Law & Social Inquiry
Volume 34, Issue 1, 5–29, Winter 2009

In Defense of Asbestos Tort Litigation: Rethinking Legal Process Analysis in a World of Uncertainty, Second Bests, and Shared Policy-Making Responsibility

Jeb Barnes

A central question in American policy making is when should courts address complex policy issues, as opposed to defer to other forums? Legal process analysis offers a standard answer. It holds that judges should act when adjudication offers advantages over other modes of social ordering such as contracts, legislation, or agency rule making. From this vantage, the decision to use common law adjudication to address a sprawling public health crisis was a terrible mistake, as asbestos litigation has come to represent the very worst of mass tort litigation. This article questions this view, arguing that legal process analysis distorts the institutional choices underlying the American policy-making process. Indeed, once one considers informational and political constraints, as well as how the branches of government can fruitfully share policy-making functions, the asbestos litigation seems a reasonable and, in some ways, exemplary, use of judicial power.

Jeb Barnes is an associate professor of Political Science at the University of Southern California. The author is very grateful to Annie Barnes, Thomas F. Burke, Gary Bryner, Martha Derthick, Josh Dunn, Malcolm Feeley, Robert A. Kagan, R. Shep Melnick, Dorit Rubinstein Reiss, Eric Schulzke, and the reviewers at *LSI* for their insightful comments. Of course, none of these fine scholars should be tainted by the mistakes in fact or judgment that survived their best efforts at correction. Special thanks are also owed to the Robert Wood Johnson Foundation, whose innovative Scholars in Health Policy Research Program provided crucial support for this project at its inception. Please direct any correspondence or comments to the author at barnesj@usc.edu.

INTRODUCTION

When should courts address complex policy issues? A standard answer stems from the legal process school, which was ascendant in the 1950s and has enjoyed a revival among prominent law professors, a development that Rubin and Feeley (2003, 621) have called "clearly one of the most important" in contemporary legal scholarship. The gist of legal process analysis (old and new) is that judges should act when adjudication promises advantages over alternative methods of social ordering such as contracts, legislation, or agency rule making.

From this perspective, asbestos litigation seems disastrous. The argument is that common law adjudication, an inherently narrow and piecemeal mode of problem solving, is ill-suited for addressing the asbestos crisis, an ongoing public health disaster that involves billions of dollars, contested medical issues, and potentially millions of interrelated claims against thousands of businesses (Brickman 1992; Schwartz, Behrens, and Tedesco 2003; Carrington 2007; see generally Horowitz 1977; Schuck 2000). In the words of the Supreme Court, "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation" (*Ortiz v. Fibreboard* 1999, 815, 821).

Consistent with these arguments, studies show that asbestos litigation is inefficient, inconsistent, and fails to deter corporate misconduct or provide meaningful individual due process (Hensler et al. 1985; Hensler et al. 2001; Carroll et al. 2002; Carroll et al. 2005). Even worse, asbestos litigation reportedly features claiming practices that, in some instances, have placed the interests of lawyers above their clients and the needs of the "worried well" before the dying (Koniak 1995; Huber 1991; Schuck 1992; Coffee 1995; Mealey's Litigation Report: Asbestos Bankruptcy 2005; Carroll et al. 2005; Carrington 2007). Given its grim track record, asbestos litigation seems a cautionary tale of the limits of adjudication.

This article offers an alternative account of both legal process analysis and asbestos litigation by juxtaposing the two. It argues that legal process analysis distorts the institutional choices underlying American policy making on several levels and thus provides a misleading lens to view the role of courts and adjudication in American policy making. Perhaps most fundamentally, it implies a stark "either/or" choice among policy-making venues. In reality, policy making entails multiple functions, including mobilization, agenda setting, information gathering, rule making, and implementation (Kingdon 2003; Feeley and Rubin 1998; see also McCann 1994). In a fragmented political system that features overlapping policy-making forums, these functions may be best *shared*. So, for example, adjudication may be relatively well suited for an initial round of mobilization, agenda setting, and information gathering on issues of fault, while legislation and agency administration may be best positioned to create and implement comprehensive programs that spread costs

and risks while prioritizing payments after a period of decentralized judicial policy making.

From this vantage, asbestos litigation has been a reasonable use of judicial power. It offered lawyers a means to raise the claims of asbestos workers after other branches and levels of government had failed to act. Once in the courts, aggressive trial lawyers working on contingency fees were able to use the powerful tools of discovery—information gathering under the auspices of the courts—to uncover decades of corporate wrong-doing and assemble vital information about the nature and scope of the underlying problem. As the limits of adjudication came into focus, judges adapted existing procedures to create alternative dispute resolution mechanisms, including ad hoc quasi-administrative compensation funds, while maintaining calls for legislative action.

The point is *not* that today's asbestos litigation is preferable to a comprehensive legislative solution. It is that courts have consistently tried to share policy-making power with the elected branches of government and have "muddled through" in the shadow of legislative stalemate (Lindblom 1957, 1979). In the process, adjudication publicized risks of asbestos-related diseases, revealed decades of corporate malfeasance, and offered useful templates for reform proposals. In a world of uncertainty and shared policy-making power, these achievements are significant, even if asbestos litigation now embodies the very worst attributes of "adversarial legalism": a distinctively American mode of policy making that features frequent recourse to the courts (Kagan 2001, 9).

To develop these arguments, this article begins with an overview of the legal process school. It then explains why asbestos litigation offers a theoretically interesting case. It next lays out the case, offering a limited defense of asbestos litigation. It ends by considering the case's implications for assessing judicial policy making in contemporary American politics.

