a surviving wife, the victim is likely to be quite elderly when he dies and so is likely to have stopped providing his wife with support from wages long before. Moreover, even if the wife is still alive, and even if the husband's death somehow does remove her support, the fact of the matter is that she also is probably quite elderly herself such that she is unlikely to need support for long.

Apart from a widow, if one exists and has survived, the brunt of the death of a mesothelioma victim typically falls on his children. But their suffering, like their mother's, is not their own physical suffering but grief from prematurely losing a father (as their mother, if still alive, lost her husband), and possibly some economic loss, normally small or nonexistent because of the victim's age at the time of death. It will be remembered that priority is premised on the idea that people in greatest need should be compensated first, and that those who suffer "mere" emotional and

35. *See* Schuck, *supra* note 2, at 559.

36. *See* Freedman, *supra* note 1, at 512. More conventionally, the latency period of mesothelioma is said to extend up to forty years. *See, e.g.*, MONOGRAPH, *supra* note 11, at 2; RAND, *supra* note 10, at 15.

economic losses should stand at the very end of the priority line. A need-based rationale does not suggest why a deceased victim's grown children may need economic support since they, if anything, are *less* likely to be in need than surviving victims excluded from the most favored claimant group because their injuries are less serious. While better off than mesothelioma victims because they are still alive, less seriously injured victims are nevertheless more needy *because* they are alive. For example, they may suffer breathing and other physical impairments, even if not severe, that at least partially disable them from earning income, and they may suffer a real and persistent fear that their asbestos injuries will one day blossom into a lethal disease. Although these injuries of better-off victims are far less consequential than death, they stand ahead of emotional and minor economic losses of third-party family members of asbestos victims now deceased. In short, classifying mesothelioma (and terminal cancer) victims as worst off, and compensating their estates first at the expense of less seriously injured victims who are still alive, turns the need-based priority system on its head.

### *B. The Moral Frailty of Priority*

Even more problematic than logical frailty is the *moral* frailty of asbestos priority schemes. Requiring better-off victims to surrender meaningful rights of redress in order to help worse-off asbestos victims may appear to draw support from John Rawls' Second Principle of Justice, the "difference principle," which commands that economic and social inequalities be ordered so as to be "to the greatest benefit of the least advantaged" members of society.[37] Under this principle of "maximin," Rawls argues that distributions justly may be unequal when they maximize benefits for persons possessing the most miniscule amounts of "primary goods."[38] This principle of justice of course reflects many other systems of moral, political, and religious thought supporting charitable principles of priority for persons in greatest need. Yet forcing persons who are better off (say, victims of nonmalignant harm) effectively to subsidize persons who are worse off (say, victims of malignant harm) conflicts with two fundamental moral and political precepts on which our republic rests: freedom and equality.[39]

37. JOHN RAWLS, A THEORY OF JUSTICE 302 (1971).

38. *See id.* at 303.

39. On how these values and principles apply to the law of products liability, and the roles of corrective and distributive justice, *see* David G. Owen, *The Moral Foundations of Products*

1. Freedom

In a republic, freedom is the most fundamental, and most important, moral and political value. Among modern philosophers, the one most credited with propounding this ideal is Immanuel Kant, who postulated that freedom is "the one sole and original right that belongs to every human being by virtue of his humanity."[40] While philosophers and governments must concern themselves to a large extent with notions of equality and group welfare, freedom is the first and most essential ideal within a broad philosophy of government and justice.[41]

The concept of freedom, or "autonomy,"[42] rests upon the notion of free will[43]—the capacity of persons rationally to select personal goals and plans for life and their possession of means to achieve those ends. Freedom thus entails at least two conditions: choice and power. The design of life plans and the selection of means to achieve those goals imply a range of options and opportunities—alternatives from which to choose. As a person's choices are enhanced, so too is the person's freedom. Freedom also requires power, for one must have the ability to bring one's chosen goals to fruition in order to control one's destiny, in order to be free. To be autonomous, therefore, one must possess requisite mental and physical

*Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993); Richard W. Wright, *The Principles of Product Liability*, 26 REV. LITIG. 1067 (2007). On how they apply more generally to the law of torts, *see, e.g.*, ALAN CALNAN, JUSTICE AND TORT LAW (1997); JULES L. COLEMAN, RISKS AND WRONGS (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193 (2000); Richard W. Wright, *Right, Justice, and Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995). Much of the remainder of this section draws from David G. Owen, *Philosophical Foundations of Fault in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995) [hereinafter Owen, *Philosophical Foundations*].

40. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE *237 (John Ladd trans., 1965) (1797).

41. *See, e.g.*, Robert B. Thigpen & Lyle A. Downing, *Liberalism and the Communitarian Critique*, 31 AM. J. POL. SCI. 637, 637 (1987). Equality and community ideals logically presuppose the priority of freedom. "Liberty is crucial to political justice because a community that does not protect the liberty of its members does not—cannot—treat them with equal concern . . . ." Ronald M. Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 53 (1987) (explaining "[t]he priority of liberty, under equality of resources").

42. I use the two terms interchangeably, although for some purposes there may be value in distinguishing between them. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 400-29 (1986).

43. "The will is free, so that freedom is both the substance of right and its goal . . . ." GEORGE W. E. HEGEL, PHILOSOPHY OF RIGHT 20, para. 4 (T.M. Knox trans., 1958) (1821). In Kant's view, freedom, autonomy, and morality are all inseparably bound together. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 70-71 (L. Beck trans., 1985) (1785). "Autonomy is thus the basis of the dignity of both human nature and every rational nature." *Id*. at 54. Kant viewed autonomy, freedom of the will, as "the supreme principle of morality." *Id*. at 59.

prowess and adequate physical goods and monetary resources to achieve the objectives one selects.[44]

Freedom accords persons dignity, for it allows each human to design and follow a life plan distinct from any other. Yet, freedom also forces persons to shoulder a burden, for it places responsibility on each person rationally to plan and live a life "good" for that individual and respectful of other persons.[45] While philosophers and theologians may debate forever the notion of what constitutes the ultimate good life and its component virtues, it is each human's moral privilege—and his or her moral responsibility—to choose particular life goals that he or she deems most worthwhile, and to seek to achieve them through personal choice and action.

Viewed in this way, freedom is the primary moral and political ideal. It is the first condition to protecting or advancing other values, such as equality, altruism, and communal welfare. Thus, whether the ultimate goal of law is thought to be the promotion of individual well-being or the welfare of the group, the first and most important function of the law is to protect and promote freedom or autonomy.

### 2. Equality

In a crowded world, the freedoms of a multiplicity of individual persons constantly collide as each person's pursuit of his or her life goals inevitably conflicts with other persons' pursuits of their own life goals. The law therefore must draw boundaries around individuals, defining where one person's freedoms end and another person's freedoms begin.[46] The most elementally helpful criterion for drawing such freedom boundaries in a just and enduring society is equality.[47]

44. RAZ, *supra* note 42, at 371-73. Conceptions of freedom vary considerably among philosophers. Having the means to be one's own master has been characterized as "positive" freedom, as distinguished from freedom in its "negative" form, consisting in the absence of interference with one's activities by others. For the classical formulation of this distinction, *see* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 121 (1969), *reprinted in* LIBERTY 33 (David Miller ed., 1991).

45. "Autonomy is valuable only if exercised in pursuit of the good." RAZ, *supra* note 42, at 381.

46. This fundamental concept is nicely captured in Nozick's "border crossing" metaphor. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 55-58 (1974).

47. The equality ideal has been a profoundly important ethic in moral and political philosophy throughout the ages. Though undeveloped, it was perhaps the central ethic in Aristotle's theory of corrective justice.

> [T]he law . . . treats the parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice then in this sense is unfair or unequal, and the endeavour of the judge is to equalize it . . . .

ARISTOTLE, THE NICOMACHEAN ETHICS bk.V, at 146 (J.E.C. Welldon trans., 1912). Equality

