THE IMPROPRIETY OF PUNITIVE DAMAGES IN MASS TORTS

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INTRODUCTION

Punitive damages have been around for centuries in classic one-on-one tort actions and are here to stay.[1] Mass torts, of more recent origin and not without difficulties[2], have matured to the point that this article is comfortable referring to most of them as traditional. Notwithstanding the legitimacy of both institutions when employed separately, loud warning signals should sound when, as with drinking and driving, they are combined.[3]

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[1] See generally, Clarence Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 0000 (1931) ("the practice of allowing punitive damages (as such) is centuries old, and is now followed in all but a few American jurisdictions. . . ."); David G. Owen, Civil Punishment and the Public Good, 56 So. Calif. L. Rev. 103, 121 (1982) ("For thousands of years, in many diverse civilizations, the law has provided for "damages" in addition to compensation for actual losses to persons injured by certain types of highly antisocial behavior. [Thus, punitive] damages have established a secure home in the legal system prevailing in this nation. . . and. . . are here to stay."); David F. Partlett, Punitive Damages: Hot Zones, 56 La. L. Rev. 781, 783-786 (1996) (extended discussion of the common law roots of punitive damages);

[2] See generally, Mary Davis, Toward the Proper Role for Mass Tort Claim Actions, 77 Or. L. Rev. 157 (1998) (identifying the difficulties that courts encounter in managing class actions); Elizabeth Chamblee Burch, Judging Multidistrict Litigation, 90 N.Y.U. L. Rev. 71 (2015) (problems with non-class action mass torts); Deborah Hensler and Mark Peterson, Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis, 59 Brooklyn L. Rev. 961 (1993) (identifying various problems with mass tort litigation).

[3] Articles expressing serious concerns with allowing punitive awards in mass torts include, e.g., W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts, 87 Georgetown L.J. 285 (1998) (punitive awards in mass torts provide no net social benefits and should be abolished); Jim Fieweger, The Need for Reform of Punitive Damages in Mass Tort Litigation: *Juzwin v. Amtorg Trading Corp.*, 39 DePaul L. Rev. 775 (1990) (punitive damages in mass torts require serious reforms); Szuch & Shelley, Mass Cases Prompt Need for Reassessment: Time to Eliminate Punitive Damages? Nat'l L.J. Feb 28, 1983 at 13, col. 1 (identifying problems that justify abolition);

Potentially destructive mixes of punitive damages and mass torts have, unfortunately, been prevalent in traditional mass-tort actions.[4] The difficulties are mostly administrative. Although punitive damages are conceptually compatible with fault-based mass torts, courts administer punitive awards in ways that are so capricious as to generate gross unfairness and inefficiency. And if for that reason the warning signals are loud in connection with punitive awards in traditional mass torts, they should be downright deafening when courts consider awarding punitives in what this article refers to as emerging, nontraditional, enterprise-liability-based forms of mass tort.

These nontraditional forms of claims-aggregation, which have only recently been reaching courts in significant numbers, involve not only *procedural* aggregation, as in traditional mass torts, but also *substantive* aggregation. The latter occurs when courts eliminate constituent elements from traditional tort doctrine—most dramatically, the element of defendant's fault[5]—to construct generic, strict liability claims brought by large numbers of plaintiffs against entire industries. [6] The industries that plaintiffs are choosing for such treatment impose significant costs on society and might be said to be politically incorrect; but they are lawful enterprises that presumably provide aggregate social benefits that exceed their costs. Were courts to award punitive damages in these nontraditional mass torts such awards would be sufficiently disconnected from the traditional objective of punishing wrongdoers as to justify rejecting them on substantive as well as

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Richard A. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing The Problems of Fairness, Efficiency, and Control, 52 Fordham L. Rev. 37 (1983) (Significant reforms are required to allow punitive awards to survive); Catherine M. Sharkey, The Future of Classwide Punitive Damages, 46 U. Mich. J.L. Ref. 4, (2013) (Reforms are required for punitive damages awards to survive constitutional scrutiny).

[4] Courts have awarded punitive damages on a regular basis in traditional mass torts. See, e.g., Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757 (Cal. App. 1981) (affirming $3.5 million in punitive damages in Ford Pinto litigation); Owens-Corning Fiberglass Corp. v. Malone, 972 S. W. 2d 35 (Tex. 1998) (affirming punitives award in asbestos litigation); Tetuan v. A. H. Robins Co., 241 Kan. 441 (Kan. 1987). See generally Seltzer, supra note 3 at 38-40.

[5] As will be explained, plaintiffs often attach negligence labels to these nontraditional mass tort claims, but substantively most of these labels are merely window dressing.

[6] This author has argued elsewhere that the substantive bases of most of these nascent forms of strict enterprise liability are so vague and so dependent on broad duties to rescue as to be unlawful. See James A. Henderson, Jr., The Lawlessness of Aggregative Torts, 34 Hofstra L. Rev. 329 (2006); James A. Henderson, Jr., Requiring Sellers of Safe Products to Rescue Users From Risks Presented by Other, More Dangerous Products, 37 Sw. L. Rev. 595 (2008). If the triggers were more specific, the major objection would be the arbitrariness of selecting a relatively few target industries on questionable substantive grounds. In any event, this article assumes for the sake of argument that courts will deem some of them to be legitimate and challenges the propriety of awarding punitive damages in those contexts.

administrative grounds.

Given that these difficulties cannot be eliminated by marginal reforms, this article argues that punitive damages are inappropriate in, and should be eliminated from, all forms of mass tort. Legislatures might accomplish this task if powerful political opposition from the plaintiffs' bar could be overcome. Broad judicial proscriptions would not so directly face political opposition but would require courts to overrule precedent in connection with traditional mass torts.[7] This article explains how this might be accomplished. In connection with emerging forms of mass tort, judicial proscriptions would come early enough to nip punitive awards in the bud without the need to overrule longstanding precedent. Thus, if courts are going to eliminate punitive awards in mass torts, now is the time for them to act.

I. CONSTITUENT ELEMENTS OF THE ANALYSIS

A. Punitive Damages: Doctrinal Triggers and Policy Objectives

Courts employ a variety of formulations to identify the behaviors that justify punitive damages. Among other triggers courts have required that the tort defendant must have acted in willful or reckless disregard of plaintiff's rights;[8] engaged in outrageous conduct creating a substantial risk of significant harm;[9] acted with actual, not merely implied, malice,[10] or acted with reckless indifference to the rights of others.[11] Scholars have variously summarized these doctrinal triggers as referring to especially opprobrious behavior,[12] abuses of power,[13] and differing levels of heinousness.[14] A majority of courts and commentators agree that only defendants who are egregiously blameworthy deserve to be punished in this manner. Mere negligence, or even gross negligence, will not suffice.[15] Moreover, whatever

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[7] See supra note 4 and accompanying text; see also supra notes 182-191 and text accompanying.

[8] See, e.g., White v. Citizens Nat. Bank of Boone, 262 N.W.2d 812, 817 Iowa 1978); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 275 (Wis. 1980); Svenson v. Swegan, 133 App. Div. 3d 1279, 1280 (N.Y. App. 2015).

[9] See, e.g., Linthicom v. Nationwide Life Ins. Co., 150 Ariz. 326 (Ariz. 1986); Grefer v. Alpha Technical, 965 So. 2d 511, 518 (La. App. 2007).

[10] See, e.g., Ellerin v. Fairfax Sav., 337 Md. 216, 228-229 (Md. 1995).

[11] See, e.g., Feld v. Merriam, 506 Pa. 383, 395 (Pa. 1984).

[12] See, e.g., James A. Henderson, Jr., et al., The Torts Process 676 (9th ed. 2017).

[13] See, e.g., Owen, supra note 1 at 104.

[14] See, e.g., Mark Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Amer. U. L. Rev. 1393, 1432 (1993).

[15] See, e.g., Indiana & Michigan Elec. Co. v. Terre Haute Industries, 507 N.E.2d 588, 610 (Ind. App. 1987). See generally Partlett, supra note 1 at 790, n.47 and text accompanying; Aaron D. Twerski, et al., Torts—Cases and Materials 793 (4th ed. 2017).

the operative trigger, courts in virtually every jurisdiction give triers of fact—juries in most cases—wide latitude in determining the size of punitive damages awards.[16] As will be developed in a subsequent discussion, this latitude is so wide that it may be said to interfere with attaining the objectives of awarding punitive damages in the first place.[17]

What social objectives are served by awarding punitive damages? The answer from scholars is nearly unanimous: punitive damages primarily aim to achieve retribution and deterrence.[18] Retribution is best conceived as a backward-looking end-in-itself, based on the moral concept of just desert. Bad actors deserve to be punished.[19] By contrast, deterrence is a forward-looking means-to-an-end, serving to reduce future, inefficiently-harmful conduct by the defendant and others.[20] Most tort scholars agree that imposition of punitive damages may serve a combination of retribution and deterrence.[21] Some have articulated other objectives that justify punitive awards, including filling gaps in compensatory damages coverage—e.g., paying the plaintiff's otherwise uncompensated attorneys' fees—in order to achieve proper levels of deterrence.[22] A leading authority rejects this view, arguing that the preferable solution to doctrinal shortcomings is to expand the

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[16] See, e.g., Pacific Mutual Ins. Co. v. Haslip, 499 U.S. 2, 18 (1991) ("One must concede that unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.") See generally Peter H. Schuck, Judicial Avoidance of Juries in Mass Tort Litigation, 48 De Paul L. Rev. 479, 480, n.5 and text accompanying; Byron G. Stier, Jackpot Justice: Verdict Variability and the Mass Tort Class Action, 80 Temple L. Rev. 1013, 1022 (2007).

[17] See infra notes 110-116 and accompanying text.

[18] See, e.g., Gary T. Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 So. Cal. L. Rev. 133, 134-136 (1982); David G. Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 375-78 (1994); Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 So. Calif. L. Rev. 1, 4-10 (1982).

[19] See Ellis, supra note 18 at 8:

> Punishment in the form of retribution . . . implies desert, which in turn requires that the person being punished must, by a fair procedure, be found to have chosen to commit an act that has been authoritatively declared wrongful. Punishment of proportionally appropriate severity must be prescribed beforehand *ex ante* and applied on an equal basis to all offenders. Retribution is backward-looking (*ex post*) and provides a complete reason for imposing a detriment.

[20] See id. at 8-9:

> [Deterrence] require[s] an assessment of whether the costs incurred by imposing a detriment on a defendant will be offset by a reduction in the expected losses to society from future harmful acts. . . . Compensatory damages ordinarily would appear to be sufficient to promote efficient levels of deterrence. Accordingly, deterrence objectives justify imposing punitive damages only in cases where compensatory damages alone produce less than optimal deterrence.

[21] See authorities cited supra note 18.

[22] See, e.g., Ellis, supra note 18 at 3, and text accompanying n.10;

scope of compensatory damages rather than to employ punitive damages to perform a gap-filling function having no necessary connection with wrongdoing.[23] A related justification for punitives is that they help to counter underdeterence resulting from defendants engaging in efforts to conceal their harmful wrongdoing.[24] In such a circumstance, it is argued, punitive awards are appropriate because they are linked logically to deceptive, antisocial conduct.

Some scholars, especially of the law-and-economics variety, justify punitive damages as a means by which to internalize the costs of inherently risky enterprises, thereby helping to achieve more efficient levels of care and activity via general deterrence.[25] Because many of the enterprises to which this rationale applies are lawful, socially beneficial—albeit inherently risky—enterprises,[26] efficiency analysts face a daunting task trying to link cost-internalization to the traditional, wrongfulness-based triggers for punitive damages.[27] To be sure, a few individual defendants who are joined in mass torts will have acted especially badly in ways that relate uniquely to them. But it is a stretch to insist that operating a lawful, albeit risky, business should, in itself, constitute sufficiently wrongful behavior to justify punitive damages.[28] The best that plaintiffs may be able to come up with is to argue that engaging in business enterprises that foreseeably and unavoidably—albeit not necessarily wrongfully—cause harm to others constitutes the sort

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[23] See Schwartz, supra note 18 at 139-140.