THE LEGAL PROCESS SCHOOL PAST AND PRESENT

The genetic marker of legal process analysis as a prescriptive framework for assessing judicial policy making is comparative institutional inquiry.[1] The challenge has always been how to define the choice among forums. Responding

1. The careful reader will note the reliance on the cumbersome phrase "legal process analysis as a prescriptive framework for assessing judicial policy making" as opposed to the simpler term "legal process analysis." The reason, as developed in the text, is that legal process analysis tends to conflate empirical and normative arguments, assuming that one follows the other. This article questions this assumption. It parses the various dimensions of legal process analysis, concentrating on its normative elements—what courts should do—in light of asbestos litigation. The goal is to explore the utility of legal process analysts' prescriptions for the proper use of adjudication in a "most likely" case for their success; namely, a case in which many of the underlying empirical predictions of legal process analysis seemingly came to pass.

to the legal realism of the 1920s and 1930s, which argued that law is politics under another name, traditional legal process analysis sought to define this choice in terms of institutional capacities and functional fit. The gist was that competing policy-making forums had developed distinct areas of competence and legitimacy. In choosing among forums, the trick is finding the forum whose inherent strengths are the most conducive toward resolving the underlying problem.

Lon Fuller's "The Limits of Adjudication" (1978), which was circulated among legal scholars for decades prior to publication, offers a classic text. Like all legal process analysis, Fuller's argument mixed analytic categories, empirical assumptions, and normative prescriptions. Analytically, Fuller posited three ideal types of social ordering: contracts (where parties participate by negotiation), elections (where parties vote), and adjudication (where parties present arguments according to preexisting rules and procedures). He further asserted that the courts' core functions and legitimacy center on adjudication. Given this institutional landscape, the question of when courts should act turned on a choice between contracts, elections, and adjudication; the answer depended on defining adjudication's proper policy domain.

In defining adjudication's purview, Fuller posited that it is well suited for "dyadic" issues, or discrete conflicts that could be reduced to competing sides and fall under preexisting principles. It is not, Fuller contended, apt for "polycentric" (395) issues that involve open-ended, multidimensional problems with interdependent components such as common pool problems, where decision makers must regulate the continued use of a limited resource among many competing claimants, including future claimants. Given these assumptions, Fuller generally advised judges to stick to their knitting and to resolve dyadic disputes, and leave polycentric problems to others.

Early legal process analysts narrowly focused on institutional capacity and functional fit because they assumed the relevant actors were motivated by public interest and aimed to devise optimal solutions. By today's standards, the language of the original legal process theorists seems almost quaint. In describing judicial decision making, Fuller (372) intoned, "Courts can be counted on to make a reasoned disposition of controversies, either by the application of statutes or treaties, or in the absence of these sources, by the development of rules appropriate to the cases before them and derived from general principles of fairness and equity."

Such assumptions provided easy targets. Rational choice theorists argued that governmental actors are narrowly self-interested, not interested in advancing the public interest (Downs 1957; Olsen 1971; see generally Farber 1989), while behaviorialists have shown time and time again that judges' individual political preferences significantly correlate with judicial outcomes (Segal and Spaeth 1993, 2002; Spaeth and Segal 1999). Meanwhile, critical legal scholars, critical race scholars, feminists, and others have shown how broader forces of class, race, and gender deeply shape law and the courts, fundamentally skewing how legal issues and remedies are framed and implemented (Gordon

1984; MacKinnon 1987; West 1988; Menkel-Meadow 1988; Rhode 1990; Litowitz 1997; Kennedy 1997, 1982; Kairys 1998; Whitehead 1999). The implication is not only that legal process analysis's assumptions about the nature of judicial decision making must be revamped but also that its conception of institutional choice must be modified to incorporate likely social and political constraints on judicial action.

Traditional legal process analysis's sharp distinction among institutional capacities is also problematic. In the American system of mixed powers, each branch performs legislative, executive, and judicial functions (Miller and Barnes 2004; Rubin and Feeley 2003; see also Shapiro 1981). Agencies make policy by promulgating new regulations; they implement laws and they adjudicate individual claims under the rules. Congress—many members of which are lawyers—enacts statutes and routinely engages in executive functions such as designing the structure of federal agencies and establishing detailed criteria for appointing agency personnel. It also conducts impeachment trials and is constantly holding hearings, taking testimony, and making findings, all of which have a distinctly judicial flavor. Courts, meanwhile, adjudicate claims and, in the process, make policy. They also perform a range of executive functions by administering themselves and bankruptcy estates, issuing structural injunctions, and supervising compliance with court orders.

Equally important, judicial policy making does not reflect a single style of action (Chayes 1976; Feeley and Rubin 1998; Sabel and Simon 1999; Barnes 2004, 2007b; see generally Williamson 1995). In institutional reform cases, for instance, sometimes courts adopt a top-down approach parallel to command-and-control regulation; sometimes courts foster an open-ended "experimentalist" approach, which establishes broad goals and procedural frameworks aimed at forcing negotiation among stakeholders (Sabel and Simon 1999, 5). Accordingly, the analytic categories underlying early legal process analysis tend to fray at the edges, as institutional capacities of the branches are far more concurrent and protean than early legal process theorists assumed (Rubin and Feeley 1998, 2003).[2]

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2. It is worth adding that traditional legal process analysis also closely tied judicial legitimacy to the courts' adherence to the ideal of neutral third-party adjudication (or least maintaining the appearance of this ideal). But the empirical evidence is mixed at best that judicial activism, careless judicial reasoning, or failure to meet expectations about judicial neutrality significantly undermines the courts' legitimacy (cf. Perretti 1998, 180 (collecting authority) with Benesh 2006). By contrast, a long line of studies find that the basis of public support for and obedience to the courts do not greatly differ from those of other policy makers. They reflect a host of political factors including agreement with judicial decisions among the public, political elites, and interest groups; public support for other actors or the political system as a whole; and the perceptions of the efficacy on checks and balances on the court's decisions (Murphy and Tanenhaus 1968; Casey 1976; Adamany and Grossman 1983; Caldeira 1986; Marshall 1989; Caldeira and Gibson 1992; Gibson, Caldeira and Baird 1998). If these studies are correct and the basis of legitimacy of the courts and other policy makers do not significantly differ, legitimacy—at least as conceived by traditional legal process analysis—provides little leverage in assessing institutional choice.