A "strong" version of equality—one that emphasizes equality of resources ("goods")—might require a person holding more goods, *A*, to transfer enough of his or her goods to *B* to achieve a state of goods equality between *A* and *B*. Yet there is very little call in a free republic for this type of pure distributional equality of goods among its citizens. Instead, most theorists prefer some kind of "weak" equality in which the interests of all are considered of equal order—where the interests of one person have no inherent priority over the interests of another, no matter how many (or what type of) goods one person or the other may possess. "Weak" formulations of equality rest on the premise that each person is entitled to a maximum amount of freedom consistent with an equal right of others, aptly termed an "equality of concern and respect."[48] Philosophers across the ages, from Plato[49] and Aristotle[50] to Kant,[51] Nozick,[52] and even Rawls and Dworkin,[53]

was central to the philosophy of Kant, who considered it to be contained within the principle of freedom. *See* KANT, *supra* note 40, at *237-38; *see infra* note 51. And its elemental power remains at the heart of much contemporary jurisprudence. *See* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 110 (1988) ("Every moral theory has some conception of equality among moral agents . . . ."); RONALD M. DWORKIN, LAW'S EMPIRE 295-301 (1986); ERIC RAKOWSKI, EQUAL JUSTICE (1991); RAWLS, *supra* note 37, § 11, at 60, §§ 32-40, at 201-51, § 77, at 504; PETER WESTEN, SPEAKING OF EQUALITY (1990) (examining the paradoxes, rhetorical force, and various conceptions of equality); Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561, 577 (1989) ("[O]ne cannot go anywhere in serious moral thought except on the basis of some assumption about the fundamental equality of human worth.").

The innate link between freedom and equality, defined by KANT, *supra* note 40, at *237-38, is captured succinctly by Hart: "[I]f there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free." H.L.A. Hart, *Are There Any Natural Rights*?, 64 PHIL. REV. 175 (1955), *reprinted in* THEORIES OF RIGHTS 77, 77 (Jeremy Waldron ed., 1984). The constitutive link between equality of resources and freedom is explained in Dworkin, *supra* note 41, at 54 (arguing that "liberty and equality are not independent virtues but aspects of the same ideal" by which they help define one another). *See also infra* note 55.

48. Although the concept derives, through Rawls, from Kant (as well as from Aquinas, Christ, and others), its statement in this form is Dworkin's. *See* RONALD M. DWORKIN, LAW'S EMPIRE 181-82 (1986) (noting that Rawls' "justice as fairness rests on the assumption of a natural right of all men and women to [an] equality of concern and respect . . . [possessed] simply as human beings with the capacity to make plans and give justice").

49. *See* PLATO, LAWS VI.757, at 143 (Taylor trans.), *quoted in* WESTEN, *supra* note 47, at 52-53 n.19.

50. *See* ARISTOTLE, *supra* note 47, bk.V., at 150-60 (discussing corrective justice).

51. "Hence the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law." KANT, *supra* note 40, at 30.

52. Nozick may find the least use for equality among major contemporary philosophers. *See* NOZICK, *supra* note 46, at 223-24. He is not alone, of course, in this position. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 537 (1982). For a valuable critique of equality from a leading English legal philosopher, *see* RAZ, *supra* note 42, at 217-44.

53. It may seem odd for Rawls and Dworkin to be included among proponents of "weak" equality, for they both view equality as central to their systems. *See* RAWLS, *supra* note 37, at 222-24, 453-504; Ronald Dworkin, *In Defense of Equality*, 1 SOC. PHIL. & POL'Y 24 (1983). Yet

have accorded some such notion of weak equality a central position among moral values.

The point of this kind of weak conception of equality, of "equal freedom," is that it proclaims the intrinsic and ineffable worth of every human,[54] and it values and protects the right of each person to direct the fruits of his or her labor toward assembling and protecting whatever basket of goods that person deems best. The value of this abstract notion of equality lies not in its substance, for it possesses little if any substantive content, but in its principled structure for interpersonal comparisons that offers a powerful, initial framework for evaluating moral questions when freedoms clash.[55]

### *C. The Inseparability of Claimants and Their Interests*

In an attempt to justify discriminating against a large class of claimants, asbestos priority schemes are conceptualized by "interest" rather than "claimant." But an examination of this distinction reveals that it carries little substance and fails to avoid equal-freedom challenge. Interest ordering rests on the premise that certain safety interests, particularly in life and limb, are inherently of a higher order than security against minor bodily injuries and interests in "mere" property and money.[56] Interest ordering

they both subscribe to the notion of "equal concern and respect," *see supra* note 48 and accompanying text, which defines the concept weakly. Though Rawls' difference principle (expressed in his second principle of justice) is thoroughly rooted in equality, his first and "prior" principle of justice, echoing Kant's own fundamental ethic, is grounded in the liberty ideal: "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." RAWLS, *supra* note 37, at 60.