[24] See Ellis, supra note 18 at 25. When actors make conscious efforts to conceal their wrongdoing, they are less likely to be caught in the act, so to speak. For the minority who are caught, imposing a penalty greater than compensatories is appropriate in order to bring the expected value of the threatened penalty up to an appropriate level.

[25] See, e.g., A. Mitchell Polinsky and Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869-901 (1998). For a fairly full explanation of the theory underlying enterprise liability see generally supra note 12, Henderson at 502-07. In brief, enterprise liability raises the costs of engaging in the relevant activities, thereby lowering the level of engagement. One of the problems with enterprise liability is maintaining workable boundaries. See James A. Henderson, Jr., The Boundary Problems of Enterprise Liability, 41 Md. L. Rev. 659 (1982).

[26] See infra text accompanying notes 43 and 45.

[27] Cost internalization is usually associated with strict liability, not with fault. See supra note 24. See also infra note 66, citing and quoting Dan Markel.

[28] The nonnegligent operation of a business is a classic trigger for strict enterprise liability. See generally Gregory C. Keating, The Theory of Enterprise Liability and Common Law Strict Liability, 54 Vand. L. Rev. 1285, 1286 (2001) ("Enterprise liability pins . . . accident costs on the activity—the enterprise—which imposed the nonnegligent risks responsible for the injuries at issue.") As subsequent discussions relating to emerging mass torts make clear (see infra notes 39-109 and text accompanying) courts in recent years have held members of certain industries liable for punitive damages based on their participation in those industries.

of disregard and indifference that some courts have held to be sufficient bases upon which to award punitive damages.[29]

Consistent with the preceding observations, a majority of scholars embrace retribution based on desert as the predominant rationale for punitive damages.[30] Professor Gary Schwartz's work stands out for the clarity with which he articulates his preference for the punishment/retribution rationale.[31] Having reviewed the work of other prominent writers and the relevant judicial decisions, he concludes: "The deterrence theory thus badly fails the descriptive test: there is almost nothing in the common law of punitive damages that it clarifies, and there are central features in that law that it contradicts."[32] Schwartz proceeds to consider characteristics of the common law that the punishment/retribution rationale for punitives helps to explain and justify, among them the distinctly moral nature of the doctrinal triggers and the way that a defendant's degree of reprehensibility and wealth help to determine the appropriate size of a punitive award.[33] He also discusses several ways that the retribution rationale runs into practical difficulties.[34] Some of these difficulties will be considered in a subsequent discussion in Part II regarding the proper role of punitives in traditional, fault-based mass torts.

B. Mass Torts: Fault-Based Traditional Forms and Recent Expansions Toward Strict Enterprise Liability

1. Traditional Mass Torts: Procedural Aggregations of Similar, Mostly Fault-Based Claims

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[29] See supra notes 8 and 11 and text accompanying.

[30] See Schwartz, supra note 18; Partlett, supra note 1; Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 U.C.L.A. L. Rev. 1659 (1992); Dan Markel, Retributive Damages: A Theory of Punitive Damages as Intermediate Sanctions, 94 Cornell L. Rev. 239 (2009); Benjamin C. Zipursky, A Theory of Punitive Damages, 84 Tex. L. Rev. 105 (2005); Anthony Sebok, Punitive Damages: From Myth to Theory, 92 Iowa L. Rev. 957 (2007). The latter two authors seem to stress moral vindication of the victims of wrongdoing rather than simply retributive punishment of the wrongdoers. In any event the two concepts are opposite sides of the same coin. See Dan Markel, How Should Punitive Damages Work?, 157 U. Pa. L. Rev. 1383, 1418-1419 (2009).

[31] See Schwartz, supra note 18.

[32] Id. at 143. ("I therefore propose that we be willing to take 'punitive' damages at face value—that is, as primarily designed to punish [to achieve retribution.] This understanding has the initial advantage of taking language seriously—of recognizing that our law's language intends to express meaning. And this understanding is also successful in illuminating a number of the common law's basic characteristics.")

[33] Id. at 144.

[34] Id. at 144-45. Cf. infra notes 131-142 and text accompanying.

Mass torts date back to the sixties when reforms in federal civil procedure began to allow the procedural aggregation of cases sharing common issues of fact and law. These procedural aggregations, which included class actions and multidistrict consolidations, aimed primarily to achieve efficiency by allowing common issues to be tried simultaneously.[35] Many of the early mass torts involved class actions, with a single defendant and multiple plaintiffs, based on traditional, fault-based tort law.[36] Plaintiffs included claims for punitive damages that, because the underlying claims for compensatory damages are based on traditional tort doctrine, fit conceptually within the fault-based action as a whole. For example, a prescription drug manufacturer found to have failed to warn of a serious risk unknown to the medical profession but of which the drug company knew should pay punitive damages to the many consumers injured by the drug.[37] As will be explained in Part II, infra, punitive damages in traditional mass torts present serious administrative problems that have led critics to urge their substantial restriction or elimination.[38] However, given that the underlying tort claims in traditional mass torts are fault-based, no fundamental disconnect exists between their compensatory and punitive aspects.

2. Emerging, Nontraditional Mass Torts: Substantive Aggregation on the Road to Strict Enterprise Liability

a. A Brief Overview of Nontraditional Mass Torts

These nontraditional mass torts, most of which date back less than thirty years,[39] are based on innovative claims that ask courts to eliminate

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[35] See generally Mary J. Davis, Toward the Proper Role of Mass Tort Class Actions, 77 Or. L. Rev. 157, 168-186 (1998); Stanley J. Levy, Complex Multidistrict Litigation and the Federal Courts, 40 Fordham L. Rev. 41 (1971).

[36] These characteristics emphasize that early mass torts involved aggregation only in the procedural dimension. A single defendant's egregious conduct happened to harm many victims in a fundamentally similar way. Courts allowed joinder of many claims as a means of reducing costs and achieving consistent outcomes. See supra note 3, Richard A. Seltzer, 52 Fordham L. Rev. at 37-38.

[37] See, e.g., Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967); Desiano v. Warner-Lambert & Co., 467 F.3d 85 (2d Cir. 2006); Forman v. Novartis Pharms. Corp., 793 F. Supp. 2d 598 (E.D.N.Y. 2011). For an analysis of related preemption issues see generally Eric Lasker and Rebecca Womeldorf, Prescription Drug Products Liability Litigation and Punitive Damages Preemption, April 2013 Defense Council J. 123 (2013).

[38] See supra note 3 and text accompanying (scholars objecting to current law allowing punitive damages in mass torts).

[39] Beginning with traditional mass tort formats, asbestos litigation dates back more than fifty years and serves as the flagship for mass torts generally. See infra notes 48 and 49 and text accompanying.

important doctrinal elements such as defect, fault, and causation from traditional tort theories. These new doctrines aim to impose liability on entire industries, through their members, for harms caused to multitudes of plaintiffs by the generic risks that those industries present to the public.[40] This author has elsewhere observed that these new torts rest on alleged duties of industry members to rescue the public from the consequences of desirable-but-dangerous commercial activities, and has argued that they present courts with vague, open-ended (and therefore mainly unadjudicable) issues.[41] This article accepts the reality that plaintiffs will continue to pressure courts to recognize these nontraditional causes of action and assumes for the sake of argument that some of these efforts will be successful.[42]

b. Examples of Emerging, Nontraditional Mass Torts

In the following examples, plaintiffs bring mass tort actions against all, or the largest, of the companies within established industries whose products and other commercial outputs their critics claim are of questionable social value. Many of these actions impose the functional equivalent of general duties to rescue and seek to recover pure economic losses rather than damages for personal injuries.[43] Although plaintiffs often dress these claims in the rhetorical clothing of traditional, fault-based tort theory, all of them involve modifications of existing tort doctrine to create new theories that are particularly amenable to collective, mass tort treatment.[44] By bringing potentially existential attacks on socially questionable industries, plaintiffs appear to be seeking large settlements that have the potential to transform litigation processes into massive compensation systems[45] by means of which

[40] See generally Jane P. Mallor, Guilt by Industry: Industry-Wide Liability for Defective Products, 49 Tenn. L. Rev. 61 (1981); see Note, From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries, 86 Cornell L. Rev. 1334 (2001).

[41] See supra note 6; Henderson, infra note 54.

[42] Among recent plaintiffs' successes are claims against what are often referred to as peripheral asbestos defendants—manufacturers of workplace products that do not themselves contain asbestos but are foreseeably used post-sale with asbestos-containing products manufactured and distributed by others In these cases the asbestos-containing add-on products cause harms for which the peripheral defendants are held liable, ostensibly for failing to warn of the asbestos-related risks.. See infra notes 54-59 and text accompanying.

[43] See, e.g., infra notes 64, 70, and 83 and text accompanying.

[44] See, e.g., infra notes 52 (new collective causation theories); 60 (recovery for pre-injury increases of risk following toxic exposure); 85 (new forms of public nuisance); and texts accompanying.

[45] One example of a failed attempt to achieve this objective via federal statute was the so-called FAIR Act, which aimed to replace asbestos litigation with an administrative compensation system. The Act failed of passage in 2006. See generally Jeb Barnes, Dust-Ups: Asbestos Litigation and the Failure of Commonsense Policy Reform, 49-75 (2011).

not only are existing plaintiffs' claims paid but also future plaintiffs' rights are foreclosed and trial dockets are cleared.[46]

i. Asbestos-Containing Products Industries

Asbestos litigation provides a paradigm for the doctrinal developments described in this article.[47] Beginning in the mid-1960s, as epidemiological studies revealed that exposures to asbestos fibers cause cancer, plaintiffs began to bring traditional tort actions against individual commercial asbestos suppliers for negligent failures to warn.[48] These early cases were fault-based personal injury actions, of both individual and class-action varieties, that did not require any significant modifications of traditional tort doctrines.[49] By the early 1980s such claims were sufficiently numerous to force the major asbestos supplier to declare bankruptcy, and many other asbestos suppliers followed.[50] Four years of negotiations resulted in the 1988 Plan of Reorganization, which created a Manville Settlement Trust that anticipated paying claims for asbestos-related personal injuries over the following three decades.[51]

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[46] See John C. Coffee, Jr., The Corruption of the Class Action: The New Technology of Collusion, 80 Cornell L. Rev. 851, 854-855 (1995); Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045, 1048, text accompanying nn.203-05 (1995); Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U. L. Rev. 469, 485-493 (1994).

[47] See generally Michelle J. White, Asbestos and the Future of Mass Torts, 18 J. Econ. Perspectives 183 (2004).

[48] See e.g. Borel v. Fibreboard Paper Products Corp. 493 F.2d 1076 (5th Cir. 1973; Tomplait v. Combustion Engineering, Inc., No. C.A. 5402 (E.D. Tex. 1967; See generally Lester Brickman, On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality, 31 Pepp. L. Rev. 33 (2003) (discussing the history of asbestos litigation).

[49] See cases cited supra note 48. See also Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975). Even in their traditional, unmodified form, failure-to-warn claims typically lack sufficient content to guide judicial decision. See generally James A. Henderson, Jr. and Aaron D. Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265 (1990).