These critiques cast serious doubts on many of the specifics of traditional legal process analysis, but do not necessarily discredit its basic instinct to evaluate judicial action in comparative terms. After all, recognizing that legislative, executive, and judicial functions are blurred in the modern American administrative state does not mean adjudication and courts are *identical* to other modes of social ordering. Even those who powerfully argue that courts and other policy makers share policy-making functions concede important institutional differences remain. Shapiro (1968), for instance, once noted that courts and agencies play parallel roles in policy formulation and implementation. At the same time, he maintained that judicial and administrative policy formulation and implementation were likely to differ in that judges tend to be generalists as opposed to specialists, they enjoy greater protections from removal than political appointees in agencies, and they often exercise negative power by striking down laws through judicial review as opposed to positively shaping policy through the promulgation of specific regulations (44). Feeley and Rubin (1998) make a similar point. They argue that policy making is a routine judicial function. However, judicial policy making differs from other modes of policy making, in part because the rule of law requires judges to use specialized modes of legal reasoning to convince other judges to adopt their decisions (see Baum 2006).

Consistent with the notion that judges perform judicial, executive, and legislative functions somewhat distinctly, leading case studies of judicial policy making find that adjudication is prone to characteristic weaknesses, while acknowledging that the policy and political ramifications of turning to the courts is far more contingent and context specific than was once assumed (Scheingold 2004 [1974], xxiii–iv). For example, a burgeoning comparative literature finds that American-style adversarial legalism tends to be more costly and unpredictable than its more bureaucratic counterparts (Kagan 2001, 8, Table 1). In addition, while the effectiveness of judicial policy making varies, framing complex policy issues in terms of individual rights and duties threatens to displace the consideration of costs, alternatives, and administrative feasibility. A host of negative consequences may follow. Targets of litigation may emphasize formalistic compliance at the expense of addressing underlying problems, administrative priorities can be reordered in favor of litigation-savvy groups at the expense of equally meritorious but less sophisticated groups, and participants that should cooperate may adopt a bunker mentality over the course of contentious legal battles (Horowitz 1977; Bardach and Kagan 1982; Melnick 1983; Schuck 1986; Rabkin 1989; Sandler and Schoenbrod 2003; Derthick 2005).

New legal process analysis has sought to build on this subtler understanding of institutional differences and tendencies to revive a comparative framework for assessing adjudication and avoid some of its predecessor's pitfalls. To do so, new legal process analysis has made two critical moves. First, it has relaxed the insistence on identifying optimal solutions, so that

the underlying institutional choice is no longer constructed as seeking the "best" response. Second, it has reconceptualized the boundaries of judicial comparative advantage to account for some of the likely social and political constraints on judicial action.

Komesar's *Imperfect Alternatives* (1994) illustrates the first move. Recalling earlier versions of legal process analysis, Komesar offers three ideal types of social regulation—markets, legislative and executive politics, and courts—and asserts that each feature characteristic differences in practice. Markets engender transaction costs, legislative and executive politics are prone to capture by special interests, and litigation is often expensive and slow (see also Kagan 2001). Komesar then turns traditional legal process analysis on its head. Instead of asking which forum is optimal given its inherent strengths, Komesar asks which mode of action is least imperfect, given its likely weaknesses under the relevant political and issue circumstances (see also Breyer 1982). This shift simultaneously avoids the often elusive quest for optimality that is embedded in early legal process analysis, and it permits a more contextualized and contingent assessment of forum choices.

Law professors drawing on public choice literature have made some strides toward the second step. In another example of intellectual jujitsu, they have used critiques of the legal process school's political assumptions to prescribe the boundaries of judicial interpretative powers. Echoing Shapiro's (1964) analysis of free speech that held courts may be better positioned to act because narrow interest groups are likely to dominate congressional committees, Sunstein (1993) has argued that courts should use judicial review more aggressively when legislatures are likely to have excluded key interests, such as when laws affect the interests of historically disadvantaged groups (see also Ely 1980). Conversely, Sunstein (1996a, 1996b) counsels courts to take a minimalist approach when deciding complex issues. By leaving things undecided, Sunstein argues, courts allow political processes to unfold, which are beneficial not just because the other branches may seem more "majoritarian" than courts, but because the interplay among competing interest groups in diverse institutional settings promises to enhance participation and broaden support for policies (see also Peretti 1999; Feeley and Rubin 1998). Eskridge (1988) similarly argues judges should interpret statutes more aggressively when narrow interests have likely captured the legislative process (see also Posner 1982; Easterbrook 1983; Macey 1986).

The bottom line is that the new legal process school shares the old legal process school's comparative bent, asking whether adjudication is likely to offer institutional advantages. However, it recognizes that any prescriptions for judicial action must be more contingent, context-specific, and sensitive to political constraints than its predecessor. In so doing, it modifies the underlying prescriptive framework for assessing the use

of adjudication. Instead of asking whether adjudication is the best response given the underlying problem, contemporary legal process analysis asks whether adjudication represents the least imperfect response, given the circumstances and its likely weaknesses. The question is, does this reconceptualization at the margins go far enough, or does legal process analysis need further revision?

CASE SELECTION

A theoretically interesting case for exploring this question would feature a major policy problem, a choice to use common law adjudication to address this problem, and data on the policy consequences of this choice of a kind that would enable comparison between adjudication and its alternatives. As discussed below, the case of asbestos nicely meets these criteria. As such, applying legal process analysis to the rise of asbestos tort litigation should be fairly straightforward. If not, asbestos litigation should provide a useful lens for probing the limits of current formulations of legal process analysis and suggesting improvements.