54. *See* Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 586 (1983); Kent Greenawalt, *How Empty is the Idea of Equality*?, 83 COLUM. L. REV. 1167 (1983); RAZ, *supra* note 42, at 228.

55. Consider the breadth and power of the Kantian ideal of equal freedom as lucidly expressed by Roger Pilon:

> [W]e proceed from a [natural law] premise of moral equality—defined by rights, not values—which means that no one has rights superior to those of anyone else. So far-reaching is that premise as to enable us to derive from it the whole of the world of rights. Call it freedom, call it "live and let live," . . . the premise contains its own warrant and its own limitations. It implies the right to pursue whatever values we wish—provided only that in doing so we respect the same right of others. And it implies that we alone are responsible for ourselves, for making as much or as little of our lives as we wish and can. What else could it mean to be free?

Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 509-10 (1993) (footnotes omitted).

56. *See, e.g.*, Deryck Beyleveld & Roger Brownsword, *Impossibility, Irrationality and Strict Product Liability*, 20 ANGLO-AM. L. REV. 257, 260, 273-74 (1991) (utilizing Alan Gewirth's lexical ranking of goods into three tiers, whereby a person's physical integrity is ranked as a first-tier, "basic" good, whereas wealth would be ranked as a third-tier, "additive" good).

along these lines—whereby life and higher bodily integrity interests are ranked more highly than lower bodily integrity interests and the security of property and economic interests—has a deep tradition in the law of torts.[57] Yet, this priority ethic is rooted in the *ex ante* context of truly intentional takings by a tortfeasor, in which context (for a variety of reasons) the lexical ordering[58] of major interest categories provides a system of useful markers that serves at once to identify, define, order, and explain society's most fundamental vested rights. And so the law declares that one person may not intentionally maim or kill another human to protect some jelly jars.[59]

In cases involving only accidental harm, however, where the state judicially allocates scarce resources, lexical interest ordering fits much less comfortably because the freedom interests of all players are entitled to an equality of respect *ex post*. While persons most certainly have important freedom interests in the security of their bodies, persons have equally worthy (if less valuable) freedom interests in their property. And a person's autonomy depends as well upon the security of his or her wealth[60]—of holdings of money and other property. Indeed, the importance of property and economic interests to a person's sense of identity, and overall autonomy, has been emphasized by philosophers across the centuries.[61]

57. *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 21, at 131-32 (5th ed. 1984) ("[T]he law has always placed a higher value upon human safety than upon mere rights in property . . . ."). This premise of tort law is widely shared by the general public. "If asked, most people would probably say that the thing of ultimate value in the world is human life." PATRICK F. MCMANUS, HOW I GOT THIS WAY 36 (1994).

58. "This is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on." RAWLS, *supra* note 37, at 43.

59. Katko v. Briney, 183 N.W.2d 657, 658-61 (Iowa 1971) (allowing jelly jar thief to recover for injuries from shotgun trap set by owner of vacant house to admonish thieves and vandals).

60. Together with liberty, opportunity, and self-respect, Rawls classifies wealth as a "primary good," since it is "necessary for the framing and the execution of a rational plan of life." RAWLS, *supra* note 37, at 433. "Wealth" essentially is "property" by another name, and philosophers from the time of Aristotle have recognized its fundamental importance to the pursuit of goals by human beings. *See infra* note 61 and accompanying text. As previously noted, some philosophers, such as Alan Gewirth, accord wealth and property a lower value. *See supra* note 56.

61. "The point of property is . . . to provide an external sphere for the operation of the free will." Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1291 (1989). "The point, in justice, of private property is to give the owner first use and enjoyment of it and its fruits (including rents and profits) . . . [which] enhances his reasonable autonomy and stimulates his productivity and care." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 173 (1980). *See* ARISTOTLE, *supra* note 47, bk.IV, at 106-19; HEGEL, *supra* note 43, paras. 40-42; JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988). *See also* RAZ, *supra* note 42, at 413.

