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BLENDING U.S. CRIMINAL AND TORT LAW FOR CIVIL PUNISHMENT

Civil actions that concurrently fulfill the private function of compensating injured claimants while serving the broader public purpose of controlling socially harmful behavior are labeled “crimtorts” because these legal hybrids blend the principles of criminal law and the law of torts. The crimtort paradigm explicitly recognizes that punitive damages litigation can advance societal interests through civil punishment and deterrence in cases that are beyond the criminal law. The fervent “tort reform” dispute over procedural fairness in punitive damages litigation is part of a much larger theoretical dispute over the legitimacy of the crimtort as a mechanism that uses private tort remedies for a public purpose.

Key words: *Crimtort. – Punitive damages. – Civil punishment. – Deterrence.*

1. INTRODUCTION

Over the past quarter century the line between criminal and tort law in the U.S. has been collapsing across a broad front,¹ creating what I

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¹ One of many examples of the increasing breakdown of the theoretical bright line between criminal and tort remedies is the U.S.’s adoption of “structured fines” for criminal misbehavior in which the amount of the fine is based on the wealth or income of the wrongdoer. Finland, Germany, Sweden, and Denmark also employ wealth calibrated penalties that are called “day fines” in which wealthy individuals are assessed fines for misbehavior such as reckless automobile driving that are based on the income of the wrongdoer. Vera Institute, Bureau of Justice Assistance, How to Use Structured Fines (Day Fines) as Intermediate Sanctions, Nov. 1996. http://www.vera.org/publication_pdf/96_64.pdf (last visited November 20, 2008).

have labeled “crim tort”² litigation that seeks quasi-criminal financial punishments to remedy organizational wrongdoing. Courts and commentators have been slow to recognize the existence of crim tort remedies because of the conceptual blinders created by the false dichotomy between criminal law and the law of torts.³ This Article argues for the legitimacy of blended remedies. Criminal law and the law of torts were not separated at birth but only became differentiated as separate law school subjects in the latter half of the nineteenth century.⁴ In the real world, “private and public consequences arise from a single act.”⁵

The fundamental debate over the legitimacy of crim tort remedies is whether tort law verdicts should go beyond redressing individual harms in order to protect the public interest.⁶ Punitive damages, the most common American crim tort remedy, is a uniquely Anglo-American alternative to Europe and Japan’s strong regulation and social insurance solutions.⁷

² Much of this essay is drawn from a much longer article, Thomas Koenig, *Crim-torts: A Cure for the Hardening of the Categories*, 17 WID. L. REV., 733 (2008) (providing an in-depth explanation of the concept of “crim tort.”)

³ “Civil wrongs, private injuries, compensation, and private law are concepts that belong together, as do crimes, public injuries, punishment, and public law. Viewed against the background of this conventional taxonomy, punitive damages, or punishments inflicted through the civil law, appear to be an anomaly, a hybrid in search of a rationale.” Marc Galanter & David Luban, *Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1394 (1993).

⁴ “To emphasize the fact torts was not considered a discrete area of the law until the late nineteenth century, Professor White noted the following: The first American treatise on torts appeared in 1859. Torts were not taught as a law school subject until 1870. Finally, the first torts casebook did not appear until 1874. As late as 1871, Holmes himself did not consider torts a discrete subject. He referred to torts as a collection of unrelated writs.” Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralistic Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 393 (2005); See also, PAUL VINOGRADOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* 185 (1920) (noting that Blackstone’s Commentaries bifurcates criminal law as concerning the community at large as opposed to private law).

⁵ Martin Shapiro, *From Public Law to Public Policy, or The ‘Public’ in ‘Public’* Law, 5 (4) American Political Science Review 410, 410 (1972).

⁶ As William L. Prosser notes “perhaps more than any other branch of the law, the law of torts is a battleground of social theory.” WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 14 (3rd ed. 1964).

⁷ “The rise of public compulsory social insurance in nineteenth-century Germany especially with respect to workplace accidents is another way of dealing with problems caused by undeveloped private insurance markets.... It is however debated whether – even with highly-developed insurance markets – tort law is well suited for this job and whether a comprehensive tort law will not cause excessive costs for the legal system as well as insufficient deterrence.” Hans-Bernd Schafer, *3000 Tort Law: General* in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS (CIVIL LAW AND ECONOMICS (2007) at 574. Cf. Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2153 (1997) (concluding that the United States must confront its thalidomide

In European countries, for example, in sharp contrast to the United States, tort law plays “a rather insignificant role for workplace injuries.”⁸

Tort reform scholars have questioned the justness of employing punitive damages to punish and deter, which are functions theoretically reserved for criminal law:

Why are punitive damages part of tort law at all? Isn't tort law about compensation, making victims whole, or corrective justice? Even from an economic point of view, isn't it about deterrence by cost-internalization, or about insurance? Why is this criminal-seeming treatment found within our private law, our tort system?⁹

My rejoinder is that punitive damages are an alternative to compulsory social insurance because of America's cultural preference for market driven solutions in contrast to the “thick” regulatory mechanisms that characterize Western European legal systems.¹⁰ For more than two hundred years, wealth-calibrated punitive damages have functioned to restore equilibrium in American society, supplementing the work of other societal institutions such as first party insurance and workers compensation.

The downside of a European-style central state insurance regime is that government officials may create “the tyranny of the status quo” by unnecessarily impeding groundbreaking, but disruptive, technologies in the name of reducing primary accident costs.¹¹ Conservatives warn of the dangers of heavy-handed government regulation:

history, as other nations in the world have done, and build social institutions – strong regulation and social insurance – to guard against toxic disasters of the future).

⁸ Hans-Bernd Schafer, 3000 *Tort Law: General, Id.* at 570.