The Asbestos Problem

Asbestos was once seen as a "magic mineral" (Tweedale 2000, x). Stronger than steel yet flexible enough to be woven into cloth, this naturally abundant resource is waterproof, fireproof, corrosion-proof, and has been used in products ranging from brake linings to building materials, missile silos to ships, and hair dryers to children's modeling clay. It also can be lethal. Inhalation of asbestos fibers can cause asbestosis, a progressive and potentially fatal scarring of the lungs; mesothelioma, a deadly cancer of the lining of the chest or abdomen; and lung cancer (Roggli, Oury, and Spourn 2004).

The combination of widespread use of asbestos and its deadly side effects has been called "the worst industrial accident in U.S. history" (Cauchon 1999, 4). The numbers are striking. The RAND Institute for Civil Justice (RAND) reports that millions of Americans have been exposed to asbestos and, as of 2002, the industry has spent over $70 billion (US) on asbestos claims (Carroll et al. 2005). Total costs could reach $265 billion (Bhagavatula, Moody, and Russ 2001), or more than the entire 2003 gross national product of Austria, the world's eighteenth largest economy. Given the scope of the problem, no one, not even the most strident critics of asbestos litigation, argues that asbestos victims should not be compensated or that the compensation of these victims should be left wholly to the private sector. The issue has been deciding the type of governmental response.

The Institutional Choice: *Borel* and the Rise of Asbestos Tort Litigation

This issue gained urgency in the 1960s, as thousands of workers who used asbestos during World War II began falling ill. At that time, workers did not rely on the tort system. They turned to state and federal workers' compensation programs. Under these no-fault employer-responsibility programs, workers did not need to prove their employer was negligent, and employers could not sidestep liability by arguing workers assumed the risk or contributed to their injuries. Instead, employers were absolutely liable for workers' medical costs and for approximately two thirds of weekly wages (subject to certain limits and offsets).

By the 1960s, workers' compensation programs had become fiercely adversarial and legalistic (Nonet 1969; Brodeur 1986; Schroeder 1986; Kagan 2001). Fault was not an issue, but employers and insurers argued that smoking, not asbestos, caused workers' lung problems. They alleged workers suffering from asbestosis—a slowly debilitating disease—were not "totally disabled" as required under many state laws. And they insisted states' statutes of limitation barred many asbestos workers' claims, because these provisions (at the time) required claims to be filed within one to three years of an injury, but many of the worst asbestos-related diseases took decades to appear.

Growing frustrated with stingy and uncertain workers' compensation benefits, American asbestos workers could have pursued a range of options in the late 1960s. Following the example of coal miners, they could have mobilized collectively for political action and lobbied Congress (or state legislatures) for a new compensation scheme along the lines of the Black Lung Program, a government-run program for miners suffering from coal dust–related illnesses, which provides benefits according to detailed payment schedules and more lenient eligibility standards than state workers' compensation programs (Nelson 1985; Smith 1987; Derickson 1998). Over time, asbestos workers individually turned to the tort system, seeking compensation from third-party manufacturers that supplied asbestos-containing products to the workplace.

At least two factors helped pave the way to the courthouse (Brodeur 1986). In October 1964, a team of doctors and epidemiologists presented a detailed study of mortality rates among asbestos-insulation workers, which provided scientific support for workers' claims that asbestos had caused their illnesses (Selikoff, Churg, and Hammond 1965). In the spring of 1965, the American Law Institute (1965) published the second edition of its *Restatement of the Law of Torts*, a comprehensive summary of tort law by leading law professors, judges, and lawyers. Section 402A of the *Restatement* recognized an evolving theory of products liability, which held that if manufacturers fail to warn users of a product's dangers, they are strictly liable for resulting harms, even if the product is unavoidably unsafe.

Armed with these medical findings and section 402A, plaintiff lawyers working on contingency fees began suing companies that allegedly failed to provide adequate warnings about their asbestos-laden products. These cases squarely raised the question of institutional choice at the heart of legal process analysis: should judges intervene and recognize new causes of action, or defer to existing programs and other branches? In *Borel v. Fibreboard Paper Products Corporation* (1973), the case that is generally seen as the legal turning point in modern asbestos litigation (Hensler 2002; see also Castleman 2005; Brodeur 1986), the Fifth Circuit for the US Court of Appeals took the plunge, holding that workers could sue suppliers of asbestos products to the workplace under section 402A. Other circuits followed suit (*Karjala v. Johns-Manville Products Corporation* 1975; *Moran v. Johns-Manville Sales Corporation* 1982).

Over the next two decades, asbestos claims snowballed into an avalanche of litigation. As of 2002, an estimated 730,000 individual claims for asbestos-related injuries had been filed in the United States, and the number of annual claims is reportedly rising (Carroll et al. 2005, xxiv). These suits have targeted over 8,400 firms, including at least one company in 75 of 83 categories of economic activity in the Standard Industrial Classification, which seeks to categorize all types of business activity within the economy (Carroll et al. 2005, xxv). By contrast, as of 1991, only *ten* tort suits had reportedly been filed in The Netherlands, even though the incidence of asbestos-related diseases was five to ten times higher in Dutch workers in the 1970s and 1980s, and Dutch law allows workers to bring tort suits against their employers (Vinke and Wilthagen 1992).

LEGAL PROCESS ANALYSIS OF THE RISE OF ASBESTOS TORT LITIGATION

To assess *Borel* and the rise of asbestos tort litigation, updated legal process analysis asks a straightforward question: was tort the least imperfect institutional response to the asbestos problem? If so, courts should have acted. If not, courts should have deferred to other policy forums and forced asbestos workers and their families to seek relief from the elected branches of government.

Borel and its progeny fail this test. According to RAND, plaintiffs received only thirty-seven cents of every dollar spent to resolve asbestos claims, which is significantly less than ordinary tort claims (Kakalik and Ross 1983). Recent follow-up studies show that high administrative costs continue, as claimants net compensation through 2002 was about 42 percent of total spending (Carroll at al. 2005; see also Carroll et al. 2002; Hensler et al. 2001). By contrast, the administrative costs of the Black Lung Program, which is often criticized as wasteful, accounted for 4.6 to 5.8 percent of the program's

annual obligations and 9.5 to 13.2 percent of yearly benefits from 1992 to 2001 (OWCP Annual Report 2001, Table B-4).