The equal-freedom premise is that one person's freedom right in security from accidental harm (whether to one's interests in life, bodily integrity, emotional integrity, property, or economic wealth) has no greater essential importance than another person's freedom right to advance and protect his or her own chosen goals—goals that often require the use of property and that may be stored in monetary form. Of course this concept of equality applies only to interests in the abstract, so that the *value* of each person's interests of any type must be measured by some fair pecuniary metric. It is true, of course, that the pecuniary *value* of life and security from severe injury is much greater than the pecuniary *value* of security from much less consequential loss. Yet, the *right* of one person to life or security from severe injury is entitled to no more respect than the *right* of another person to security from minor injury, emotional loss, or property loss. At bottom, the equal-freedom ethic posits that a seriously injured person's claim for legal redress is morally equal to, not higher than, the claim of a person whose injuries are less severe.[62]

For these reasons, one must be skeptical of arguments that prioritizing interests across all asbestos victims accords disparate treatment only to their *interests*, not to them as individuals, and so treats them all equally. Such an argument is that an interest priority scheme fairly accords equal protection to everyone similarly situated, which is all that equality requires. Despite its superficial appeal, this argument at bottom denies the equal-freedom entitlement of all citizens to equal respect for each item in their individual baskets of interests—interests in bodily security (avoidance of death, serious injuries of various types, less serious bodily injuries of various types), emotional security, property security, and purely economic security.

The inseparability of people from their legal interests, and how priorities based on a distinction between them conflicts with the equal-freedom ideal, may be illuminated by an example. Assume that *A* puts all fruits of his or her labors (wages) into his or her body—yoga and other special exercise, cosmetic and other bodily enhancement surgeries, health foods, various other health products, health spa vacations, and the like. By contrast, assume that *B* puts all his or her resources into a house. Assume, further, that *C* tortiously causes an explosion that harms *A*'s body and *B*'s house. If *C* has limited resources, principles of equal freedom would prevent the law from applying a priority rule that protects *A* but not *B*.

62. "Interest ordering, based on the absolute priority of certain interests, is out of place" in figuring responsibility for accidental harm resulting from "rough and tumble choices in an imperfect world, where life and limb (as valuable as they surely are) simply must be tossed into the same decisional scales as 'mere' property, money, and convenience." Owen, *Philosophical Foundations*, *supra* note 39, at 220.

Surely we would reject an argument that giving priority to *A* would accord equal respect to *A* and *B* because they are similarly treated, that both are protected in their bodily security interests prior to their property security interests. Such a priority argument fails because it fully respects *A*'s freedom right to decide how to order his or her basket of goods while showing no respect whatsoever for *B*'s similar freedom right.[63] Such an interest-ordering priority scheme, in derogating one person's freedom right in order to benefit that of another, brazenly flouts *B*'s right to equal freedom under law.[64]

In short, a person's freedom to a large extent reflects the degree to which the law respects and protects whatever type of goods the person individually chooses to amass, and the principle of equal freedom requires that the law equally respect each person's basket of chosen goods.

## IV. MORAL PRIORITY

Law in a liberal state, it has been argued, should strive to achieve equal freedom for all its citizens, and to maximize individual choice. Thus far, the moral discussion has explained how priority schemes favoring worse-off asbestos victims violate a right of equal access to both justice and funds by better-off victims who have an equal corrective justice right to limited pools of asbestos resources.[65] It might be thought that better-off asbestos victims (those with less serious injuries) are benefited by an inactive docket that permits them, by tolling statutes of limitations, to keep their claims alive for when they eventually may contract a malignant asbestos disease (such as mesothelioma), at which time their claims will be transferred to the active docket for timely disposition. No doubt statutes of limitations, together with prohibitions in many jurisdictions against "claim-splitting,"[66]

63. The analogy to asbestos priority schemes is strengthened, and the unfairness of such schemes further illuminated, by expanding the number of victims and defining their harms to, say, broken legs suffered by 100 *A*s, and destroyed homes suffered by 100 *B*s. Assuming *C*'s assets are not sufficient to cover all 200 claims, a priority scheme that protects *all* harms to the 100 *A*s for their broken legs (physical, emotional, and economic) at the practical expense of protecting *none* of the interests of the 100 *B*s for their destroyed homes would be patently unfair.

64. My claim here is a moral argument that law should enforce the equal-freedom right, not a legal argument based on the constitutional right to equal protection of law. Others have argued that asbestos priority schemes do not violate equal-protection constitutional requirements, a topic I do not address. *See, e.g.*, Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253, 291-93 (2005); Lloyd, *supra* note 2, at 186-88.

65. Whether in the civil justice system or bankruptcy, asbestos victims own property rights arising from principles of corrective justice. For works on corrective justice, *see supra* note 39.