⁹ Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 *TEX. L. REV.* 105, 106 (2005). Professor Zipursky believes that punitive damages should be limited to enforcing the individual victim's “right to be punitive,” but should not vindicate society's rights, which are the province of criminal law. *Id.* at 106; See also, James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 *VAND. L. REV.* 1117, 1158–64 (1984) (contending that punitive damages has illegitimately invaded the province of criminal law).

¹⁰ U.S. antitrust law, for example, is largely about protecting the market, whereas the European approach is more paternalistic:

Since the 1990s, the task of antitrust enforcers has been to find a middle ground that avoids the extremes of over-and under-enforcement. In contrast, European antitrust enforcers perceive competition process as vulnerable and are more eager to address perceived distortions.

Katarzyna A. Czapracka, *Where Antitrust Ends and IP Begins – On the Roots of the Transatlantic Clashes*, 9 *YALE J. L. & TECH.* 44 (2007) (comparing U.S. market based approach to European “thick” regulation of competition). See generally, LESTER THURLOW, *HEAD TO HEAD: THE COMING ECONOMIC BATTLE BETWEEN JAPAN, EUROPE AND AMERICA* (1993) (arguing that America is falling behind Japan and Europe because of its preference for market based economic policies in contrast to Japan and Europe's strong regulatory regimes).

¹¹ See generally, MILTON AND ROSE FRIEDMAN, *THE TYRANNY OF THE STATUS QUO* (1984) (asserting that already existing interest groups subordinate market forces by lobbying the government to protect their interests).

[A]n overzealous government that tries to keep all bad products off the market is likely to err by keeping too many good products off the market.... The danger is that new legislation could be a veil for protectionism, as special interests try to gain advantage in the domestic market by restricting imports and by handicapping smaller domestic firms by increasing their regulatory costs.¹²

Crimtort remedies fill the enforcement gap without requiring rigid bureaucratic rules, which are inherently incapable of evolving quickly enough to address new social problems. An inflexible government regulatory body may work well in a homogenous society such as Sweden but is likely to obstruct important innovations in the United States. Wealth-calibrated fines that strip illicit profits from wrongdoers provide the financial deterrent power to constrain powerful organizational actors.¹³ Crimtorts serve as a necessary mechanism of social control that punishes and deters practices and policies that threaten the well-being of American society.

2. THE SOCIAL FUNCTIONS OF CRIMTORT REMEDIES

2.1. Compensating for inherent weaknesses of the criminal law

The crimtort is an invaluable supplement to fill the enforcement gap created by the inherent limitations of criminal law. Criminal law is ineffective in punishing and deterring emergent social problems that do not fit the precise elements of criminal law causes of action. Even when criminal law statutes do address embryonic social problems, the elevated burden of proof required for criminal convictions and the limited resources of government prosecutors often make public law enforcement impractical for dealing with rapidly evolving threats to society.¹⁴ Public law develops at a snail's pace and is thus unable to restore equilibrium, given the amazing dynamism of American society.

Crimtort law, in contrast, possesses the flexibility necessary to redress the new vulnerabilities continually being created by America's swiftly globalizing information society.¹⁵ Hackers, for example, have re-

¹² James Dorn, *Toxic Toys: Congress Risks Making Things Worse*, http://www.cato.org/pub_display.php?pub_id+8808 (last visited Jan. 21, 2008).

¹³ See Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 *Geo. L. J.* 421, 455–56 (1998) (contending that effective deterrence depends upon stripping illicit gains from wrongdoers).

¹⁴ Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 *S. CAL. INTERDIS. L.J.* 63, 86, 96 (2001). “Criminal law, by its very nature, lags behind technology. . . . By the time a statute is enacted to counter an Internet-related threat, the creative cybercriminal finds new technologies to bypass an essential element of the prohibited act or offense.” *Id.*

¹⁵ “Punitive damages . . . can be individualized to provide a deterrent that will be adequate for each case... Such flexibility can ensure a sufficient award in the case of a rich

cently established “service businesses [that] aggregate large networks of compromised computers, called botnets and rent out portions of their networks for whatever task the client has, perhaps to distribute spam, disable a competitor’s website, or infiltrate a firm’s network in order to steal intellectual property.”¹⁶ Online enablement of identity theft is a boom industry that takes advantage of the low probability of prosecution by public authorities:

Gifted hackers are now enabling the far larger market of wannabes whose deficient skills would otherwise shut them out of the cybercriminal enterprise system. By creating services for those people, hackers can generate huge profits without actually committing fraud. Gold prospectors may or may not strike it rich, but folks selling pans and pickaxes make a heck of a living either way. What surprises some experts about this new service economy is just how innovative and vibrant it has become. The hackers code at a PhD level. Their solutions to problems are creative and efficient. They respond to market conditions with agility. Their focus on customer service is intense. If this loose collective of criminal hackers were a company, it would be a celebrated case study of success.¹⁷

Few prosecutors possess the training and resources to even identify, much less punish, these sophisticated cybercriminals. Cybercrim torts, by incentivizing private attorneys general with specialized computer and legal knowledge, potentially have the deterrent power to constrain theft that crosses national borders at the click of a mouse.¹⁸ Crim torts have the ability to evolve to meet this type of novel legal challenge that endangers the network of trust that is the glue of societal co-operation, stability, and prosperity.¹⁹

defendant and avoid an overburdensome one where the defendant is not as wealthy.... In short, ‘although a quantitative formula would be comforting, it would be undesirable.’” *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985) (citations omitted).

¹⁶ Debra Wong Yang & Brian M. Hoffstadt, *Countering the Cybercrime Threat*, 43 AM. CRIM. L. REV. 201, 204 (2004).