[50] See Kane v. Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988) ("By the early 1980's, Manville had been named in approximately 12,500 such suits brought on behalf of over 16,000 claimants. New suits were being filed at the rate of 425 per month. Epidemiological studies undertaken by Manville revealed that approximately 50,000 to 100,000 additional suits could be expected from persons who had already been exposed to Manville asbestos. On the basis of these studies and the costs Manville had already experienced in disposing of prior claims, Manville estimated its potential liability at approximately $2 billion. On August 26, 1982, Manville filed a voluntary petition in bankruptcy under Chapter 11").

[51] See generally Marianna S. Smith, Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust, 53 Law & Contemp. Prob. 27 (1997).

Gradually, first facing the depletion and then the exhaustion of solvent companies that sold products containing asbestos, plaintiffs began to modify traditional tort claims to maintain an uninterrupted stream of asbestos litigation. During this transitional period, which continues, mass tort actions evolved from traditional to nontraditional forms. Thus, plaintiffs who could not identify the particular sources of asbestos to which they had been exposed joined groups of defendants within a given asbestos-related industry and invoked various theories of collective responsibility.[52] Plaintiffs argued that because exposures to asbestos from various sources over periods of years had cumulative deleterious effects, any substantial exposure to a defendant's products should suffice to hold that defendant jointly and severally liable with others within the same industry even though the exposure to defendant's product was not sufficient, by itself, to cause plaintiff's injury.[53]

During the past several decades, asbestos plaintiffs have pressured courts to accept other doctrinal expansions aimed at providing fresh categories of defendants by which to extend asbestos litigation into the indefinite future. One such expansion imposes tort liability, ostensibly on the basis of failure to warn, beyond distributors of asbestos-containing products to include defendants who distribute products that do not themselves contain asbestos but are used post-sale in combination with asbestos-containing products that cause injury. In effect, these claims require defendants to rescue the victims and potential victims of asbestos-containing products distributed by others. [54] The New York Court of Appeals recently affirmed judgment for plaintiff in a failure-to-warn action against the manufacturer of pump valves for harm caused by asbestos-containing gaskets manufactured and distributed by an unrelated company and installed by the purchasers of the pump valves.[55] A concurring judge joined the outcome on appeal but argued for a

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[52] See generally Donald G. Gifford, The Challenge to the Individual Causation Requirement in Mass Products Torts, 62 Wash. & Lee L. Rev. 873 (2005) (detailing various forms of collective liability that have been attempted in both asbestos cases, and other toxic tort cases); Allen Rostron, Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products, 52 UCLA L. Rev. 151 (2004) (discussing market share liability and arguing in favor of an even broader form of liability); Brian M. DiMasi, The Threshold Level of Proof of Asbestos Causation: The Frequency, Regularity, and Proximity Text and a Modified Summers v. Tice Theory of Burden-Shifting, 24 Cap. U. L. Rev. 735 (1995) (detailing alternative liability, and arguing in favor of a modified version of it).

[53] See, e.g., Bostic v. Georgia-Pacific Corp., 439 S.W.3d 332 (Tex. 2013). See generally Victor E. Schwartz and Mark A. Behrens, Asbestos Litigation: The "Endless Search for a Solvent Bystander," 23 Widener L.J. 59, 70 (2013).

[54] See generally James A. Henderson, Jr., Requiring Sellers of Safe Products to Rescue Users From Risks Presented by Other, More Dangerous Products, 37 Sw. L. Rev. 595 (2008). See generally supra note 53, Victor E. Schwartz.

[55] See Matter of New York City Asbestos Litigation (Dummit v. A.W. Chesterton, et al. Crane Co. Appellant) (N.Y. Court of Appeals, No. 83, June 28, 2016).

more limited liability rule defining in specific fashion when a manufacturer must warn of the risks presented by another manufacturer's product.[56] The concurring judge expressed concern that courts may expand the test for liability to the point that mere foreseeability that a defendant's asbestos-free products may be combined in some fashion with asbestos-containing products will suffice to hold the defendant manufacturer responsible for asbestos-caused injuries.[57]

Several further revisions of tort doctrine carry the possibility of promoting nontraditional mass torts. The first increases the categories of injuries, besides personal injury and property damage, for which successful asbestos plaintiffs may recover. Over the last decade plaintiffs have sought, prior to manifesting injury from exposures, to recover compensation for increases in their risks of future injury;[58] mental distress at being placed at higher risk;[59] and medical monitoring costs necessary to detect asbestos-related illnesses at their earliest stage.[60] Plaintiffs relying on these doctrinal expansions have met with limited success.[61] Another example involves new definitions of property damage and extensions of public nuisance law that shift the high costs of asbestos abatement from property owners (often public

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[56] Id. at 00, Garcia, J., concurring.

[57] Id. at 00. ("[The jury instruction below] is the 'mere foreseeability' test. . . . We should disavow that test to prevent a further expansion of the standard.")

[58] See James A. Henderson, Jr. and Aaron D. Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S.C. L. Rev. 815, 822-23 (2002) (detailing lack of success that increased risk cases have had); Mauro v. Raymark Industries, Inc., 116 N.J. 126 (N.J. 1998) (disallowing claim alleging an increased risk and providing a list of cases addressing increased risk claims); In re Asbestos Products Liability Litigation (No. VI), 278 F.R.D. 126 (E.D. Pa. 1989) (Erie prediction that Illinois Supreme Court would not allow recovery for increased risk of subsequent injury).

[59] See Henderson and Twerski, supra note 58 at 823-836 (discussing courts' unwillingness to award damages for mental distress caused by exposure to asbestos absent a physical injury); Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997) (disallowing recovery for mental distress absent physical injury); Zerak v. Police Athletic League, 132 A.3d 541 (Pa. Commw. Ct. 2016) (disallowing recovery for mental distress for exposure to asbestos in case where a police officer discovered asbestos at a youth center run by the defendant).

[60] See Henderson and Twerski, supra note 58 at 836-849 (discussing the mixed case law regarding recovery for medical monitoring, and arguing against recovery for medical monitoring); Bourgeois v. A.P. Green Industries, Inc., 716 So. 2d 355 (La. 1998) (reversing motion to dismiss granted against plaintiffs on ground that asymptomatic plaintiffs who have been exposed to asbestos, and now must pay to monitor their medical conditions, have suffered damage upon which they may base a claim); Elsea v. U.S. Engineering Company, 463 S.W.3d 409 (Mo. App. 2015) (allowing class certification in order to pursue medical monitoring claims).

[61] See supra notes 58-60.

entities) to manufacturers of asbestos-containing products.[62] As with the examples involving increased risk, mental distress, and medical monitoring, these new theories raise problems that have led courts to hesitate.[63] But plaintiffs' persistence causes the future to be uncertain.

Before considering targets other than the asbestos industry, a brief summary will be useful. Asbestos claims in the 1960s and 1970s were based on traditional tort theory—asbestos sellers had allegedly failed to warn of hidden risks of which they knew full well. However, beginning with the Manville bankruptcy and subsequent Plan of Reorganization, the culpability of industry members who willfully distribute asbestos-containing products has been more or less taken for granted[64] and the important issues in emerging, nontraditional mass torts have concerned causation, elements of recovery, and the question of which defendants could be considered members of the relevant asbestos industry.[65] Currently, actions seeking to impose asbestos liability have, empty rhetoric aside, very little to do with anyone's moral fault and everything to do with the amoral reallocation of losses and costs from mostly innocent victims to mostly innocent enterprises.[66]

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[62] See generally Richard C. Ausness, Tort Liability for Asbestos Removal Costs, 73 Oregon L. Rev. 505 (1994); Victor E. Schwartz & Phil Goldberg, The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort, 45 Washburn L.J. 541, 553 (2006). See, e.g., Detroit Board of Education v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992) (leading case; cited by Schwartz, supra, at n.71.)

[63] Id. See also Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915 (8th Cir. 1993).

[64] By the time that Manville declared bankruptcy, the substantial cancer risks presented by asbestos fibers were common knowledge and were assumed to have been discoverable earlier, and virtually no defendants had, up to that point issued any kind of warnings. In effect, the asbestos industry had been caught off-base and red-handed. Moreover, so-called tertiary defendants such as pump manufacturers had not warned because they never received adequate notice that they might be liable for products they had not distributed. See infra notes 193-198 and text accompanying.

[65] See supra notes 54-57 and text accompanying.

[66] The asbestos liability story could be said to consist of three chapters. In the first, commercial asbestos-product distributors such as Johns Manville were held liable on the basis of failure to warn (see supra notes 46-49 and text accompanying) under circumstances where the issue of fault was quite disputable. The second chapter covers the period from the nineties until present, where the issue of defendants' fault fell out of the mass tort liability picture almost entirely (see supra notes 64 and 65 and text accompanying). The third chapter, referenced in the text accompanying this note, involves what are here referred to as emerging mass torts, in which peripheral defendants are being threatened with potentially sweeping liability (see supra notes 54-57 and text accompanying) although they never distributed an asbestos-containing product. See supra notes 54-57 and text accompanying. On the subject of the dispassionate nature of punitive damages as a cost-internalization device see Dan Markel, How Should Punitive Damages Work?, 157 U. Pa. L. Rev. 1383, 1412 (2009) ("Deterrence damages are a purely nonstigmatic, 'cool' cost internalization device. They do not "punish" a defendant any more than state incorporation fees "punish" a defendant.")

ii. The Tobacco Industry

Tobacco is a high-profile example of a lawful, but disfavored, industry against which plaintiffs have brought expansionary, nontraditional mass torts. As with asbestos, plaintiffs based their earliest efforts on traditional theories of failure to warn. Unlike asbestos, however, these early actions were entirely unsuccessful.[67] One of the more spectacular of the subsequent expansions into nontraditional liability involved claims by governmental units at the local, state, and federal levels against tobacco industry members for having, merely by lawfully distributing their nondefective products, increased the costs of maintaining public welfare systems. The best-known examples were claims brought by the attorneys general of a large number of states against members of the tobacco industry seeking reimbursement, on essentially unjust enrichment grounds, of tobacco-related health care expenditures by their states.[68]

The soundness of the unjust enrichment theory invoked in these cases was questionable, but the stakes were huge. Perhaps in part reflecting the crapshoot aspects, the parties entered into a Master Settlement Agreement in 1998 calling for payment of $246 billion to the states and to the nongovernmental lawyers who had managed the litigation.[69] Other actions along similar lines followed. In one of them the federal government brought an unjust enrichment action based on the Racketeer Influenced and Corrupt Organizations Act (RICO).[70] The government sought disgorgement of $280 billion that the tobacco industry had allegedly received over a 30-year period while concealing the addictive qualities of cigarettes.[71] After the federal district court denied defendants' motion for summary judgment and certified the case for interlocutory appeal, the Court of Appeals for the D.C. Circuit reversed on the ground that RICO does not provide for disgorgement-type remedies.[72]

One more example of how the tobacco industry has been the target of nontraditional mass tort actions deserves mention. From the 1970s into the

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[67] See James A. Henderson, Jr. and Aaron D. Twerski, Reaching Equilibrium in Tobacco Litigation, 62 So. Car. L. Rev. 67, 70-72 (2010).

[68] See generally Robert L. Rabin, The Tobacco Litigation: A Tentative Assessment, 51 DePaul L. Rev. 331, 337-342 (2001).

[69] Regarding doubts about relying on unjust enrichment theory see id. at 337-339. For a description of the settlement process see generally Susan Beck, The Lobbying Blitz Over Tobacco Fees: Lawyers Went All Out in Pursuit of Their Cut of a Historic Settlement and the Arbitrators Went Along, Legal Times, Jan. 6, 2003 at 1.

[70] 18 U.S.C. §§ 1961-1968 (2005).