66. Claim-splitting permits a person to bring a present claim for asbestosis (or other injury) without losing the right to sue later, perhaps decades later, for a mesothelioma or cancer claim that

can present major hurdles for better-off asbestos victims, and the inactive docket device is a creative way to help this class of victim avoid losing their rights to future redress for more serious injury claims.

While inactive dockets help better-off victims preserve their rights to bring eventual actions for more serious injuries, such dockets may be faulted for depriving better-off victims of a meaningful choice to obtain relief for their present, less serious claims.[67] Consistent with principles of equal freedom, courts should allow such claimants an equal right to *timely* justice—and, with that right, an equal, proportionate shot at the current asbestos fund pie. While designing a full-fledged allocation plan lies beyond the scope of this essay, the basic idea is that better-off claimants should be given a timely opportunity to recover their fair, proportionate amount of the limited asbestos fund pie without losing their rights to future recourse for more serious injuries.

Assume, for example, that a number of asbestos claims are made against one or more defendants whose present and future assets available for distribution to claimants are determined to be $60 million. Further assume that a court or special master determines that all present and future claims are likely to total $100 million. Hence, because available assets would cover sixty percent of all claims, each claimant would be entitled, under equal-freedom principles, to sixty percent of his or her claim.

All claimants under such a proportional approach thus would be entitled to receive current compensation for their current claims, and less seriously injured claimants ideally should be permitted to split their claims and remain on inactive dockets for possible future transfer to active dockets in case they eventually do develop more serious injuries. Any proportional scheme like this no doubt in practice will confront various obstacles, such as prohibitions against claim-splitting in some states, and possibly statutes of limitation. But the virtue of such a proportional approach is that it offers equal access to justice, and equal access to limited pools of funds, to all asbestos victims no matter how severe their injuries.

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lies dormant until that later time. Some jurisdictions still prevent a plaintiff from so splitting his or her claim and thus bar the subsequent action. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 819-22 (2002); David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1, 39-41 (2005); Note, *Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits*, 103 HARV. L. REV. 1989, 1989-90 (1990); David G. Poston, Note, *Gone Today and Here Tomorrow: Damage Recovery for Subsequent Developing Latent Diseases in Toxic Tort Exposure Actions*, 14 AM. J. TRIAL ADVOC. 159, 159-61 (1990).

67. To be meaningful, freedom requires the availability of "an adequate range of choices" and that those choices be "good." *See* RAZ, *supra* note 42, at 373, 379.

To preserve sufficient funds for all asbestos claims, particularly those coming far in the future, valuations of the defendants' pools of resources and estimates of the numbers and types of future claimants should be conservative, which means that amounts paid to all present claimants should be reduced substantially (and proportionally) from their ordinary litigation values. But such is the price of protecting future claimants, of according them equal respect. And courts might fairly permit claimants with more serious injuries to litigate their claims now and funnel less serious claims out of the traditional judicial system into an administrative compensation system administered promptly according to the principles of proportion just described.[68] Yet any claimant should have a choice to decline to participate in such a present administrative distribution plan and remain instead on the inactive judicial docket, with claim intact, indefinitely. Equal freedom supports some kind of approach along these lines that provides equal access to present redress to each class of claimant, large and small alike.

## V. CONCLUSION

Asbestos has become the law's worst nightmare: too many claims to adjudicate, and too few funds to pay the claims. But the solution lies not in unfairly depriving victims with less serious claims of their right of redress in order to benefit those who are more seriously injured. Not only do "worst-should-come-first" priority schemes fail in their promise of delivering funds to those in greatest need, but the ideals of freedom and equality demand that every holder of a legal claim be treated with equal respect. This means that the law cannot fairly require holders of claims of more modest pecuniary value to surrender those legal entitlements to modest damages in order to subsidize holders of claims worth more. Logic and fairness, resting on principles of equal freedom, compel rejection of priority schemes that sacrifice rights of better-off victims for the benefit of those with injuries more severe.

68. Funneling better-off claimants into such an administrative system merely alters the means by which their claims are administered without derogating their entitlement to legal recourse. Nevertheless, an important, preliminary responsibility of the administrator of such a mechanism would be to separate false claims from good. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 168 (2003) ("[F]or the most part, asbestos litigation consists of a massive client recruitment effort which relies on the creation and use of specious evidence in a process which has corrupted the civil justice system.").