¹⁷ Scott Berinato, *The Cybercrime Service Economy*, 26, 26 HARV. BUS. R. (Feb. 2007) (reporting that, “Cybercrime services are so sophisticated and powerful that they make one pine for the days of simple website defacements and e-mail viruses with cute embedded messages. The new breed does not just disrupt business; they threaten it by frightening customers and undermining commercial confidence. As the victims of online crime pile up, more and more of them will look for someone to hold responsible. And it won’t be the hackers; it will be the brands that customers trusted to protect them.”)

¹⁸ “Last year, two Russians created a subscription-based– identity theft service. Rather than steal personal credentials themselves, the two hacked into PCs and then charged clients \$1,000 per compromised machine for 30 days of unfettered access. The clients are betting that during the 30-day period (one-billing cycle) victims will bank or otherwise submit personal data online.” Id.

¹⁹ FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1996) (arguing that only societies that have developed a high degree of social trust can build the large scale corporate enterprises necessary to achieve economic prosperity).

Government regulators are understaffed and often lack the political will to tackle corporate malfeasance on the borderline between criminal law and the law of torts.²⁰ Prosecutors rarely have either the expertise or the financial resources to prosecute corporate wrongdoers who endanger public health and safety.²¹ No criminal prosecution for corporate manslaughter has been successful in any U.S. mass products liability action. The first American prosecution of a manufacturer for manslaughter, a case that arose from three deaths caused by the dangerously defective Ford Pinto, resulted in a defense verdict.²² The automobile manufacturer was acquitted despite evidence that Ford failed to recall their dangerously defective vehicles.²³ Ford's punishment was the punitive damages awarded in private lawsuits that led to the recall and redesign of an entire line of automobiles.

2.2. Evolving to meet new challenges in a rapidly changing society

As American society becomes increasingly differentiated and multifaceted, its legal system must adapt to mediate relationships between strangers with dissimilar values, backgrounds, and societal interests.²⁴ As the nineteenth century French sociologist, Emile Durkheim, argued:

Life in general within a society cannot enlarge in scope without legal activity similarly increasing in a corresponding fashion. Thus, we

²⁰ See THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 176 (2001) (documenting how tort remedies bridge the gap left by long decades of weak enforcement by federal government agencies).

²¹ The criminal prosecutions largely are for regulatory offenses punishing companies for failure to have the proper permits or for filing false reports rather than actually causing the increased risk of death among their workers, customers, or surrounding community. It is easier to prove that a company transported hazardous materials such as PCB transformers without a permit. The criminal standard of "beyond a reasonable doubt" is almost impossible to prove where the causal connection cannot be clearly established and epidemiological or animal studies are not conclusive.

²² Joseph R. Tybor, *How Ford Won Pinto Trial*, NAT'L L.J., Mar. 24, 1980, at 1 (reporting acquittal of Ford Motor Company in *State v. Ford Motor Co.*, No. 5234 (Ind. Super. Ct. Mar. 13, 1980)).

²³ Michael Rustad & Thomas Koenig, *Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1329 n. 296 (1983) ("first American prosecution of a manufacturer for manslaughter arose from three deaths caused by the ... defective Ford Pinto The prosecutor based the case on the company's failure to recall a potentially deadly vehicle when the company had knowledge of a defect in the vehicle").

²⁴ "[T]he great diversity of the population; the lack of direct communication between various segments; the absence of similar values, attitudes, and standards of conduct; economic inequities, rising expectations and the competitive struggles between groups with different interests have all led to an increasing need for formal mechanisms of social control." STEVEN VARGO, *LAW AND SOCIETY* (6th ed.) 18 (2000).

may be sure to find in the law all the essential varieties of social solidarity.²⁵

America's rapid rise over the past two centuries has required a co-evolving legal order that facilitates far-reaching technological and economic change while preserving the social fabric.²⁶

Throughout Anglo-American history, crimtort remedies have evolved to defend each era's core social norms and values. Most eighteenth American punitive damage verdicts punished and deterred reprehensible conduct between members of the local community.²⁷ The *TVT Court* noted that early punitive damage awards were reserved for malicious torts such as:

severe intentional misconduct causing bodily injury, personal affronts, or deprivations of property. Especially noteworthy in the formative precedents were cases evincing a defendant's abuse of social status, wealth or public office, for instance through deliberate injuries inflicted by a master assaulting or killing a servant, by a person of great wealth or rank outrageously mistreating a poor one, and by agents of the state misusing authority.²⁸

In the nineteenth century, punitive damages extended to punish railroads that recklessly endangered passengers and other corporate wrongs.²⁹ In the post-World War II era, punitive damages further stretched to punish and deter grossly negligent medicine, malicious activities by inadequately supervised employees, and dangerously defective products.³⁰ Contemporary punitive damages cases generally redress organizational harms and penalize hated individuals such as O.J. Simpson, when the criminal law fails to properly punish and deter.

²⁵ Emile Durkheim, *The Division of Labour in Society* in STEVEN LUKES AND ANDREW SCULL (eds.) *DURKHEIM AND THE LAW* 34 (1983).

²⁶ "A legal system attains the end of the legal order ... by recognizing certain of these interests, by defining the limits within which those interests shall be recognized and given effect through legal precepts developed and applied by the judicial process according to an authoritative technique and by endeavoring to secure the interests so recognized within defined limits." ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* 66 (1997) (originally published in 1941).

²⁷ Clarence Morris stated that the remedy was utilized as "an orderly legal retaliation . . . to be preferred to a private vengeance, which will disturb the peace of the community" Clarence Morris, *Punitive Damages in Tort Cases*, 44 *HARV. L. REV.* 1173, 1198 (1931).

²⁸ *TVT Records v. Island Def Jam Music Group*, 279 F.Supp.2d 413, 419 (S.D. N.Y. 2003) (citing Michael Rustad and Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 *AM. U. L. REV.* 1269 (1993)).