These costs might be bearable if asbestos litigation produced fair and consistent decisions, but it has been erratic. In Texas, five juries in a multi-plaintiff trial heard exactly the same evidence and ruled differently on specific liability and causation issues (Bell and O'Connell 1997, 22). Jury damage awards also have varied case to case and jurisdiction to jurisdiction, providing similarly situated plaintiffs different compensation and those with harder-to-prove claims nothing at all (Sugarman 1989, 46; Carroll 2002 et al., 63).

Some might contend that such unpredictability enhances tort law's ability to deter corporate misconduct and thus offers consumers an added measure of safety. But even under the best circumstances, the deterrence value of tort law is uncertain (Kagan 2001). As Sugarman (1989) has argued, manufacturers are subject to a host of other pressures to act with care, including governmental regulations and market forces that provide strong financial incentives to prevent widely publicized problems. Moreover, the deterrence value of asbestos suits may have become attenuated, as asbestos litigation has increasingly focused on defendants who played a relatively minor role in exposing workers to asbestos and covering up its dangers, and serious concerns have emerged about unscrupulous claiming practices (*Mealey's Litigation Report: Asbestos Bankruptcy* 2005; see also Koniak 1995; Coffee 1995). RAND made the point as follows: "If business leaders believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure" (Carroll et al. 2005, 129).

Others may stress that, regardless of cost and unpredictability, common law adjudication promises individualized treatment of asbestos claims, which is essential to perceptions of procedural fairness and trust in the legal system (Tyler 1990). But, as early as the mid-1980s, many asbestos claimants did not enjoy their day in court. After six or more years of asbestos litigation, the state court in San Francisco had completed only 11 percent of their asbestos cases. In Massachusetts, the news was worse—the state court had resolved only 10 of 2,141 claims, or less than 1 percent (Hensler et al. 1985, 84–85). Today, leading asbestos litigation attorneys have massive portfolios of claims, called "inventories," which are often settled en masse or tried in groups. The upshot, according to RAND, is that "individualized process is a myth" in asbestos litigation (Carroll et al. 2005, 129).

Under these circumstances, legal process analysis suggests that *Borel* was wrongly decided. If judges had refused to recognize asbestos workers' novel tort claims, or had construed them very narrowly, asbestos workers would have been forced to concentrate on other remedies, such as the creation of new compensation programs or significant modifications of existing programs in Congress or state legislatures. These legislative forums, in turn, seem far better suited to establishing comprehensive programs that broadly share the risks of

asbestos exposure among victims, spread the costs of asbestos injuries across industries, and prioritize claims of competing groups in light of limited resources.

THE LIMITS OF LEGAL PROCESS SCHOOL ANALYSIS IN ASSESSING ASBESTOS LITIGATION

In retrospect, it may seem obvious that Congress, as the national legislature, is the most appropriate forum to sort out the complexities of a multibillion dollar health policy problem. However, courts did not have perfect information about the scope and nature of the underlying problem. When *Borel* was decided in the 1970s, prominent observers argued that asbestos compensation issues were relatively discrete, as most litigation targeted the asbestos mining and manufacturing industry, which was dominated by the Johns-Manville Corporation. In the words of leading practitioners, most saw it as a "one company problem."[3]

Consistent with this view, in 1985 the federal research and education agency for the US federal courts, the Federal Judicial Center (FJC), found that concerns of a growing asbestos litigation crisis were "greatly exaggerated" (Willging 1985, 2). It went on to say that "asbestos cases, however complex they may have been at first, have become relatively routine product liability cases that involve a large number of parties" (5). A high-profile book by Paul Brodeur (1986), a journalist for *New Yorker Magazine*, echoed this sentiment, citing the FJC study and dismissing talk of an asbestos litigation crisis as corporate spin.

These perceptions, however incorrect, provide essential context for understanding the rise of tort in the case of asbestos. If key observers, including the courts' own research agency, believed that asbestos liability was concentrated in a single industry and raised routine product liability issues, then recognizing asbestos workers' tort claims may have been seen as tweaking the common law as opposed to leaping into a sprawling health policy issue. From this vantage, *Borel* seems far less objectionable.

Even if courts properly anticipated the potential scope and nature of the asbestos litigation crisis, legal process analysis of the *Borel* decision remains problematic. Legal process analysis compares adjudication with other modes of social ordering, which implies that these alternatives are available. But significant asbestos injury compensation legislation was probably not a viable option in the early 1970s. As a general matter, the creation (or significant expansion) of bureaucratic programs is always an uphill battle in the United States. Institutionally, the American lawmaking process generally favors

3. Interview of litigator and Washington lobbyist, who has worked on asbestos issues; conducted by author on August 5, 2004.

incremental change, because it is highly fragmented and features multiple veto points that provide reform opponents ample opportunities to water down or block major reforms (see generally Steinmo and Watts 1995; Steinmo 1994). Culturally, Americans are said to be suspicious of centralized authority and prefer private solutions to public problems (Kagan 2001; Lipset 1996). Politically, deferring to the courts offers elected officials an enticing combination of blaming judges for unpopular decisions while shifting much of the costs of governmental intervention to private litigants (Burke 2002; see also Barnes 1997; Kagan 1994, 2001; Melnick 2004).