[71] See United States v. Phillip Morris, Inc., 116 F.Supp. 2d 131 (D.D.C. 2000); see also United States v. Phillip Morris U.S.A., Inc., 396 F.3d 1190 (D.C. Cir. 2005).

[72] See Id., Phillip Morris U.S.A., 396 F.3d at 1193.

1990s, tobacco companies labeled some cigarettes "light" and "lowered tar and nicotine."[73] With grounds for suspecting that these labels misrepresented the relevant safety levels, plaintiffs might have brought traditional class actions to recover for smoking-related personal injuries that would have been avoided had the defendants not falsely promised greater safety. However, courts might very well have refused to certify such classes because of the absence of commonality regarding the personal injuries suffered by the smoker-plaintiffs.[74] Thus, plaintiffs transformed traditional mass tort actions into new, expansionary actions seeking recovery for the economic losses incurred by light cigarette smokers who claimed they had paid too much for what they erroneously believed were safer cigarettes.[75] Unlike personal injuries, which would vary from plaintiff to plaintiff, the economic nature of the losses caused them to be fairly uniform across the entire class. The amount of the losses varied, but their nature was uniform. To be sure, tobacco industry management had lied to Congress shortly before plaintiffs commenced these mass tort actions.[76] But even if that misconduct helped to create the public image of the tobacco industry as "Peck's bad boy," technically those lies did not serve as the legal basis for recovery.[77] Although results in these actions have been mixed,[78] there may be reasons for plaintiffs to be optimistic regarding future prospects.[79]

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[73] See Price v. Phillip Morris U.S.A., Inc., 848 N.E.2d 1, 00 (2005) (overview of light cigarette litigation). See generally Edward L. Sweda, et al., Light Cigarette Lawsuits in the United States: 2007, William Mitchell College of Law Legal Studies Research Paper No. 88 (2007); supra note 67, James A. Henderson, Jr. at 91-93.

[74] Rule 23(a)(2) of the Federal Rules of Civil Procedure sets forth the requirement that, for a class to be certified, there must be questions of law or fact "common to the class." See Wal-Mart Stores v. Dukes, 131 S.Ct. 2541 (2011) (review and discussion of commonality requirement). Individually-oriented fraud claims would have required a plaintiff to establish that he did not know that the representations of lower tar and nicotine were false, that he relied reasonably on the representations, and that his reliance caused him to suffer harm (including economic harm). All of these elements of the tort would have varied from plaintiff to plaintiff, thus destroying the necessary commonality.

[75] See supra note 73, Price v. Phillip Morris U.S.A. Inc. The commonality requirement was satisfied because, once the court approved a formula by which to measure the overcharge per pack of cigarettes, the claims became, essentially, claims of unjust enrichment that eliminated the need to prove reasonable reliance or individual personal injury.

[76] See Robert L. Rabin, The Third Wave of Tobacco Tort Litigation, in Regulating Tobacco 176, 185 (Robert L. Rabin & Steven D. Sugarman, eds. (2001).

[77] See supra note 73, Price v. Phillip Morris, U.S.A., Inc.

[78] See Id. (class certification denied); Aspinall v. Phillip Morris, Inc., 813 N.E.2d 476 (Mass. 2004) (class certification granted).

[79] See supra note 4, 34 Hofstra L. Rev. at 335-336 ("[V]irtually every major industry in this country might be found to satisfy [the] criteria [for liability adopted in the light cigarette litigation.])

iii. The Lead Pigment Industry

Mass tort actions against members of the lead pigment industry reflect these same patterns. A major front in the growing mass-tort wars is being fought in public nuisance actions commenced by units of government to shift to the lead pigment industry the costs of abating lead-based paint in public buildings.[80] In the 1980s, traditional products liability abatement claims by nongovernmental plaintiffs against lead pigment distributors routinely failed.[81] More recently, plaintiffs have relied on the concept of public nuisance, recast and stretched thin to the point of being synonymous with "interference with a public right [including any] lawful activity conducted in such a manner that it imposes costs on others."[82] The breadth of this expansive redefinition of public nuisance doctrine has prompted one critic mockingly to label it as a "super tort."[83] Most of the buildings in these lead pigment mass actions are old and are painted with pigments from many different sources. Because adequate records are almost never available, causation is a difficult issue.[84] Not surprisingly, the results in these actions have been mixed, with plaintiffs losing many more claims than they have won.[85] But given the large sums at stake, the plaintiffs' bar are quite likely to maintain their efforts.[86]

iv. The Firearms Industry

Nontraditional mass torts have also drawn aim on the firearms industry.[87] Of all the proposed extensions of liability, this one is most

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[80] See generally Victor E. Schwartz supra note 62 at 000.

[81] Id. at 558, n.103 and text accompanying.

[82] See City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222, 1233-34 (Ind. 2003).

[83] See Victor E. Schwartz supra note 62, at 552.

[84] See, e.g., Santigo v. Sherwin Williams Co., 3 F.3d 546, 547 (1st Cir. 1993); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1073 (N.Y. 1989).

[85] See generally Scott A. Smith, Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong, 71 Def. Couns. J. 119 (2004) ("[L]ead paint and pigment defendants had never lost or settled a case [since 1987.]"

[86] See Victor E. Schwartz supra note 62 at 559, n.111, citing Michael Freedman, Turning Lead into Gold, Forbes, May 4, 2001, at 122 (A leading member of the plaintiffs' bar targeted lead pigment companies as his "next big-game hunt" and "demonized" the industry because they were a "fat target").

[87] See generally Timothy D. Lytton, Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry, 65 Mo. L. Rev. 1 (2000) (detailing various theories that plaintiffs have used to hold firearm manufacturers liable and making an argument regarding how the tort system can be used to complement legislatures and administrative agencies in regulating the firearm industry).

obviously based on an expansive, nontraditional duty to rescue. The plaintiffs insist that members of the firearms industry owe a duty to market their products so as to rescue the public from gun-related criminal activity by unrelated third parties. The two theories most often invoked, with limited success thus far, are negligent marketing[88] and public nuisance.[89] Causes of action based on negligent marketing allege that the defendant companies—usually the major firearms suppliers in a geographic area—market their products in ways that should alert them that their weapons are being channeled to dangerously unlawful activities.[90] Plaintiffs assert that the failure of the firearms industry to stop these destructive patterns of gun distribution constitutes negligence, for which industry members must be liable in tort to the families of those injured and killed by the unlawful use of handguns. Moreover, because it is nearly impossible to trace the weapon used in a particular incident back to its distributors; and because members of the industry employ essentially the same methods of distribution; plaintiffs rely on theories of collective causation that would apportion responsibility among industry members according to market shares or otherwise.[91]

In a well-known example of this sort of nontraditional mass tort, plaintiffs brought their negligent marketing action in a federal district court in New York, where they won a substantial verdict and judgment against a group of firearm industry members.[92] On appeal, the federal court certified

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[88] See Id. at 21-45 (detailing several scenarios that the author argues justify the imposition of a duty to market firearms reasonably); District of Columbia v. Beretta U.S.A. Corp., 872 A.2d 633 (D.C. Ct. App. 2005) (affirming dismissal of claim brought by plaintiffs, the District of Columbia ,and nine individuals that defendant negligently distributed firearms, on ground that plaintiffs did not claim that they would be able to establish that defendants were directly responsible for their injuries).

[89] See supra note 62, Victor E. Schwartz at 555-557 (detailing efforts to hold firearm manufacturers liable for creating a public nuisance); People ex rel. Spitzer v. Sturm, Ruger, & Co., Inc., 309 A.2d 91 (N.Y. App. Div. 2003) (affirming motion to dismiss plaintiff's public nuisance claim on numerous grounds, including that it is improper to hold manufacturers liable for the criminal acts of third parties, the unfairness of holding defendants liable for engage in a legal and heavily regulated industry, and that courts are not the proper vessel of government by which to regulate the firearm industry); But see City of New York v. Beretta U.S.A. Corp., 315 F.Supp. 2d 256 (E.D.N.Y. 2004) (denying motion to dismiss public nuisance suit against firearm manufacturers).

[90] See Bloxham v. Glock, Inc, 203 Ariz. 271 (Ariz. Ct. App. 2002) (dismissal of claim for negligent marketing of firearms affirmed.)

[91] In a much-cited leading decision discussed infra, Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222 (N.Y. 2001), the plaintiffs relied on a market-share approach against a number of gun industry members. The New York high court, responding to certified questions, never reached the issue.

[92] Id. The opinion of the Court of Appeals does not indicate that punitive damages were part of the trial court's judgment. Plaintiffs in these cases often do pursue punitive damages. See, e.g., City of Gary, infra note 96.

two questions to the New York Court of Appeals. The first asked whether under New York law handgun manufacturers owe a duty to exercise reasonable care in marketing their products; the second asked whether, if so, liability may be apportioned on the basis of market share.[93] The New York high court answered the first of these questions in the negative, leading the federal court of appeals to reverse the judgment below.[94] The other doctrinal basis upon which plaintiffs have brought mass tort actions against members of the firearms industry is public nuisance. Here the focus is not on gun manufacturers' negligence but on the negative social impacts of illegal secondary gun markets, which the firearms industry makes possible but does not undertake to control.[95] In one well-known decision approving the plaintiff's nuisance claim, the Indiana Supreme Court made clear that it was embracing a new legal theory aiming to internalize the social costs of maintaining a firearms industry, with those costs being reflected in the prices charged for that industry's products.[96]

v. Other Targeted Industries

In addition to the asbestos, tobacco, lead pigments, and firearms industries, plaintiffs have targeted a number of others. These include fast foods,[97] soft drinks,[98] high caffeine-content energy drinks,[99] alcoholic

[93] Id. at 000.

[94] See Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21 (2d Cir. 2001). For a contemporary view that plaintiffs will do well in mass tort actions against the gun industry see Daniel L. Feldman, Not Quite High Noon for Gunmakers, But It's Coming: Why *Hamilton* Still Means Negligence Liability in Their Future, 67 Brook. L. Rev. 293 (2001).

[95] For the legal standard, see supra note 82 and text accompanying. For a list of cases denying recovery see supra note 62, Victor E. Schwartz at 556, n. 89.

[96] See City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003). Cf. supra note 25 and text accompanying.

[97] See Stephen D. Sugarman and Nirit Sandman, Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry, 56 Duke L.J. 1403, 1410 (2007) ("[Litigators] would like to see already-obese plaintiffs have access to courts through a novel cause of action sounding in negligence or products liability.") John J. Zefutie, Jr., Comment, From Butts to Big Macs—Can the Big Tobacco Litigation and Nationwide Settlement with States' Attorneys General Serve As a Model for Attacking the Fast Food Industry?, 34 Seton Hall L. Rev. 1383, 1414-1415 (2004) ("Even if fast food lawsuits are continually dismissed, the litigation against the fast food industry will not disappear [because it is] the resolve of the plaintiffs' bar to attack industries that injure American consumers.")

[98] See In re Coca-Cola Products Marketing and Sales Practices Litigation (No. 11), Case No. 4:14-md-02555 (D.C. N.D. Calif. 2014) (plaintiffs allege concealment of potentially harmful ingredient and false "no artificial flavors" labelling).

[99] See generally Jeremy Kogan, Buzzkill: Use of Product Liability Doctrines in Litigation Against Energy Drink Manufacturers, 26 Loyola Consum. L. Rev. 316, 333 (2014)

beverages,[100] and health care.[101] As noted earlier, these industries, while lawful and beneficial, share the characteristic of being suspect in the eyes of many citizens.[102] Plaintiffs exploit these public sentiments, in all likelihood hoping (and at some point no doubt expecting) to reach global settlements similar to those reached with the asbestos and tobacco industries.[103] Rather than necessarily aiming to destroy the targeted industries via fault-based claims that drive them into bankruptcy, plaintiffs seek to tax the industries in the name of cost-internalization, creating trust funds out of which each industry's victims may receive no-fault compensation and their lawyers may be paid their fees.