²⁹ THOMAS H. KOENIG & MICHAEL RUSTAD, *IN DEFENSE OF TORT LAW* 40 (2001) (documenting that "[r]ailroads were frequently assessed punitive damages in their capacity as common carriers of passengers").

³⁰ *Id.* at 46–59.

The law must evolve at a slower pace than other social institutions in order to minimize its interference with societal synchronization:

An incessant change of such fundamental social relationships as property, the family, and the forms of government would mean a continuous revolution—economic, social, and political—which would make stable order in the society impossible. These facts explain why the norms of official law tend to “harden” and in this “hardened” form tend to stay unchanged for decades, even centuries, until a profound change in the law-convictions of the members occurs... *Official law, then, always lags somewhat behind unofficial law.*³¹

Legal lag becomes a problem because threats emerge more rapidly than criminal law statutes can be drafted, let alone enforced.³²

Crimtorts, unlike statutory law, advances from the common law decisions of jurists who face novel social problems that require the stretching of time-honored civil law doctrines. Social conservatives have viewed the common law as an embankment protecting personal liberty and societal stability.³³ Legislators cannot possibly be aware of all of the consequences that may arise from a new statute,³⁴ while common law remedies are constantly being tested and refined through judicial wisdom and practical experience. Conservative icon Friedrich Hayek extolled the common law for its ability to adjust to changing circumstances, arguing that, “the common law is superior because it builds piecemeal in response to immediate situations, with regular feedback – the supply of new cases responding to previous decisions – and having the capacity to make adjustments.”³⁵

³¹ PITIRIM A. SOROKIN, *SOCIETY, CULTURE AND PERSONALITY: THEIR STRUCTURE AND DYNAMICS: A SYSTEM OF GENERAL SOCIOLOGY* 82 (1947) (italics in original).

³² Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 95 (2003) (explaining term “legal lag” through sociologist William Ogburn’s concept of cultural lag in which the various institutions of American society do not change at the same rate, therefore various institutions of American society do not change at the same rate, thereby creating a “cultural lag” when one element has not yet accommodated to developments in another).

³³ “Owing to the entrenched, disbursed nature, renewed every day in decisions made in ordinary courts, Dicey considered this common law tradition, taken in its entirety, to be a more secure basis for liberty than the enactment of written constitutions, for it could be overturned only in the unlikely event of a complete revolution.” BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 64 (2004) (summarizing the viewpoint of nineteenth century conservative theorist Albert Venn Dicey).

³⁴ Adam Smith’s “invisible hand” is the most famous example of the often-made argument that legislative interference into complex social relationships is likely to produce unanticipated consequences because lawmakers are unlikely to understand all the impacts of their actions. See generally, Robert Merton, *The Unintended Consequences of Purposive Social Action*, in ROBERT MERTON, *SOCIOLOGICAL AMBIANCE* (1976).

³⁵ Hayek argues “[t]he efforts of the judge are thus part of that process of adaptation of society to circumstances by which the spontaneous order grows. He assists in the

2.3. Providing financial incentives for private enforcement

Crimtorts, in the form of punitive damages, feature individual litigants, serving as “private attorneys general,”³⁶ rather than inflexible bureaucrats. The private attorney general’s possibility of obtaining a substantial punitive damages verdict is a key incentive for exposing, publicizing, litigating, and punishing patterns and practices of corporate wrongdoing.

The long-established “American rule” of attorneys’ fees is that the plaintiff and the defendant are responsible for paying their own lawyers and litigation costs. The unique U.S. institution of the contingency fees, including punitive damages,³⁷ creates crucial incentives for trial lawyers to pursue complex cases on the frontier of the litigation landscape.³⁸ Augmented compensation is frequently justified on the ground that the contingency fee system ensures that plaintiffs will be systematically under-compensated because they must pay substantial legal fees out of their award.

Punitive damages are not an undeserved bonus payment, but rather:

process of selection by upholding those rules that, like those, which have worked well in the past, make it more likely that expectations will match and not conflict.... But even when in the performance of this function he creates new rules, he is not the creator of a new order but a servant of an existing order. And the outcome of his efforts will be a characteristic instance of those “products of human action but not of human design” in which the experience gained by the experimentation of generations embodies more knowledge than can be possessed by anyone.” FRIEDRICH .A. HAYEK, *THE ROAD TO SERFDOM* 133 (1944).

³⁶ “Private attorney general” is a concept coined by Circuit Judge Jerome Frank in *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943). Judge Frank employed the term to describe “any person, official, or not, who brought a proceeding...even if the sole purpose is to vindicate the public interest. Such persons as authorized are, so to speak, private Attorneys General.” *Id.* at 704. Private attorneys general supplement but do not supplant public law enforcement.

³⁷ Congress has enacted hundreds of statutes permitting multiple statutory damages on behalf of the public interest. Examples of multiple damages well-known federal consumer protection statutes are the Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Protection Act, and the Magnuson-Moss Consumer Warranty Act. “Nearly every state has a general consumer protection statute, called Unfair and Deceptive Trade Practices Acts (UDTPA) or Little FTC Acts. Many of these statutes enable consumers to file direct actions by awarding double or treble damages, attorneys’ fees and costs.” MICHAEL L. RUSTAD, *EVERYDAY CONSUMER LAW* 15 (2007).