More importantly, efforts to create a legislative program to compensate asbestos workers had already failed in Congress by the time *Borel* was decided on September 10, 1973. Specifically, on April 12, 1973, Republican Representative Peter H. B. Frelinghuysen introduced a bill entitled the "Asbestosis and Mesothelioma Benefits Act" (HR 6906). The bill was targeted. It sought to provide benefits to asbestos workers suffering from asbestosis and mesothelioma, who often fell through the cracks of workers compensation programs designed to deal with traumatic workplace injuries on the job, such as broken limbs, and not occupational diseases with long latency periods. The bill was cosponsored by members on both sides of the aisle, whose Americans for Democratic Action (ADA) scores ranged from very conservative (6.64 out of 100) to moderate (49.67 out of 100) to very liberal (92.69 out of 100). Despite its narrow focus and bipartisan sponsorship, the bill was not even assigned a hearing date after referral, and it died in the House Committee on Education and Labor. Other asbestos injury compensation bills met a similar fate throughout the 1970s and early 1980s.

Given the general difficulty of passing social benefit legislation and the failure of asbestos injury compensation legislation, judges could have reasonably believed that legislation would have been the least imperfect response to the asbestos problem, but that it was not politically feasible. If so, the initial choice in *Borel* was not litigation versus legislation, as implied in legal process analysis, but was litigation versus a patently inadequate workers' compensation benefits program. Under these conditions, the task was not providing a least imperfect response; it was advancing the policy-making process with the tools at hand while encouraging others to act.

Consistent with this standard, judges recognized asbestos workers' tort claims, offering them a forum to raise their concerns and supplement inadequate workers' compensation programs. In addition, as the costs of asbestos tort litigation came into focus, judges did not rigidly adhere to traditional forms of adjudication or jealously guard their territory. To the contrary, judges proved remarkably resourceful in attempting to move beyond traditional adjudication and ameliorate the costs of adversarial legalism by implementing "court-based tort reforms"—the ad hoc use of existing procedures to create alternative dispute resolution mechanisms (Barnes 2007b; see also Carroll et al. 2005; McGovern 1989). To help rationalize the claims process, judges used their

equitable powers to create inactive dockets to give priority to the most ill claimants (while preserving claims of those exposed to asbestos but not yet ill). They also conducted group trials and used multidistrict litigation to consolidate claims and reduce redundant individual common law suits. Perhaps most strikingly, judges and defendants used Chapter 11 to create no-fault compensation schemes on a company-by-company basis.

It should be stressed that these piecemeal court-based tort reforms have not erased the costs and inconsistency of adversarial legalism. The Chapter 11 trusts, for example, have produced decidedly mixed results (Peterson 1990; Carroll et al. 2005; Barnes forthcoming). While these trusts have arguably saved administrative costs for *individual* companies and provided a means to (imperfectly) manage their liability, it remains unclear whether these savings have translated into an *overall* reduction in costs, or if litigation costs have merely shifted as new defendants are dragged into court. Indeed, some lawyers report using the proceeds from these trusts to fund additional litigation, suggesting that these trusts have ironically curbed asbestos litigation against some defendants while helping fuel its growth against others.

In addition, Chapter 11 trusts create limited funds that pay according to varying terms and the trusts' liquidity. Because trust terms and liquidity vary over time and across companies, similar claims are not always treated the same over time or across trusts (Coffee 1995). The Manville Trust, for example, initially paid 100 percent of its claims' liquidated value, but it now pays only 5 percent as claims have consistently overrun trust assets. Whether individual claimants will receive more hinges on their ability to find alternative "deep pockets" under the rules of joint and several liability, which allow plaintiffs to sue any company in the chain of distribution for the full amount of damages, or some other theory. The net effect is that the cost of litigation and risk of insolvency falls to either (1) claimants who cannot find other solvent defendants in the supply chain or (2) nonbankrupt companies in the supply chain, who may have had little to do with covering up the dangers of asbestos—hardly a fair result. Finally, even if Chapter 11 trusts are significantly more efficient than tort, bankruptcy is still very costly. In a widely cited analysis, Joseph Stiglitz et al. (2002) estimated that asbestos-related bankruptcies could cost as many as 423,000 jobs, while the average value of these firms' pensions dropped 25 percent (see also Carroll et al. 2005).

Given these types of problems, many of which center on the details of implementation, it is easy to overlook the contributions of court-based tort reforms to the policy-making cycle. Many crucial elements of these judicial innovations have surfaced in legislative reform proposals, including proposals to create a national system for prioritizing litigation according to medical criteria (such as Asbestos Claims Criteria and Compensation Act of 2003 and Asbestos Compensation Fairness Act of 2005) and a national compensation trust for the victims of asbestos exposure (such as the Fairness in Asbestos Injury Resolution Acts of 2003 and 2005). This suggests that courts have

provided a useful policy-making laboratory, even if their experiments have not eliminated the costs and unpredictability of adversarial legalism.

Moreover, federal courts have been willing to reassess the use of adjudication, acknowledge the limits of individual tort suits and court-based tort reforms, and seek congressional help. In 1987, only two years after it pooh-poohed the idea of an asbestos litigation crisis, the FJC convened a special conference of stakeholders and judges to discuss asbestos litigation and its potential resolutions (Hensler 2002, 1899). In 1990, US Supreme Court Chief Justice Rehnquist established a special committee of the Judicial Conference on asbestos litigation, which called for "congressional action to establish a national asbestos claim resolution system" (Judicial Conference 1991, 31). The Supreme Court has repeatedly reiterated the need for federal action in *Amchem Products v. Windsor* et al. (1997), *Ortiz v. Fibreboard* et al. (1999), and *Norfolk & Western Railway Co. v. Ayers* (2003). Accordingly, the courts have not poached on Congress's lawmaking turf; they have broken new ground and have tried to plant the seeds of legislative action.

The problems with legal process analysis go beyond oversimplifying the informational and political context of judicial policy making. The very nature of the institutional comparisons underlying legal process analysis is flawed. First, legal process analysis requires an assessment of *net* costs and benefits of competing modes of policy making. Such assessments are more complicated than one might suspect. As Kagan (2001) argues, adversarial legalism is inevitably a double-edged sword; the same institutional features that make it open and flexible as a policy-making forum, such as pliable common law rules, juries, entrepreneurial lawyers, and policy-oriented judges, render it costly and inconsistent as a means of compensation. These benefits of adversarial legalism are often difficult to quantify and may not be wholly commensurable with its costs because openness and flexibility may be seen as important democratic virtues, while administrative efficiency and consistency are important policy goals.