Products liability law provides another potential pathway for plaintiffs to impose industry-wide enterprise liability. Under traditional doctrine, a defendant is liable for harm caused by a product design if, but only if, the plaintiff can prove that a reasonable, safer alternative design was available and that the defendant manufacturer's failure to adopt the safer alternative rendered the defendant's design not reasonably safe.[104] Plaintiffs seeking to impose strict enterprise liability assert that the inherent generic risks presented by a broad product category are unreasonable even though there was no reasonable, safer alternative design available at the time of distribution.[105] And once the focus shifts to the industry that distributes such unavoidably dangerous products, political incorrectness replaces fault as the primary factor determining liability. In a case in Iowa the plaintiff, who had suffered injury on defendant's trampoline, brought an action claiming that all trampolines are inherently unreasonable in design because they all involve inherent risks of harm that cannot be eliminated by altering the designs. The

("If Congress and the FDA are not willing to hold manufacturers accountable, injured plaintiffs [who are currently bringing unsuccessful actions on a variety of theories] themselves must be willing to shoulder that burden."); Kevin I. Goldberg, Dangerous Drinks, March 2013 Trial 28, 34 (2013) ("Energy drinks can be deadly, and the industry has failed to properly warn consumers of the known dangers.")

[100] See James A. Henderson, Jr. et al., Products Liability: Problems and Process 327-328 (9th ed. 2017); James A. Henderson, Jr., supra note 6 at 336, n.36; Victor E. Schwartz, supra note 62 at 581 nn.242-245.

[101] See Pelman v. McDonald's Corp. 237 F. Supp. 2d. 512 (S.D.N.Y. 2003). See generally Bryce A. Jensen, Note, From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries, 86 Cornell L. Rev. 1334, 1347-1365, 1384 (2001) ("The tobacco litigation christened a new form of class action in which teams of well-financed lawyers . . . attempt to expose an entire industry [including the health care industry] to liability so expansive that it will capitulate and settle before the plaintiffs' legal theories are even tested in court".)

[102] Cf. supra notes 26, 40, and 45 and text accompanying.

[103] See supra notes 51 (asbestos) & 69 (tobacco) and text accompanying.

[104] See Restatement, Third, of Torts: Products Liability § 2(b) (1998).

[105] See Ellen Wertheimer, The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third *Restatement*, 61 Tenn. L. Rev. 1429 (1994).

Iowa high court rejected plaintiff's claim.[106] If plaintiff's claim had succeeded and if most courts had followed suit, then every trampoline distributed by members of the trampoline industry would bring liability when users foreseeably suffered harm. This author has argued elsewhere against this proposed "product category liability," [107] and courts thus far have agreed.[108] But as the plaintiffs' bar continue to bring these mass tort claims against unpopular industries such as tobacco and firearms, strict enterprise liability may be on the products liability horizon.

Ostensibly, the actions described above seek to internalize the social costs of politically incorrect commercial enterprises, thereby accomplishing general, or market, deterrence. In effect, the plaintiffs' bar seek to impose a risk tax on selected industries, receiving generous fees for their troubles. This article does not argue that these emerging mass tort actions are unlawful. It assumes for the sake of argument that courts will accept some of them and addresses the further question of whether these actions—or mass tort actions more generally—should include awards of punitive damages. These are the subjects to which Parts II and III now turn.

II. PUNITIVE DAMAGES ARE UNWORKABLE AND UNFAIR IN MASS TORTS GENERALLY

A. The Problems Punitives Present

The problems punitive damage awards present in mass torts generally, including traditional and nontraditional forms, stem in some measure from a clash of philosophical perspectives. On the one hand, mass torts are an impersonal, dispassionate means to the ends of reducing transaction costs and treating like cases alike. Once a civil justice system commits to the procedural aggregation of similar claims, to a significant extent it commits to an off-the-rack, one-size-fits-all administrative approach in place of tailor-made, personalized justice.[109] By contrast, punitive damages traditionally

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[106] See Parish v. Jumpking, Inc., 719 N.W.2d 540 (Iowa 2006).

[107] See James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1263 (1991).

[108] See, e.g., Parish v. Jumpking, Inc., supra note 106 (trampoline); Graham v. R.J. Reynolds Tobacco Co., 2015 WL 1546522 (11th Cir. 2015) (tobacco); S.F. v. Archer Daniels Midland Co., 594 Fed. App'x 11 (2d Cir. 2014) (high fructose corn syrup).

[109] See generally David Rosenberg, Class Action for Mass Torts: Doing Individual Justice by Collective Means, 62 Ind. L. J. 561, 565-566 (1987) ("[critics of class-action mass torts argue] that the bureaucratic justice of class treatment…achieves administrative goals…by subordinating the interests of individual victims…to the interests of the class as a

punish injurers and vindicate their victims individually rather than collectively. Given these different perspectives, it is hardly surprising that problems of the sorts described below should arise.

1. Juries Award Punitive Damages Capriciously

Capriciousness in decisionmaking implicates outcomes that are unpredictable and subject to whim in the sense that they are not tied logically to any applicable standards.[110] In the context of punitive damages awards in mass torts, capriciousness is primarily a function of inexperienced lay juries applying vague legal standards in a trial setting containing many elements that are quite emotional.[111] Juries sit for one case only and cannot draw on previous experiences in similar cases.[112] Regarding the vagueness of applicable standards, recall that many states allow juries in traditional mass tort cases to award punitive damages if they find the defendant to have acted with willful disregard of, or reckless indifference toward, the rights of others.[113] Even morally-innocent, socially-beneficial corporate behavior that exposes many persons to nontrivial risks may, with hindsight, be characterized as disregarding and indifferent. Moreover, corporate defendants often reach important management decisions by a sensible process of cost-benefit analysis that may be callous and even cruel to lay jurors at trial.[114] Given the latitude trial courts give juries to grant punitive damages,[115] juries might well return sizeable punitive damages verdicts in any of the mass tort actions described thus far. Judicial review at trial or on appeal may reduce some very large awards, but seemingly random risks of

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whole.")

[110] Webster's New World Dictionary defines "capricious" as "inclined to change abruptly and without reason; erratic; flighty; unpredictable."

[111] Plaintiffs in mass torts choose juries over judges most of the time. See generally Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1141 (1992) (statistics relating to medical malpractice and products liability cases). Regarding emotional elements at trial, see supra notes 8-14 and text accompanying.

[112] See Neil Vidmer, Medical Malpractice and the American Jury: Confronting the Myths About Jury Incompetence, Deep Pockets, and Outrageous Damage Awards 162, n.3. (1995) ("[J]uries can never be as effective as specialized triers of fact . . . because jurors are exposed to the medical issues only once; consequently, they cannot develop an institutional memory to aid them in deciding a specific dispute.)

[113] See supra notes 8 and 11 and text accompanying.

[114] See, e.g., Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 813 (1981) (substantial punitive award affirmed on ground that cost-benefit analysis, balancing human lives against profits, constituted callous indifference and conscious disregard.)

[115] See supra note 16 and text accompanying.

crushing liability remain.[116] This unpredictability is unfair to both plaintiffs and defendants.[117] More fundamentally, capriciousness is bad for the tort system; it is antithetical to the very concept of the rule of law.[118]

Threats of blockbuster punitive damages also produce undesirable deterrent effects on corporate defendants' behavior, both ex ante and ex post of bringing a mass tort action. Ex ante, the threat of existential punitive awards coming down like thunderbolts on a nice day tends to inhibit innovation and long-term planning.[119] Ex post of the commencement of a mass tort action, the risk of suffering a crushing punitive damages penalty gives rise to so-called "blackmail settlements" in which defendants pay more than the relevant mass tort claims are reasonably worth.[120] Most of the shareholders of widely-held public corporations are highly diversified and thus risk neutral.[121] As such, given good information and adequate bargaining skills, they could be expected to settle at close to reasonable values—what the claims are reasonably calculated to be worth at the outset

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[116] See Byron G. Stier, Jackpot Justice: Verdict Variability and the Mass Tort Class Action, 80 Temple L. Rev. 1013, 1024-1028 (2007).

[117] It is the variability of awards, not simply their average size, that presents problems. See Cass R. Sunstein, et al., Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071, 2103 (1998) ("the variability of individual dollar judgments [is very] large . . ."). See also Robert J. Rhee, A Financial Economic Theory of Punitive Damages, 111 Mich. L. Rev. 33, 35 (2012) ("Although punitive damages are seldom awarded in tort cases and the median award is less than the median compensatory damages award, the variance in awards is great, and the other cases subject defendants to punitive damages that dwarf the corresponding compensatories."); W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts, 87 Georgetown L.J. 285, 286 (1998) ("Often there is no clear-cut basis to predict the likely size of the punitive damages award. . ."); Victor E. Schwartz, et al., Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures, 65 Brook. L. Rev. 1003, 1010-11 (1999) (showing how corporate concern over high, randomly-administered punitive damages awards drove a useful prescription drug off the market).

[118] See generally Lon L. Fuller, The Morality of Law, 46-49 (rev'd. ed. 1969) (the author identifies eight necessary conditions for law to function properly, including the need for rules that are sufficiently specific, clear, and constant, so that they can guide private conduct and produce consistent, predictable judicial outcomes).

[119] See generally supra note 117, Victor E. Schwartz, et. al.

[120] See *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) ("[Defendants in mass tort actions] may not wish to roll [the] dice. . . . They will be under intense pressure to settle. . . . Judge Friendly . . . called settlements insured by a small probability of an immense judgment in a class action blackmail settlements.") In the context of insurers' potential liabilities for huge verdicts in excess of policy limits, co-authors observed that "some have argued that the duty to settle creates a blackmail dynamic, where insurers feel compelled to settle cases at limits, even when expected damages are below limits." See David A. Hyman, et. al, Settlement at Policy Limits and the Duty to Settle: Evidence from Texas, 8 J. Empir. Legal Stud. 48, 77 (2011).

[121] See generally Steven Shavell, Foundations of Economic Analysis of Law 258-59 (2004).

of litigation. However, the corporate managers who negotiate the settlement tend not to be highly diversified and thus are quite likely to be risk averse.[122] Mass tort plaintiffs are able to exploit risks of crushing punitive awards and managers' risk averseness, extracting excessive, socially-wasteful blackmail settlements.[123]

The accuracy of the preceding analysis is supported by similar analyses of analogous circumstances regarding liability insurers' duties to settle tort claims within policy limits. For decades a number of American courts have recognized a duty on the part of liability insurers to deal with offers to settle insured tort claims within policy limits as would a reasonable insurer on a policy without limits.[124] Failure to settle reasonably brings excess liability without limits. Absent such a liability rule, an insurer would have a lower incentive to respond reasonably to settlement offers within policy limits because the policy limits would reduce the settlement's value to the insurer.[125] With the duty-to-settle rule in place, in theory a reasonable, risk-neutral insurer would accept an offer to settle within policy limits only when the offer is at, or less than, the "true" (not policy-limits-constrained) expected value of the claim.[126] The interesting question is whether the risk averseness of the insurer's managers would lead them to pay blackmail, in such circumstances—i.e. would the threat of substantial in excess of policy limits liability cause them to pay more than the expected value of the claim? In theory, such a hypothesis seems plausible; empirical work on the problem is inconclusive, though it does not rule out such an effect.[127] If one accepts

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[122] Id.

[123] Cf. supra note 120. The tacit assumption here is that shareholders are unable adequately to monitor the behavior of managers. See James A. Henderson, Jr., Products Liability and the Passage of Time: The Imprisonment of Corporate Rationality, 58 N.Y.U. L. Rev. 765, 782 n.72 (1983).