³⁸ “The contingency is not just whether there will be a positive outcome for the client (often a given since most tort suits settle before trial) but whether that outcome will be large or small. Other contingencies include the amount of time a case will take; expenses; the period of time between the investment of the first hour and payment by the client; and if there is a trial and a positive verdict, whether the money can be collected given the various obstacles that defendants can raise, including bankruptcy.” Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 *TEX. L. REV.* 1465, 1498 (2007).

the extra recovery afforded to plaintiffs by punitive damages, rather than constituting a ‘windfall,’ serves a useful purpose. The potential for recovering an exemplary award provides an incentive for private civil enforcement of important social norms. The Ninth Circuit noted the social function of punitive damages in incentivizing private attorneys general: “So far is this from being a fundamental personal right that it is not truly personal in nature at all. It is rather a public interest.”³⁹

Crimtort penalties are most valuable when they encourage private attorneys general to uncover and prosecute complex threats to the public interest. Neither the criminal law nor the civil law alone, for example, can adequately protect the public from the growing hazards of chemical, biological, biochemical, or radioactive exposures. Toxic crimtort cases can take years or even decades and generally require the extensive use of costly research by experts. Even with the possibility of obtaining punitive damages, it is extremely difficult to convince a law firm to undertake this litigation because of the intricacy of establishing a causal connection between an injury and a particular toxic exposure. Private enforcement will be crippled if punitive damages are capped at too low a level, although trial courts have the ability to award attorney fees under many private attorneys general statutes.⁴⁰ Trial courts have the option to grant attorney’s fees in cases of great “societal importance” where the litigation advances important public policies.⁴¹

2.4. Vindicating societal norms and values

The well-established functions of punitive damages are punishment and deterrence.⁴² As the Supreme Court recently noted in *Philip Morris v. Williams*,⁴³ “[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”⁴⁴ Nearly every state or federal court employs these twin rationales when imposing punitive damages.⁴⁵ Crimtort verdicts play a

³⁹ *In re Paris Air Crash*, 622 F.2d 1315, 1319–20 (9th Cir. 1980).

⁴⁰ *Anderson v. Ethington*, 651 P.2d 923 (Idaho 1982).

⁴¹ *Hellar v. Cenarrusa*, 682 P.2d 524, 531 (Idaho 1984).

⁴² As Ben Zipursky notes: “The standard answer is that punitive damages are intended to punish a defendant who has engaged in a form of tortious conduct that is particularly egregious.” Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 105 (2005) (stating that “[c]ourts routinely state that the “punishment” delivered by punitive damages is justified by both deterrent and retributive concerns”). See also, Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1318–20 (1993) (describing punishment and deterrence functions of punitive damages).

⁴³ *Philip Morris USA*, 127 S. Ct. 1057 (2007).

⁴⁴ *Id.* at 1061.

⁴⁵ RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 3.2, at 90–97 (2005 ed.) (documenting predominance of punishment and

key role in vindicating social norms by punishing particularly abhorrent misconduct.

A society maintains and reinforces its sense of unity and cultural integrity through the establishment of social boundaries of tolerable behavior.⁴⁶ Crimtorts develop and safeguard social synchronization by teaching the general population about society's norms and the penalties for violating its rules of proper behavior. Elite deviance that goes unpunished creates public cynicism, alienation, and disrespect for the law.

Crimtort punishments often receive enormous publicity, teaching the defendant and the wider society the limits of acceptable behavior:

[P]unitive damages serve a strong educative function for both the individual offender and society in general, in two significant respects. First, punitive damages certify the existence of a particular legally protected right or interest belonging to the plaintiff, on the one hand, and a correlative legal duty on the part of the defendant to respect that interest, on the other. Second, punitive damages proclaim the importance that the law attaches to the plaintiff's particular invaded right, and the corresponding condemnation that society attaches to its flagrant invasion by the kind of conduct engaged in by the defendant.⁴⁷

The crimtort remedy of punitive damages, from this perspective, accomplishes an educative purpose by teaching and reaffirming America's core values. As the Maine Supreme Court noted: “[p]unitive damages survives because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice.”⁴⁸ Crimtort remedies are not anomalies; they are a functional necessity for flexibly teaching and reinforcing societal mores.

deterrence rationale). Two states, Connecticut and Michigan, conceptualize punitive damages as fulfilling a purely compensatory function. Connecticut's approach is to award punitive damages to defray the legal expenses of bringing the lawsuit, whereas Michigan's remedy redresses non-economic damages. Michael Rustad and Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1318 (1993).

⁴⁶ KAI ERIKSON, *WAYWARD PURITANS* 10 (1966) (explaining that “[w]hen one describes any system as boundary maintaining, one is saying that it controls the fluctuation of its constituent parts so that the whole retains a limited range of activity, a given pattern of constancy and stability, within the larger environment.”)

⁴⁷ David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 375 (1994) (discussing the multiple functions and aims of punitive damages).

⁴⁸ *Tuttle v. Raymond*, 494 A.2d 1353, 1355 (Me. 1985).

3. EXAMPLES OF EMERGING CRIMTORTS FOR A GLOBALIZING WORLD

American tort law is just beginning to address the swiftly escalating problem of hazardous consumer products manufactured by Chinese companies, which do not follow U.S. safety standards. Recently, a Massachusetts jury awarded a \$3.35 million⁴⁹ to a 4-year-old American boy whose hand was mangled in a Chinese department store escalator malfunction.⁵⁰ The plaintiff's attorney was able to hold Otis liable for the boy's injuries because the U.S. company was a joint venturer with the Chinese firm.⁵¹ Otis' elevators in other countries had a "Guardian Skirt Panel" that prevented the "possibility of entrapment."⁵² The plaintiff's attorney declared; "Business and travel is global, and the law must recognize these changes—and it does."⁵³ This cross-border litigation illustrates the ability of tort law to evolve rapidly to address an emergent social problem arising out of America's globalizing economy.