Second, legal process analysis implies a false "either/or" choice among policy-making forums. The policy-making cycle entails multiple functions, including mobilization, agenda setting, information gathering, rule making, and implementation. These functions may best be shared, especially when the scope and nature of the problem is unclear and one branch or level of government may be unlikely to act. So, given the understanding of the problem and the track record of asbestos injury compensation legislation during the 1970s, the least imperfect institutional response to the asbestos problem may have a period of judicial mobilization, agenda setting, and information gathering on issues of fault followed by legislative and administrative action. If so, the primary failure of the American response to the asbestos problem has not been the undoubted shortcomings of adversarial legalism, but rather a breakdown in interbranch relations, as Congress has repeatedly failed to heed judicial calls for legislative action after a period of fruitful judicial experimentation (Henlser 1992; Schwartz, Behrens, and Tedesco 2003).

One might reasonably counter that this analysis overlooks the crucial fact that judicial innovation is not politically neutral. It can undermine legislative and executive action in a variety of ways. The pursuit of litigation can divert scarce resources from efforts to build political coalitions needed to press for legislation and administrative reforms (Rosenberg 1991). Litigation is also prone to increasing returns and thus is path dependent (Burke 2001; Hathaway 2001; see generally Pierson 2004). So, for example, as plaintiffs begin to win in the courts, they unearth useful facts, set precedents, and gain experience that make future lawsuits more likely to succeed, and thus increase the expected return of litigation. As the expected returns of litigation increase, claimants adjust their expectations accordingly and become less willing to pursue the creation of alternative remedies, even if they would be more efficient in the long run. As a result, whatever its short-term benefits, one might argue that the courts' decision to recognize the asbestos workers' tort claims—as opposed to denying their claims (or construing them very narrowly) and forcing them to lobby—locked in a mode of policy making with predictably negative consequences.

The point is well taken. The rise of litigation has complicated the passage of asbestos injury compensation legislation by shifting the winners on the ground and introducing effective veto players in the legislative process, including the influential American Association for Justice, formerly the American Trial Lawyers Association (ATLA) (Barnes 2007b). But these political risks counsel judicial caution, not exile from the process. If the chances of legislative action are already very slim, it is hard to argue that a further reduction is a compelling reason for judicial restraint, especially when litigation does not *always* preclude legislation and can help trigger it, as when the courts invite congressional action (Hausegger and Baum 1999; see also Barnes 2004; Melnick 1994).

On this score, it is crucial to remember that the courts did not act in the case of asbestos until *after* initial legislative reform efforts failed and, once they acted, courts continued to signal the weaknesses of adjudication as a mode of policy making and asked Congress for help. Under these circumstances, *Borel* and subsequent cases seem reasonable, even if the rise of tort litigation complicated the political prospects of passing asbestos injury compensation legislation.

Another potential counterargument is that courts should have acted, but ruled much more narrowly than *Borel*, perhaps recognizing a cause of action under negligence but not strict liability. Again, the historical record complicates the picture. As noted above, many believed at the time *Borel* was decided that the asbestos problem was limited to a relatively small number of companies. Under these circumstances, it seems somewhat unfair to criticize the courts for failing to anticipate the spread of asbestos litigation.

More critically, the *Borel* decision was not nearly as bold or broad as one might think. It is important to remember that the circuit court was applying

existing state law, and its ruling was consistent with a broader pattern of state court decisions that were expanding tort liability in general and product liability in particular (see Kagan 2001, 133–35; Polisar and Wildavsky 1989, 129–55; Ursin 1981, 243–44). In addition, the term "strict liability" is somewhat misleading. Under *Borel*, the seller's liability was qualified with a whole host of reasonableness requirements and affirmative defenses. It held that companies were only under a duty to warn about "dangers that are reasonably foreseeable" (*Borel*, 1088) in connection with reasonably foreseeable applications (1090). The warnings need only be "adequate" (1089) and "reasonably calculated to reach" the public (1091). Even if a seller acted unreasonably, the failure to warn had to proximately cause the plaintiffs' injuries (1090). *Borel* also recognized the so-called "state of the art" defense, which holds that sellers cannot be held liable for unknown risks (1089).[4]

In short, *Borel* did not give plaintiffs carte blanche. According to Brodeur (1986), plaintiffs won only about half of all cases that went to trial immediately following *Borel*, as defendants successfully used the state of the art defense. As such, the real turning point in the acceleration of asbestos claims was not necessarily the recognition of a qualified strict liability standard. It was the discovery of smoking-gun evidence that some asbestos manufacturers knowingly concealed deadly risks from their workers for decades (Castleman 2005), which significantly eroded the state of the art defense and established the original defendants' culpability. As a result, what seems a dramatic (and fateful) doctrinal leap in retrospect appears much more incremental (and defensible) on closer inspection.

RETHINKING LEGAL PROCESS ANALYSIS

Drawing lessons from a single case is always tricky, especially when the case is admittedly extreme in some ways (White 2004). However, single case studies, even extreme ones, can be theoretically useful (Gerring 2004, 2007). If the rise of asbestos litigation seems tailor-made for legal process analysis, and legal process analysis fails to offer a persuasive prescriptive framework for assessing it, the asbestos story offers a useful lens for probing its limits.