[124] The seminal judicial decision is Crisci v. Security Insurance Co., 66 Cal. 2d 425, 426 P.2d 173 (1967). The leading law review articles are Robert Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136 (1954); Kent D. Syverud, The Duty to Settle, 76 Va. L. Rev. 1113 (1990).

[125] For example, if the applicable policy limits were $100,000, the likely verdict were $150,000 and the probability of plaintiff winning were fifty percent, the expected value of the claim would be $75,000 (0.5 x $150,000). If the plaintiff offered to settle for $70,000, an individual defendant without insurance should be willing to accept plaintiff's offer. However, an insurance company under no duty to settle within policy limits would reject the offer, because the value of the claim to the insurer would be $50,000 (0.5 x $100,000).

[126] Under the liability rule, the insurer in note 125 would accept an offer of $70,000 because it is lower than the $75,000 value of the claim. The analysis here and in supra note 125 ignores the role of transaction costs. That consideration increases the value to insurers of any offer to settle, given that settlement always avoids the costs to both sides of continuing to pursue trials or appeals.

[127] See supra note 120, 8 J. Empirical Legal Stud. at 78. The critical variable is the risk averseness of the managers who decide whether or not to accept offers to settle. As a

the analogy between the threat of significant excess liability for failure to settle within policy limits and the threat of significant punitive damages for failure to settle mass tort claims, then the evidence suggests that jury capriciousness in the latter context tends to produce blackmail settlements that are, from a societal perspective, wastefully high.

2. Multiple Successive Awards for the Same Wrongful Conduct Are Unfair to Defendants

The task of triers of fact in a mass tort action involving punitive damages is to determine the appropriate punitives award, if any, in the case before them based on an assessment of the wrongfulness of the defendant's conduct toward the broadly-defined category of persons of which the joined plaintiffs are members.[128] Ordinarily nothing prevents persons who do not join as plaintiffs in earlier mass tort actions from subsequently bringing their own actions against the same defendants, perhaps in different jurisdictions. In the later actions, the triers of fact are not limited by punitive awards in the earlier action(s), and are free to arrive at newly-calculated awards based on the same evidence and reflecting the same overall assessment of the defendants' wrongfulness as in previous actions. And nothing necessarily prevents even further actions, punishing the defendants repetitively for the same wrongful conduct. The likelihood of multiple, duplicative (and thus often greatly excessive in the aggregate) punishments has struck both courts[129] and scholars[130] as grossly unfair.

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counterbalancing consideration, shareholders of insurance companies might be more apt to monitor managers successfully than would shareholders of other types of business corporation. Cf. supra note 123.

[128] For a critique of this process and suggestions for reform see supra note 117, Cass R. Sunstein, et al., at 2097-2125.

[129] See, e.g., Roginsky v. Richardson-Merrell, Inc., supra note 37 at 839-840; Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1096-97 (5th Cir. 1991); Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233 (D.N.J. 1989).

[130] See, e.g., John C. Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139 (1986) ("Nowhere is the danger [of out-of-control judgments] more complete than in . . . mass tort cases, where punitive damages may be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation."); Howard A. Denemark, Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant, 63 Ohio St. L.J. 931, 937-39 (2002) (emphasizing the limited extent to which courts have implemented solutions to the multiple-awards problem); Victor E. Schwartz and Liberty Magarian, Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process, 8 Adel. L.J. 101 (1992) (multiple awards are unconstitutional); Gary T. Schwartz, Mass Torts and Punitive Damages: A Comment, 39 Vill. L. Rev. 415, 422-431 (1994) (the problem is

3. Punitive Damages Awards Exact Greater Retribution From Actors Who Are Less Deserving of Punishment

Most of the defendants in mass tort actions are corporations, artificial entities with "no soul to damn; no body to kick."[131] Corporations typically pay punitive judgments out of general assets owned indirectly by shareholders and liability insurance paid for on their behalf.[132] Corporate structures shift both types of liability costs from the individual managers who make what are later judged to be the antisocial decisions to the corporation's shareholders who, in a publicly-held corporation, almost certainly do not.[133] This cost-shifting may not make much practical difference from the standpoint of deterrence since management, whom the market incentivizes to maximize their corporations' profits, will presumably internalize the relevant costs in any event, thereby promoting allocative efficiency. But shareholders of publicly-held corporations do not deserve moral retribution for the wrongful behavior of management over whom shareholders have no meaningful control.[134] And they most certainly do not deserve such retribution when they become shareholders only after the allegedly egregious corporate behavior has occurred.[135] Not surprisingly scholars have concluded that the very idea of expressing moral outrage and righteous indignation toward a public corporation is manifestly unrealistic.[136] It follows

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serious).

[131] See John C. Coffee, Jr., "No Soul to Damn; No Body to Kick:" An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1981).

[132] On the question of whether one can insure against liability for punitive damages see Alan I. Widiss, Liability Insurance Coverage for Punitive Damages? Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions, 39 Vill. L. Rev. 455, 469-487 (1994).

[133] Corporate employers almost always provide insurance to hold their directors, officers, and managers harmless for decisions made on behalf of the corporation. See Directors and Officers Liability Insurance, https://en.wikipedia.org/wiki/Directors_and_officers_liability_insurance. The insurance premiums—or punitives judgments if there is inadequate insurance—are paid out of the corporation's revenues and capital, and thus are borne by the shareholders or, if the corporation is bankrupt, the tort victims or the corporation's creditors. For a discussion of this and related corporate issues see generally A. Mitchell Polinsky and Steven Shavell, supra note 25 at 948-953.

[134] See supra note 123.

[135] See Helen E. Freedman, Selected Ethical Issues in Asbestos Litigation, 37 Sw. U. L. Rev. 511, 527 (2008) ("[T]o charge companies with punitive damages serves no corrective purpose. In many cases the wrong was commited by a predecessor company, not even the company now charged.")

[136] See Gary T. Schwartz, supra note 18 at 144 ("[T]he entire notion of punishment-as-punishment becomes deeply problematic when applied to the corporate form."). See also

that, while punitive damages in mass torts may help to achieve efficiency and may symbolically signal to the public that certain corporate management teams are worthy of punishment,[137] punitives do not serve, as do criminal convictions, to punish specific wrongdoers.[138] Thus, as a form of moral retribution punitives in mass torts miss the mark.

4. Punitive Awards Fail to Vindicate Those Who Most Deserve Vindication

Scholars have pointed to the reality that, especially in connection with mass torts based on toxic exposures, a queuing problem arises in which great numbers of plaintiff-victims, many with no physical injuries, threaten defendants with bankruptcy.[139] In those cases, one may assume that plaintiffs who get into court early, while corporate coffers are relatively full, tend to receive their judgments in full; whereas later-filing, often more seriously injured plaintiffs may receive pennies on the dollar, or nothing at all.[140] Of course, this can happen even if punitive damages are not involved.[141] But large punitive awards, when granted in actions that first reach court, can greatly exacerbate the problem. To the extent that large punitive awards paid in early actions reduce the funds available to pay victims who file and settle later;[142] and victims who are injured more severely tend to come to court later;[143] punitive awards in mass tort actions tend to reduce or deny vindication of arguably more deserving victims.[144]

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supra note 1, David F. Partlett, at 811-814.

[137] See authorities cited supra notes 19 & 30 and text accompanying.

[138] See Gary T. Schwartz, supra note 130 at 431 ("[T]he question of why the criminal law is not the appropriate instrument for imposing . . . punishment . . . is the question that proponents of punitive damages [in mass torts] have so far failed adequately to answer.")

[139] See supra note 36, Seltzer at 39.

[140] See Paul F. Rothstein, What Courts Can Do in the Face of the Never-Ending Asbestos Crisis, 71 Miss. L. Rev. 1, 2 nn.6&7 and text accompanying. (2001)

[141] Large compensatory pay-outs may deplete a defendant's resources without any help from punitive awards, especially if courts allow plaintiffs without personal injury to recover for elements such as increased risk, mental upset, and medical monitoring. See supra notes 58-61 and text accompanying.

[142] Certainly this is true when early filers are part of a class of plaintiffs seeking recovery for increased risk of illness and mental suffering. See id. and accompanying text.

[143] See supra notes 56-59 and text accompanying. Many of those who are exposed to asbestos fibers or other toxics can be expected to wait to file until they manifest symptoms of physical injury.

[144] For a plausible argument that plaintiffs who suffer no physical injury are no less deserving recipients of punitive damages, see David G. Owen, Against Priority, 37 Sw. U. L. Rev. 557 (2008).

5. Punitive Damages Are Not Only Ineffective, They Are Not Really Necessary

The preceding subsections describe the imperfect mechanics of delivering punitive awards in mass torts. This subsection argues that, in addition to administrative problems blunting their effectiveness, punitive damages are not really necessary to achieve adequate deterrence. Regarding general deterrence, recall that tort law achieves that objective by internalizing the costs of risky enterprises.[145] To the extent that commercial enterprises bear their social costs, market demand for what they produce declines in proportion to risk and the world is a safer place. Instrumentalists justify punitive damages as a gap-filling device that steps in when compensatory damages do not adequately cover all of plaintiffs' losses,[146] thereby helping to internalize the social costs of the relevant enterprises. This justification for punitive damages is undermined to the extent that American courts are willing to allow more and more generous compensatory awards for a widening variety of intangible losses.[147] One may reasonably assume that those more generous compensatory awards internalize a greater portion of an enterprise's social costs, thus leaving less need for courts to award punitive damages with all their administrative difficulties and accompanying unfairness, in order to achieve general deterrence.

Much the same things may be said of the effectiveness of, or need for, punitive damages to achieve specific deterrence. Rather than aiming to internalize the social costs of risky enterprises, specific deterrence aims to discourage enterprises from engaging in the specific types of wrongful behavior referenced in the relevant punitive damages triggers. To accomplish this objective, the punitive damages triggers must be specific enough to provide fair notice to potential wrongdoers of what is expected by way of forbearance. However, given the vagueness of many such triggers[148] and the significant lengths of time between defendant's conduct and entry of judgment, one may doubt whether threats of future punitive awards actually affect industry behavior beyond maintaining a generalized terror regarding ruinous litigation. Another specific-deterrence-related rationale for punitive awards rests on the assumption that many victims injured by wrongful conduct do not link defendants' activities with their injuries. For that reason

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[145] See supra note 24 and text accompanying.

[146] See supra note 22 and text accompanying.

[147] See supra notes 58-60 and text accompanying.

[148] See supra notes 8-11 and accompanying text. See generally Anthony J. Franze and Shiela B. Scheuerman, Instructing Juries on Punitive Damages: Due Process Revisited After *State Farm*, 6 J. Const'l L. 423, 424 nn.7-8 (2004). See also Gary T. Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 So. Cal. L. Rev. 133, 146 n.66 (1982).

many victims never bring tort actions, thereby lowering the expected values of would-be defendants' exposures to liability for compensatory damages.[149] Punitive damages in traditional one-on-one litigation presumably add to the values of these exposures, helping to bring levels of deterrence closer to the optimum. The problem with this rationale in the present mass-tort context is that its factual premises are probably false, given that mass torts have an inherently high profile and the plaintiffs' bar advertises extensively in ways that inform injured victims regarding the sources of their injuries.[150]

From a broader perspective, punitive damages may not be necessary to achieve specific deterrence in mass torts, given that most of the corporate enterprises against whom plaintiffs bring mass tort actions are subject to nonjudicial governmental safety regulations, specifically formulated and backed by criminal sanctions.[151] Given these regimes of regulation, it seems unlikely that vague threats of future punitive damages awards serve any useful purpose as a supplemental source of specific deterrence.