3.1. Crim torts to protect society from defective imports

The question of how to protect the consuming public from dangerously defective imported products will become more urgent as an increasingly higher percentage of goods travel across international borders. Already, hardly a week goes by⁵⁴ without another report of a consumer recall of a product originating in China.⁵⁵ Early in 2007, an estimated 39,000

⁴⁹ The compensatory award included special damages of \$200,000. Noah Schaffer, *Escalator Accident in China Leads to \$3.35 M Verdict Here: Worcester Jury Ties Boy's Hand Injury to Co. Based in U.S.* MASSACHUSETTS LAWYERS WEEKLY (Jan. 7, 2008) at 39. The remainder of the award was non-economic damages. *Id.* Massachusetts has never recognized the common law of punitive damages but if the plaintiff had died, the Massachusetts Wrongful Death Statute would have permitted the recovery of punitive damages if a jury had found Otis had been reckless in not protecting the public after being placed on notice that the elevator repeatedly malfunctioned.

⁵⁰ *Id.* at 1.

⁵¹ *Id.*

⁵² *Id.* at 39.

⁵³ *Id.* at 1.

⁵⁴ *Who Sucks? We'll Tell You, Dangerous Made-In-China Products: 2007* (providing a time-line of Chinese important product defects during the first half of 2007). <http://www.who-sucks.com/business/made-in-china-2007-danger-timeline> (last visited Feb. 1, 2008).

⁵⁵ "The number of Chinese-made products that are being recalled in the U.S. has doubled in the last five years, helping to drive the total number of recalls in this country to an annual record of 467 last year. Chinese-made products account for 60 percent of all consumer-product recalls, and 100 percent of all 24 kinds of toys recalled so far this year. Even China's own government auditing agency found that 20 percent of the toys made and sold in China had safety hazards." Consumer Reports On Safety, *Can You Trust Chi-*

U.S. household pets died because of dangerous chemicals in pet food manufactured in China.⁵⁶ A New York company recently recalled an imported children's snack food from China that caused "six salmonella cases, mostly in toddlers in nineteen states."⁵⁷ American retailers recalled millions of Chinese toys during the 2007 Christmas season because of "dangerous levels of lead used in cheap paints."⁵⁸ Mattel and Fisher-Price recalled Chinese-made toys: "Dora the Explorer was the first mascot for the invasion of lead-coated toys, but there were others" including Thomas the Tank, which also delivered lead-based paint to the mouths of American infants.⁵⁹

Neither Chinese exporters nor their American trading partners set out to injure individual consumers. The gross nonfeasance of U.S. companies lies in their failure to conduct the basic due diligence necessary to insure that their Chinese joint venturers follow minimum safety and testing standards. The toy safety crisis is a suitable target for crimtort prosecution because of the enforcement shortfall of regulatory and criminal law institutions. The national toy companies' failure to supervise Chinese suppliers goes to the heart of an expanding threat to children's health and safety. Multi-national corporations were reckless in not preventing "their factories in China from slipping in lead to make colors bright or plastic more stable."⁶⁰

Private litigants are filing crimtort lawsuits in an attempt to hold American importers liable for failing to monitor the safety of the products that they introduce into the stream of commerce.⁶¹ American corporations

nese-Made Products? June 27, 2007 <http://blogs.consumerreports.org/safety/2007/06/can-you-trust-c.html>, (last visited Jan. 21, 2008).

⁵⁶ World.Net Daily, *China's Toy Sweatshop Pays 36 Cents an Hour: Christmas Product Safety Recalls Continue Along With Import Mania*, (Jan. 6, 2008)

http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=59309.

⁵⁷ Paul A. Dame, *Recent Trends in Food and Product Defect Litigation*, Wiley Rein LLP. (Sept. 2007) (citing San Francisco Chronicle report) (last visited Jan. 8, 2008)

http://www.wileyrein.com/publication.cfm?publication_id=13303.

⁵⁸ Id.

⁵⁹ Curtiss Gibson, *China: A Scapegoat for Unsafe Toys*, THE ORACLE (University of South Florida) (Nov. 7, 2007).

⁶⁰ Michael D. Sorkin, *Which Toys are Safe? Maybe None*. ST. LOUIS POST-DISPATCH (Dec. 9, 2007) at A1.

⁶¹ "[A] number of lawsuits have been filed against importers of Chinese products. Menu Foods, the Ontario pet food maker whose Chinese-sourced product contained melamine, faces more than 100 class action lawsuits. A proposed class action has been filed against the distributor of various Thomas & Friends™ wooden railway toys. As long as companies continue to import Chinese goods, it is inevitable that more class actions will be filed." *Chinese Defective Products*, (last visited Jan. 21, 2008) <http://www.lawyer-sandsettlements.com/case/chinese-defective-products.html>, (last visited Jan. 21, 2008).

charged with complicity in the Chinese importing scandals will likely mount a “scorched earth” campaign against the first wave of consumer lawsuits because the potential liability is so vast:

There are billions of dollars in U.S. investment in China, rich contracts between U.S. corporations and Chinese contractors to produce goods for export, and the health and safety of millions of consumers in the balance.⁶²

Crimtorts, not the criminal law or regulations, give ordinary citizens the muscle to expose the ways in which the pursuit of profits endangers the larger society.

The consuming public cannot count on the Consumer Product Safety Commission, the Food and Drug Administration or other government agencies for protection from dangerously defective products imported from China.⁶³ Imports of consumer products have quadrupled since 1980, yet Congress cut the CPSC budget by a third.⁶⁴ The CPSC has only fifty percent of the employees it had at its formation. “Currently, only fifteen inspectors are policing the hundreds of points of entry for imported toys; 80 percent of all toys in the U.S. are imported from China.”⁶⁵ Regulators in China will not safeguard American consumers because “China has no safety standards in its manufacturing, we can’t inspect it at a higher rate because of trade rules.”⁶⁶ The law of products liability in China is as underdeveloped as its manufacturing safety standards.⁶⁷ Chi-

⁶² Paul A. Dame, *Recent Trends in Food and Product Defect Litigation*, Wiley Rein LLP. (Sept. 2007) (citing San Francisco Chronicle report) <http://www.wileyrein.com/publication.cfm?publicationid=13303> (last visited Jan. 8, 2008).