Equally important, asbestos is not a wholly isolated case. The use of dangerous workplace materials and production of some products with latent defects or perceived health risks is inevitable in a vibrant market economy. Examples abound: coal, DDT, Thalidomide, lead, mercury, tobacco, intrauterine devices, and polyvinyl chlorides. More recent examples include Phen-Fen,

4. In the 1980s, about a decade after *Borel* and after plaintiff lawyers had uncovered evidence of deliberate concealment of the dangers of asbestos, several state court decisions abandoned the state of art defense as a matter of law (*Beshada v. Johns-Manville Products Corp.* 1982; *Elmore v. Owens-Illinois, Inc.* 1984).

an untested, or "off label," combination of federally approved obesity medications linked to increased risk of valvular heart disease, and COX-2 inhibitors such as Vioxx, Celebrex, and Bextra, a group of medications for arthritis and other inflammation-caused pain, which were linked to increased risk of heart attacks and strokes. These dangers can create huge classes of claimants, seeking compensation for injuries, lost wages, and diminished quality of life as well as retribution for any corporate wrongdoing that contributed to their losses. These claims, in turn, will raise the issues of whether courts should try to address the underlying issues or defer to other forums.

On this central issue of institutional choice, the rise of asbestos litigation suggests two main lessons. First, contemporary legal process analysis implies that there is a choice of social ordering mechanisms, albeit imperfect ones. In reality, some options will be off the table as a practical matter. Indeed, in a lawmaking process riddled with veto points and supermajority requirements such as the filibuster in the Senate, legislation is often out of reach. As a result, the initial choice facing judges is often not litigation versus other modes of social ordering; it is litigation or nothing at all (Rubin and Feeley 2003; see also Frymer 2003). When the baseline for comparison is a troubling status quo, judicial policy making may be defensible, even if other modes of social ordering would be preferable in the abstract (Haltom and McCann 2004).

Second, contemporary legal process analysis presents an overly stark choice among forums. Congress, courts, and agencies share powers and have partially overlapping tool kits. Under these circumstances, the relevant institutional choice is not a static decision among legislation, administration, or litigation. It involves different divisions of labor among the branches in which the least imperfect institutional arrangements shift as issues progress through the policy-making cycle. In some cases, the least imperfect policy response may be a traditional division of labor in which Congress creates a national program, and agencies and courts apply the rules subject to congressional oversight. In other cases, as when the scope of the problem is uncertain, a period of decentralized judicial or agency experimentation may be the most appropriate initial response. As the nature of the problem comes into focus, it may be then appropriate for Congress to take the policy-making lead. Alternatively, it may make sense for Congress, agencies, and the courts to share powers in a process of mutually muddling through, as when Congress asserts limited control over some aspects of a policy while delegating other aspects to agencies and courts.

The point is not that judicial policy making is a panacea in a world of uncertainty, second bests, and shared power. It clearly is not. Judicial policy making is inevitably incremental, and scholars have long recognized that incrementalism—whether through Congress, agencies, or the courts—has its limitations (Dror 1964). The point is that a period of flexible rule making by the courts may be the only available option. Under these circumstances,

the question is not whether courts offer the least imperfect policy-making forum, but whether litigation can advance the policy-making cycle—an argument that resonates with several long lines of sociolegal scholarship, including one that seeks to understand courts as part of broader political and policy-making processes (Shapiro 1964, 1968, 1981; Melnick 1994; Rubin 1996; Gillman 2002; Barnes 2004, 2007a), and another that recognizes the "success" of litigation must be assessed not only in light of policy development and implementation but also in terms of movement building, agenda setting, and the transformation of the understanding of claims and appropriate solutions (Scheingold 2004 [1974]; Casper 1976; Galanter 1983; McCann 1992, 1994, 1999; Feeley 1992; Haltom and McCann 2004).

A final implication involves how judges should use their policy-making powers. The asbestos case suggests that, in a system of shared powers, judicial decisions should seek to enrich interbranch interactions and encourage nonjudicial inputs into the process. So, during a period of judicial policy making, it is appropriate to ask: Did judges wait and see if action in other forums was feasible? In crafting their decisions, did judges openly acknowledge the limits of adjudication? Did they make findings of fact that helped other actors assess the relative strengths and weaknesses of adjudication? Did they invite legislative overrides when adjudication seemed ineffective and experiment with alternative modes of decision making? If so, a period of judicial policy making can benefit the broader policy-making process, even if adversarial legalism is likely to be suboptimal mode of compensation in the long term.

CONCLUSION

In a system of "separated institutions sharing powers" (Neustadt 1990, 34), judicial policy making inevitably raises questions of institutional choice. To its credit, traditional legal process analysis understood the comparative dimension of assessing judicial policy making and asked the right types of questions. The problem was that its conception of institutional choice was too simplistic. Since the 1990s, new legal process analysis has sought to resuscitate a comparative institutional framework for assessing judicial policy making by relaxing its predecessor's insistence on identifying optimal institutional responses and incorporating insights into the likely social and political constraints on judicial action.

The case of asbestos suggests that this process of refinement needs to continue. The easiest changes involve paying closer attention to the context of judicial policy making. Legal process analysis must better integrate the problems of imperfect information and the political feasibility of alternative modes of social ordering when assessing whether adjudication is a defensible institutional response. This not only avoids the problem of viewing judicial

action through the distorting lens of 20/20 hindsight but also recognizes that the operative choice in the fragmented American political process is often litigation versus no action at all. Of course, we may prefer a hands-off approach. However, arguing that doing nothing is better (or less imperfect) than judicial action is very different than arguing courts should not have acted because a hypothetical, but politically impracticable, legislative response would have been better.

More fundamentally, legal process analysis must move beyond static, dichotomous choices among alternative modes of social ordering and recognize that American policy-making functions may be best shared among the branches, levels of government, and the public and private sector. Under these circumstances, we should not compare single modes of social ordering and ask which is the least imperfect in the aggregate; we should ask which division of labor among policy-making forums is available and most likely to advance the policy-making cycle. In making this inquiry, we must also acknowledge that the answer is likely to shift as we move from mobilization, agenda setting, information gathering, rule making, and implementation. Incorporating these intergovernmental and policy development dynamics surely complicates the evaluation of judicial policy making from a comparative institutional perspective, but it is a more viable framework for evaluating the role of courts and adjudication in our system of overlapping and diversely representative policy-making forums.

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