B. Possible Solutions to the Problems of Awarding Punitive Damages in Mass Torts

1. Marginal Changes in the Rules Might Accomplish, at Most, Modest Improvements

A number of possible solutions to the above-described problems are worth considering.[152] Capriciousness in the awarding of punitive damages might be reduced by replacing vague triggers such as "indifference," "disregard," and "willfulness"[153] with either more qualitatively specific

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[149] Defendants may intentionally help to create this circumstance. See supra note 24 and text accompanying.

[150] See generally Elizabeth C. Tippett, Medical Advice for Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits, 41 Am. J. L. & Med. 5 (2015); Daniel Schaffzin, Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balanced Commercial Solicitation of Clients in Pharmaceutical Litigation, 8 Charleston L. Rev. 319 (2013).

[151] Regarding asbestos, see Asbestos Laws and Regulations (EPA https://www.epa.gov/asbestos/asbestos-laws-and-regulations (Oct. 14, 2015)); for tobacco, see Federal Regulations of Tobacco: A Summary (publichealth-lawcenter.org/sites/default/files/sources/tcic-fda-summary.pdf (Jly 2009)); for lead pigments, see Lead Laws and Regulations (https://www.epa.gov/lead/lead-laws-and-regulations (June 3, 2016)) for firearms, see Federal Firearms Regulations Reference Guide, https://www.arf.gov/resource-center/docs/atf-p-5300-4pdft/download (ATF 2005). See generally Gary T. Schwartz supra note 138.

[152] For a list of possible reforms see Richard C. Ausness, Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation, 74 Ky. L. J. 1, 92-99 (1985).

[153] See supra notes 8 & 11 and text accompanying.

triggers such as "criminally dangerous conduct intended to cause great harm"[154] or more quantitatively extreme triggers such as "opprobrious" and "heinous."[155] And judges might either replace juries in deciding whether punitives are warranted and in what amounts, or review jury verdicts more strictly in those regards.[156] Raising the burden of persuasion also might help to reduce jury capriciousness.[157] A combination of these marginal changes might to some extent reduce the capriciousness of punitive damages awards. Marginal solutions to the problem of multiple punitive awards for the same conduct are equally difficult. Reductions in unfair redundancy might be achieved by limiting punitives in any given action to some modest multiple of the compensatory damages awarded or preventing mass tort plaintiffs from introducing evidence of harm caused by defendant's conduct to persons not joined as plaintiffs in the case before the court.[158]

The problems associated with the ineffectiveness of punitive damages in achieving general or specific deterrence in mass torts defy solution by means of marginal adjustments. This is where the clash of basic philosophies is most telling. At heart, deterrence is an instrumental, efficiency-oriented concept.[159] Because mass tort actions ostensibly serve efficiency objectives,[160] it is appropriate that deterrence should be an objective of such actions. By contrast, in the opinion of a majority of experts, punitive damages reflect mostly noninstrumental, fairness values.[161] It follows that purporting to punish wrongdoing has nothing logically to do with achieving efficiency objectives except to confuse matters. No marginal law reform will alter such a fundamental inconsistency in objectives.

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[154] No jurisdiction employs this hypothetical trigger.

[155] Cf. supra notes 12-14 and text accompanying. Note that the earlier-referenced concepts are scholars' characterizations rather than judicially-implemented triggers.

[156] Replacing juries with judges might run into difficulties with right-to-jury-trial provisions in federal and state constitutions. See generally Fleming James, Jr., Right to a Jury Trial in Civil Actions, 72 Yale. L. Rev. 655 (1963). And one may question the effectiveness of judicial attempts to second-guess jury awards. See supra note 116 and text accompanying.

[157] Many states already raise the burden. See generally Richard L. Blatt, Punitive Damages: A State by State Guide to Law and Practice 000 (1991) (Supp. 0000). An argument may be made that these sorts of adjustments do not actually affect decisionmaking by triers of fact. See generally James A. Henderson, Jr., Contract's Constitutive Core: Solving Problems by Making Deals, U. Ill. L. Rev. 89, 130 n.224 and text accompanying (2012).

[158] Interestingly, the U.S. Supreme Court has incorporated both of these latter modifications of existing law as important elements in its efforts to limit punitive awards on due process grounds. For a collection of materials describing these developments see supra note 12, James A. Henderson, Jr. et. al. at 651-62.

[159] See supra notes 20 and 25 and text accompanying.

[160] See supra note 35 and text accompanying.

[161] See supra note 30 and text accompanying.

The problem with punitive awards advantaging mass tort plaintiffs who file early remains to be considered.[162] One possible solution might be for trial courts to split their dockets in asbestos and other toxics litigation and send to deferral registries those plaintiffs who, although exposed to defendants' asbestos-containing products, have not yet manifested physical injuries resulting from such exposure.[163] Deferral registries cover mass torts more broadly than merely those that award punitives; but punitives exacerbate the problem they address.[164] Many courts have implemented these proposals.[165] In these split-docket arrangements, the main tort action proceeds, often on an accelerated, expedited basis.[166] Claims assigned to the deferral registry hang in limbo, awaiting such time that the plaintiffs manifest asbestos-related physical injury. When and if this occurs, courts return the deferred claims back to the active docket and they proceed to trial. Judges who have worked with these deferral registries have commended them as effective docket-clearing mechanisms.[167] At least one leading academic has criticized deferral registries on fairness grounds.[168] An alternative solution might be for courts to allow separate actions for punitives, prosecuted in parallel with the underlying mass tort actions for compensatory damages and managed by the trial judge. The proceeds of the punitive damages actions held in trust for the benefit of those who join the mass tort actions regardless of when they happen to file.[169] A number of scholars have suggested variations on this solution.[170]

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[162] See supra notes 139-140 and text accompanying.

[163] The seminal article is Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J. L. & Pub. Pol'y 541 (1994).

[164] Empirical work reveals that punitive awards equal to, or greater than, compensatory awards are not uncommon. See generally Theodore Eisenberg & Martin T. Wells, The Significant Association Between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer, 3 I. Empirical L. Stud. 175 (2006).

[165] See generally David G. Owen, Against Priority, 37 Sw. U. L. Rev. 557 n.1 (557).

[166] Id. at 561-562. See also supra note 135 at 514.

[167] See supra note 135.

[168] See supra note 165.

[169] For descriptions of how limited trust funds were managed in mass tort settings see Alvin K. Hellerstein, et. al., Managerial Judging: The 9/11 First Responders Litigation, 98 Cornell L. Rev. 127 (2012); Marianna S. Smith, Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust, 53 L. & Contemp. Prob. 27 (1999).

[170] See, e.g., Joan Steinman, Managing Punitive Damages: A Role for Mandatory "Limited Generosity" Classes and Anti-Suit Injunctions?, 36 Wake Forest L. Rev. 1043 (2001); Francis E. McGovern, Punitive Damages and Class Actions, 70 La. L. Rev. 435 (2010); Elizabeth J. Cabraser & Thomas M. Sobol, Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims, 74 Tul. L. Rev. 2005 (2000).

2. The Only Effective, Principled Solution Would Be to Eliminate Punitive Damages from All Forms of Mass Tort

a. The Substantive Merits

As indicated, the administrative problems that result in jury capriciousness might be reduced somewhat by marginal adjustments.[171] However, multiple awards in successive mass tort actions are bound to persist in the absence of a central authority empowered to coordinate otherwise independent recoveries.[172] And as observed earlier, punitive damages awards are not required in order for mass torts to accomplish adequate general deterrence[173] and are unlikely to accomplish specific deterrence.[174] Moreover, the retributive potential of punitive awards is questionable, given that such awards frequently punish the wrong actors and vindicate the wrong victims.[175] It follows that the only effective solution to these problems would be for state courts and legislatures to eliminate punitive damages altogether in mass torts. A number of respected tort scholars, especially those who approach tort law from a fairness perspective, doubt that punitive damages belong in mass tort actions.[176]

Scholars who endorse punitive awards in mass torts tend to view tort law's primary goal to be the efficient allocation of resources.[177] For these writers, embracing the concept of punishment as an appropriate end in itself reflects fuzzy, circular thinking.[178] From the efficiency perspective, punitive damages in mass torts are mainly a means of achieving general deterrence via cost internalization.[179] As noted earlier, efficiency scholars justify punitive

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[171] See supra notes 152-170 and text accompanying.

[172] See Gary T. Schwartz, supra note 130 at 431 ("[T]ort law should certainly seek to avoid the result of inflicting inappropriate multiple punishments. . . . [Critics] have . . . suggested that the solution must be decided at the national level. [However,] [n]o single state—let alone a single state court—can develop and carry out a meaningful solution.")

[173] See supra text accompanying notes 145-147.

[174] See text preceding note 148, supra.

[175] See supra notes 131-144 and text accompanying.

[176] See supra note 3 and accompanying text.

[177] See, e.g., A. Mitchell Polinsky and Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869 (1998).

[178] Id. at 949, 955. Likening the fairness-based retribution rationale to condoning the punishment of trees that fall on people, the authors leave their readers to decide whether the fairness rationale makes sense, clearly implying that it does not. See also Richard A. Posner, Killing or Wounding to Protect a Property Interest, 14 J. L. & Econ. 201, 225 (1971) (Fairness analysis is a "method of maxims—the pseudo-logical deduction of legal rules from essentially empty formulas.")

[179] See supra note 25 and text accompanying.

damages on the ground that punitives help to compensate plaintiffs for elements of loss, such as attorneys' fees, not recoverable under American law.[180] By internalizing such costs, punitive awards help to achieve allocative efficiency. From the fairness perspective, economists who endorse a cost-internalization rationale for punitives are not only ignoring a major rationale for imposing liability, but they are oblivious to the plain meaning of law's language.[181]

b. Overturning Precedents

It remains to consider a further plausible argument for retaining punitive damages awards in mass torts: adherence to precedent. After all, even regarding legislation, constancy deserves respect.[182] And regarding court-made change in the law, the rule of stare decisis formalizes the commitment to constancy.[183] But even that general rule admits of exceptions based on preserving institutional integrity.[184] Thus, whenever an appellate court decides whether to overturn a precedent that the court believes either to have been wrongly decided or to have outworn its welcome, two institutional considerations should be brought to bear: first, whether the existing rule is encountering administrative/mechanical difficulties that are producing inconsistent, capricious outcomes;[185] and second, whether overturning the

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[180] Fairness-oriented scholars might respond by arguing that if cost-internalization were a primary objective served by punitives awards, one would not only expect the law governing compensatory damages to allow for attorney's fees, but also would not expect cost-internalization to be served by proof of egregiously wrongful behavior. See supra notes 22-23 and text accompanying.

[181] As one leading author observes in support of the noninstrumental concepts of retribution and desert:

> "I . . . propose that we be willing to take 'punitive' damages at face value—that is, as primarily designed to punish. This understanding has the initial advantage of taking language seriously—of recognizing that our law's language intends to express meaning."

See Gary T. Schwartz, supra note 18 at 00.

[182] See supra note 118, Fuller at 79-81, (legal rules must be constant over time.).

[183] See generally Tomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rhenquist Court, 52 Vand. L. Rev. 647 (1999).

[184] See generally John M. Walker, Jr., The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?, https://egc.law.stanford.edu/comentaries/15-john-walker/(2016) ("In determining whether to [overrule] a precedent . . . courts balance a number of non-dispositive factors. . . .") (text following n.68).