⁶³ Joshua Kurlantzick, *The Chinavores Dilemma*, Mother Jones, (Sept/Oct 2008) (Describing the failure of the Food and Drug Administration and other branches of the federal government to protect U.S. consumers from dangerous Chinese imports). <http://www.motherjones.com/news/feature/2008/09/exit-strategy-the-chinavores-dilemma.html> (last visited Nov. 15, 2008).

⁶⁴ Public Citizen, *NEW REPORT, SANTA’S SWEATSHOP: MADE IN D.C. WITH BAD TRADE POLICY* (Dec. 19, 2007) <http://www.citizen.org/pressroom/release.cfm?ID=2576> (last visited Dec. 28, 2007).

⁶⁵ *Rep. Cummings Holds Press Conference on Toxic Toys, Congressman Calls on Mattel to Stop Using Lead, Discusses New Legislation to Protect Children*, CONGRESSIONAL DOCUMENTS AND PUBLICATIONS (Dec. 20, 2007) (available on LEXIS/NEXIS curtnws library).

⁶⁶ Lou Dobbs, *Toxic Toys Still on Shelves*, LOU DOBBS’ THIS WEEK (Dec. 23, 2007) (quoting consumer advocate Kitty Pilgrim).

⁶⁷ George C. Conk, *A New Tort Code Emerges in China: An Introduction to the Discussion with a Translation of Chapter 8—Tort Liability, of the Official Discussion Draft of the Proposed Revised Civil Code of the People’s Republic of China*, 30 *FORDHAM INT’L L.J.* 935, 953 (2007) (noting that Chinese officials have an interest in product liability but have not yet addressed other legal infrastructure).

na's civil code gives consumer's rights that are expressed as aspirational principles, but no concrete remedies.⁶⁸

No criminal statute makes American corporations or their officers liable for failing to conduct due diligence in overseas plants. Criminal defendants are entitled to advance notice of what specific behavior is subject to prosecution. Crim torts supplement anemic public enforcement by imposing punitive damages against reckless organizational activities that threaten the larger public.⁶⁹ Crim tort remedies assessed against U.S. companies that enable Chinese manufacturers to endanger the consuming public are necessary to administer a legal spanking that demonstrates that "tort does not pay."⁷⁰

Crim tort lawsuits initiated by private citizens will be the only meaningful way to make U.S. companies' answerable for their reckless outsourcing that endangers millions of consumers. Punitive damages optimally punish and deter wrongdoers where the probability of detection is very low and the probability of harm is very high. The price of wrongdoing must significantly exceed the expected gain in order not to provide the malefactor with a competitive advantage. The message of punitive damages is "teaching the defendant not to do it again, and of deterring others from following the defendant's example."⁷¹

The current China recall disaster will potentially bankrupt some American importers, who may find themselves saddled with products li-

⁶⁸ In spite of these strong provisions protecting consumers, the CRIL's principal weakness lies in its failure to address the legal consequences should a business operator fail to comply with its obligations. Brooke Overby, *Consumer Protection in China After Accession to the WTO*, 33 SYRACUSE J. INT'L L. & COM. 347, 362 (2006)(contending that Chinese law codifies protections without providing consumer remedies).

⁶⁹ "[T]he criminal system cannot always adequately fulfill its role as an enforcer of society's rules." *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985). Crime in the streets is the target of criminal prosecution not crimes in the suites. When prosecutors direct their scarce resources to white-collar crime, they are far more likely to prosecute environmental, antitrust, fraud, campaign finance, tax evasion or boycotts than cases involving product or workplace safety. See, Russell Mohibker, *The Top Corporate Criminals of the Decade*, CORPORATE CRIME REPORTER (last visited Jan. 1, 2008) <http://www.corporatecrimereporter.com/top100.html> (documenting that the hundred most important corporate crime prosecutions fell into the following categories: "The 100 corporate criminals fell into 14 categories of crime: Environmental (38), antitrust (20), fraud (13), campaign finance (7), food and drug (6), financial crimes (4), false statements (3), illegal exports (3), illegal boycott (1), worker death (1), bribery (1), obstruction of justice (1) public corruption (1), and tax evasion (1)").

⁷⁰ *Rookes v. Barnard*, 1964 A.C. 1129, 1129 (H.L.).

⁷¹ See also, ROBERT KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS at 9 § 2 (5th ed. 1984). (observing that "[Punitive] damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example.")

ability.⁷² The recent surge in dangerously defective products recalls results from “a long-term corporate strategy of seeking ever-cheaper wages and raw materials offshore while avoiding oversight and legal liability.”⁷³ American importers’ failure to properly monitor their supply chains enables foreign bad actors to intentionally violate U.S. law, making millions of dollars in profits at the expense of the U.S. consuming public. To date, no corporation or officer has been charged with any crime despite the widespread endangerment caused by cheap Chinese imports. Civil punishment is especially appropriate when a company is undeterred by the threat of fixed criminal fines and penalties. Crim torts send a message to even the wealthiest organizations that they are not above the law.

3.2. Crim torts to redress societal harm from reckless private armies

Blackwater USA is a multi-billion dollar complex web of companies that provides armed mercenary personnel⁷⁴ and security services to the U.S. State Department and other government agencies.⁷⁵ The United States government has paid Blackwater and its associated companies

⁷² “More recently an importer of defective automobile tires manufactured in China has stated it will use its remaining assets to recall as many tires as possible, and then go out of business.” CORP. COMPL. SERIES: PROD. LIAB. § 3:8 (2007) (available in Westlaw’s TP-ALL Library).

⁷³ KOENIG & RUSTAD, IN DEFENSE OF TORT LAW, Id. at 20–23.

⁷⁴ Blackwater Worldwide was founded in 1997 by Erik Prince, a former Navy SEAL. See Blackwater USA, Company profile (last visited Jan. 10, 2008 <http://blackwaterusa.com> (Select company profile)). Moyock, NC is home to Blackwater headquarters, as well as its’ 7,000 acre training facility. Id. In recent years, primarily during the Bush administration, Blackwater has grown to become one of the largest private military service providers in the world. See Staff of H.R. Comm. On Govt. Oversight and Reform, 110th Cong., Memo on Additional Information about Blackwater USA at 3 (Text in <http://oversight.house.gov>. Select view more stories. Select October 1, 2007) The company offers a wide range of services including personal security, military training, and its own line of armored vehicles, to U.S. Government and non-U.S. government affiliates, though the former has proven most lucrative. Id. Blackwater’s current contract with the State Department known as Worldwide Personal Protective Services II (WPPS II) has a maximum value \$1.2 billion per contractor over a five-year period. Id. at 4–5. Triple Canopy and DynCorp, two other private military companies, are signatories to WPPS II. Id. at 4; See also, Complaint in *Albazzaz v. Blackwater Worldwide*, Case No. 1:07-cv-02273-RBW (U.S. District Court, District of Columbia, filed Dec. 19, 2007) (last visited Jan. 8, 2008).

⁷⁵ The State Department requires specific training experience, depending on position, from each of its independent contractors. *Private Security Contracting in Iraq and Afghanistan: Statement before the H.R. Comm. On Govt. Oversight and Reform*, 110th Cong. at 4–5 (statement of Ambassador Richard J. Griffin, Assistant Secretary of State for Diplomatic Security). WPPS II was initiated in 2005 to provide Protective Security Specialist, or bodyguard, details throughout Iraq. U.S. Congressional Research Service. *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues* (RL32419, at 5; June 21, 2007) <http://www.fas.org>. (posting Select Government Secrecy. Select Con-

nearly a billion dollars since the invasion of Iraq.⁷⁶ The crim tort paradigm of public enforcement through private litigation⁷⁷ is being tested in litigation recently filed against Blackwater and its affiliated companies for using excessive deadly force against Iraqi civilians. Lawyers for the Center for Constitutional Rights filed a lawsuit in D.C. District Court under the Alien Tort Claims Act.

These alleged incidents involve not only severe injuries to the individual plaintiffs but also substantial harm to America's standing abroad and the undermining of U.S. foreign policy objectives.⁷⁸ The U.S. military, the "State Department, and the nation of Iraq"⁷⁹ have been victimized if the plaintiff's allegations are true. If successful, the Blackwater lawsuit will serve a broader societal purpose by encouraging other private military forces to renounce lawlessness.

Blackwater's attorneys claim that none of their entities or employees is subject to either Iraqi law or its courts.⁸⁰ American criminal prosecutors are powerless to take legal action against private employees of the U.S. military.

This punitive damages lawsuit has the potential to fill this enforcement gap by allowing the plaintiffs to conduct discovery on other possible Blackwater misconduct to determine whether there is a pattern of reckless behavior. If this case goes to trial, the public may well benefit from greater information about the role of military contractors in Iraq; a group which has been characterized as the "coalition of the billing."

The U.S. Supreme Court's downsizing of punitive damages over the past two decades marginalizes the remedy's capacity to address social problems arising out of this type of organizational misconduct.⁸¹ The Court has held that the due process clause of the U.S. Constitution forbids

gressional Research Service Reports. Select General National Security Topics) (last visited Jan. 10, 2008).

⁷⁶ Michael A. DeMayo, *North Carolina Private Security Company Blackwater is Sued for Wrongful Death, Personal Injury and War Crimes*, North Carolina Injury Lawyer Blog

http://www.northcarolinainjurylawyerblog.com/2007/12/north_carolinabased_private_se.html (last visited Dec. 28, 2007).

⁷⁷ *Id.*

⁷⁸ *Id.* (describing the Abu Grahیب incident as demonstrating "the power individual contractors wield in terms of influencing global perception of American foreign policy and values in times of war. More importantly, it highlighted a lack of accountability, oversight and administrative mechanisms for bringing civilian contractors who accompany the military overseas to justice").

⁷⁹ *Id.*

⁸⁰ Carmel Sileo, *Suit Against Blackwater*, *Id.* at 19.

⁸¹ The punishment and deterrence function of punitive damages is a well-established example of a tort remedy serving a public purpose. See W. PAGE KEETON, PROSSER

juries from awarding punitive damages designed to punish a corporate defendant for harming non-parties in other cases not directly involved in the lawsuit.⁸² This ruling weakens the ability of punitive damages to evolve to meet the legal challenges created by globalization.

4. CONCLUSION

The crimtort paradigm is an attempt to influence the path of the law by emphasizing the need for robust tort remedies that punish and deter organizational misbehavior. Private litigants play a vital societal role in governance when public regulators or prosecutors lack the will, the expertise or the financial resources to control corporate wrongdoing. Plaintiffs' lawyers representing consumers injured by lead-based toys from China will require broad and expensive discovery and considerable legal and cultural proficiency to stand any chance of winning their cases.

The new millennium will require groundbreaking solutions to the growing problems of globalized supply chains, international human rights violations, online oppression, environmental degradation, and negligent enablement of third party crimes. Throughout its long history, punitive damages have served as a private law remedy that is flexible enough to adapt to new forms of wrongdoing that are not adequately punished and deterred by the criminal law. The price of wrongdoing must significantly exceed the expected gain in order not to provide the wrongdoer with a competitive advantage.

& KEETON ON THE LAW OF TORTS 9 (5th ed. 1984) (describing punitive damages as an instance where “the ideas underlying the criminal law have invaded the field of torts”).

⁸² *Id.* at 1063.