[185] See John M. Walker, Jr., supra note 184 at text accompanying notes 21-35, relying on Payne v. Tennessee, 501 U.S. 808 (1991).

existing rule would detrimentally affect either the reliance-based interests of the parties typically involved in its application or the judicial system's reputation for apolitical integrity. [186]

Both of these considerations support breaking with precedent and proscribing punitive damages in all mass tort actions. As for the first consideration of administrative unworkability, the existing rules allowing punitive damages awards in traditional mass torts are clearly in serious trouble on a variety of fronts. If the observations made earlier leave doubts regarding the administrative/mechanical problems and the proposed marginal solutions,[187] one need look no further than the Supreme Court's current due-process efforts at reform for clear indications that state laws governing punitive damages are seriously in need of change.[188] Regarding the second consideration relating to reliance interests of the parties, the only repeat players who could plausibly be said to have reliance-based expectations of continuing to receive the benefits from punitive awards in mass torts are members of the plaintiffs' bar.[189] But plaintiffs' lawyers' expectations, in the absence of significant changes in their position in reliance on those expectations, do not constitute the type of detrimental reliance that might justify retention of an unworkable status quo.[190]

The consideration relating to the judiciary's continued appearance of legitimacy supports overruling precedent in this instance, given that doing so would eliminate manifestly unpredictable, inconsistent, and self-contradictory aspects of awarding punitive damages in mass torts.[191] Overruling in this instance would appear to reasonable observers to be necessary in order to repair a broken aspect of mass tort. Quite simply, punitive damages awards in mass torts are not only substantively wrong but

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[186] See id at text accompanying notes 36-60, relying on Planned Parenthood of S.E. Pennsylvania v Casey, 505 U.S. 833 (1992). See generally Randy J. Kozel, Precedent and Reliance, 62 Emory L.J. 1459 (2013).

[187] See supra notes 109-170 and text accompanying.

[188] See supra note 158.

[189] Plaintiffs, themselves, are not repeat players and therefore have no cognizable expectations prior to the commencement of their tort action. Courts do not recognize rights of the parties to have applicable law frozen as of the filing of a complaint. See generally Beryl Harold Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960) (seminal article approving prospective overruling).

[190] By allowing punitive damages historically, the tort system may be seen to impliedly promise to repeat players such as members of the plaintiffs' bar, to continue to do so. However, plaintiffs' lawyers do not materially change their positions in reliance on this implicit promise, and therefore do not rely to their detriment in the sense required for the equivalent of estoppel to occur. Cf. Jones v. Wachovia Bank, 230 Cal. App. 4th 935 (2014) (no promissory estoppel without change of position.)

[191] See supra, text accompanying notes 111-144.

also transparently anachronistic and unworkable. Precedents allowing such awards deserve to be overruled.

III. PUNITIVE DAMAGES ARE MANIFESTLY INAPPROPRIATE IN EMERGING, NONTRADITIONAL FORMS OF MASS TORT

This Part III assumes for argument's sake that courts will endorse some, at least, of the emerging forms of mass tort herein referenced and that some of them will continue to expand into the foreseeable future.[192] The analysis that follows argues that punitive awards should not be part of these emerging expansions of mass tort. This conclusion should not imply that punitive damages are appropriate in traditional mass torts. It simply reflects the reality that, in connection with nontraditional mass torts, the case against punitives is much stronger and that stare decisis presents less of a problem.

A. The Administrative Problems Regarding Punitives Are Exacerbated in the Context of Emerging Forms of Mass Tort

If Part II of this Article makes a persuasive case that punitive damages awards have no proper place in traditional mass torts, then beyond question punitives have no place in connection with the subset of emerging, nontraditional forms of mass tort. Courts in these emerging forms encounter all of the problems identified in preceding discussions. Indeed, a number of the problems are likely to worsen when courts strip traditional elements of fault from the underlying doctrine and mass tort actions evolve into vehicles for achieving strict enterprise liability. In general, the inherently self-contradictory mix of fairness-based punishment and efficiency-based strict enterprise liability will survive marginal reform efforts and will continue to confuse triers of fact.[193] Indeed, capriciousness in trial outcomes may increase as a result of such confusion. Moreover, as these nontraditional mass torts more and more transparently come to resemble industry-wide enterprise liability, adding potentially crushing punitive awards will increase opportunities for plaintiffs to prosecute so-called settlement class actions, exacting huge sums from defendants seemingly in exchange for terminating the rights of underrepresented future claimants for pennies on the dollar.[194]

Another problem generated by punitive awards in emerging,

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[192] Cf. supra note 5 and text accompanying.

[193] See generally Ellen Wertheimer, Punitive Damages and Strict Products Liability: An Essay in Oxymoron, 39 Vill. L. Rev. 505, 508 (1994) ("For those who would keep [the basis of liability] strict, the presence of any fault concepts [such as punitive damages] would be anathema.")

[194] See supra note 46 and text accompanying.

nontraditional forms of mass tort is the lack of adequate forewarning to members of industries not yet selected as mass tort targets. With respect to specific deterrence, as a general rule the threat of future liability should create incentives for wrongdoers to avoid behaving badly. For such behavioral modification to occur the wrongdoers must be given advance warning regarding what to expect. So long as liability for punitive damages rests on notions of truly egregious wrong-doing, actors can modify their conduct accordingly. However, once courts eliminate fault from these emerging forms of mass tort, members of lawful, not-yet-targeted industries can only guess when, if ever, their turn at the public whipping post, including the potentially deadly sting of punitive damages, will arrive.

This problem of lack of adequate forewarning is illustrated by peripheral defendants in asbestos litigation.[195] Twenty-five years ago it is doubtful that sellers of non-asbestos-containing workplace machinery could reasonably have foreseen that they would one day be liable for harms caused by asbestos-containing products manufactured by others and combined post-sale with the seller's asbestos-free machinery. But even if they are properly charged with foreseeing liability for compensatories based on these new versions of strict enterprise liability,[196] could they, have anticipated the threat of potentially crushing punitive damages awards for being members of an industry whose products are combined post-sale with asbestos-containing products?

Projecting beyond peripheral defendants in asbestos litigation, it is anyone's guess which large industry will be the next target of nontraditional forms of mass tort. Should portions of the sports equipment industry begin to prepare for an onslaught of claims, including claims for punitive damages, on behalf of the hundreds of thousands of persons injured each year while engaging in healthful and enjoyable, but inherently risky, sports activities?[197] Will members of the petroleum industry find themselves in strictly liable for having distributed gasoline that enables and encourages inherently dangerous motor vehicle travel?[198] In these somewhat farfetched hypothetical examples, the ostensible doctrinal bases of liability would be stretched-thin

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[195] See supra note 54 and text accompanying.

[196] Tort law is always evolving and changing and actors arguably should be required, within reason, to anticipate such changes.

[197] That this is not a totally far-fetched possibility is borne out by plaintiffs' effort to impose category liability on inherently dangerous sports equipment such as trampolines. See supra note 105 and text accompanying.

[198] If one envisions the gasoline distributors as attracting motor vehicle operators to harm one another, such a theory would resemble the imposition of liability on peripheral defendants who distribute machines that attract asbestos-containing gaskets. See supra notes 54-57 and text accompanying. See also note 95 and text accompanying (actions to hold weapons manufacturers liable for gun-related criminal behavior).

variations of failure-to-warn, public nuisance, and the like.[199] But the true objective of such new forms of mass tort, should they arise, will be the imposition of a potentially crushing risk tax on lawful industries that, while unavoidably contributing to causing harm to some persons, deliver significant benefits to many others. Once again, the question here is not whether courts should recognize such theories of strict enterprise liability, but whether courts should make punitive damages part of the mass torts used to implement those theories.

B. From a Substantive Perspective, Awarding Punitive Damages in Nontraditional Forms of Mass Tort Would Be An Exercise in Disheartening Cynicism

As preceding discussions make clear, a near-total disconnect exists between the true rationale underlying the new mass torts—strict enterprise liability based on the lawful, nonnegligent creation of risk—and the major rationale underlying punitive damages—punishing egregious wrongdoing. To be sure, an individual industry member may act badly and be deserving of punishment. But the ostensible basis of these punitive awards will not be idiosyncratic wrongdoing by a few, but the willingness of all defendants to participate in the targeted industry while knowing of the generic risks to customers and bystanders. Were courts to invoke the rhetoric of punishing wrongdoing to impose the functional equivalents of no-fault risk taxes on socially suspect industries, they would clearly be engaging in exercises of disheartening cynicism.[200]

C. Proscription of Punitive Damages in Nontraditional Mass Torts Would Not Require Much Overturning of Precedent

Recall that a broad proscription of punitive damages in traditional mass torts would require courts to overturn precedent.[201] Because emerging forms of mass tort are works-in-progress, they present an easier task in this regard. Thus, if courts become convinced that punitive damages should not be allowed in these emerging, nontraditional forms of mass tort, presumably they will be able to distinguish their earlier decisions allowing punitives in

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[199] Cf. supra note 40 and text accompanying.

[200] For a vivid description of peripheral defendant liability as simply an unprincipled means toward the end of finding defendants with whom to fund asbestos litigation in perpetuity, see Victor E. Schwartz and Mark A. Behrens, Asbestos Litigation: The "Endless Search for a Solvent Bystander," 23 Widener L.J. 59 (2013). See also supra note 86 for a plaintiffs' lawyer's cynical observation in the context of lead pigment abatement.

[201] See supra notes 4, 7, & 182 and text accompanying.

traditional mass torts. Those earlier decisions can and should be overturned.[202] But that need not occur in this context.

CONCLUSION

Punitive damages have no proper place in mass torts. No hard data are available showing that punitives awards in mass tortsachieve deterrence objectives effectively, and common sense strongly suggests they do not. Nor are punitives needed in those contexts. Expansions in the rules governing compensatory damages have enhanced general deterrence to the point that punitive damages are not justified on that ground. And nonjudicial safety regulations, backed by criminal sanctions, presumably provide adequate specific deterrence with regard to most of the commercial activities involved in mass torts. Of course, even if punitive damages in mass torts are not warranted instrumentally on the basis of achieving deterrence, one might try to justify them noninstrumentally in terms of punishing wrongdoers and vindicating their victims. Although some legal scholars believe that such symbolic gestures are worth making for their own sakes, upon closer examination reasonable minds must conclude that punitive awards in mass torts accomplish retribution and vindication at best clumsily and often quite unfairly. Moreover, in addition to these serious shortcomings, juries award punitive damages so capriciously that the threat of crushing liability places extraordinary power in the hands of plaintiffs to extort blackmail settlements that primarily serve not the public welfare, but the lawyers' own. Punitive damages, which have an ancient lineage, may make more sense in classic one-on-one tort litigation. However, in the context of mass tort actions they make no sense at all, generating significant social costs that far exceed their benefits.

Legislatures might eliminate punitive awards in mass torts if the anticipated political opposition from the plaintiffs' bar could be overcome. Presumably courts are not so directly influenced by politics, but for them to proscribe punitive damages in all mass tort actions, including traditional mass torts, in many states they would be required to overrule a half-century or more of precedents. The general rule of stare decisis, admonishing courts to follow precedents, is subject to exceptions based on institutional criteria independent of the substantive merits. Regarding punitive awards in traditional mass torts, these criteria are clearly satisfied. Because punitive awards in mass torts are manifestly unworkable and grossly unfair, courts are justified in overturning precedents allowing such awards. Regarding punitive damages in nontraditional mass torts—attempts at social engineering aiming to impose

[202] See supra notes 182-191 and text accompanying.

strict enterprise liability on entire industries—no long-standing precedents exist that courts need to overrule. It follows that even if some courts were misguidedly to balk at overruling precedents in traditional, fault-based mass torts, they should not feel similarly constrained in the context of nontraditional, strict-liability-based forms of mass tort where, in the absence of precedents that might otherwise require overruling, they are free to do the right thing.