CRIMTORTS: A CURE FOR HARDENING OF THE CATEGORIES

Thomas H. Koenig

ABSTRACT

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 tort law. Professor Koenig examines the difference between the manifest and latent functions of crimtorts as civil punishment, drawing upon the work of classic sociological theorists. The manifest functions of crimtorts are punishment and deterrence, but crimtort remedies also arm ordinary citizens with the power to return society to equilibrium through the deterrent power of punitive damages. Professor Koenig uses the recent Blackwater litigation and the Chinese-import safety crisis to illustrate the crimtort's utility as a flexible response to social problems that threaten society but cannot be addressed on the criminal side of the ledger. He concludes that crimtorts, or their functional equivalent, are urgently needed in the twenty-first century because the criminal law, by its very nature, lags behind the other social institutions.

CRIMTORTS: A CURE FOR HARDENING OF THE CATEGORIES[*]

Thomas H. Koenig[**]

> [Tort law doctrines] can be stretched or contracted to meet the needs of the moment and is always colored by the desires of the user. Doctrine for doctrine's sake may become an obsession with lawyers as it does with preachers and politicians. It feeds on itself; hardens into cliches and blocks the arteries of thought.[1]
>
> Leon Green

I. INTRODUCTION

A decade ago, Michael Rustad and I coined the term "crimtort"[2] as a *portmanteau*[3] that sought to explain the hidden

---

[*] Special thanks to Samantha Bernstein, a student at Suffolk University Law School, who provided valuable research on Blackwater and to Michael Rustad for many useful suggestions. I am grateful to Christopher Robinette for organizing the Crimtorts Symposium and to the staff of the *Widener Law Journal* for editorial assistance.

[**] Professor and Chair, Department of Sociology and Anthropology, Executive Committee: Law, Policy and Society Doctoral Program; Northeastern University, Boston, Massachusetts.

[1] Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 257, 266 (1960) (arguing that tort law fulfills societal functions).

[2] Michael Rustad coined the term "crimtorts" in his 1986 LL.M. thesis at Harvard University Law School entitled: *The Social Functions of Punitive Damages and the Rules of Evidence*. Professor Rustad and I developed the concept of the crimtort in more depth in Thomas Koenig & Michael Rustad, "*Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289 (1998). Our most comprehensive explanation of crimtorts as an important mechanism for protecting social justice is presented in THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW (2001).

[3] Lewis Carroll coined this term in *Through the Looking Glass* to describe words with two meanings contained in one word. For example, slithy toves are both lith and slimy. *See generally* REPOSITORY OF MYTHOS & POESY, JABBERWOCKY GLOSSARY, http://www.home.netcom.com/~kyamazak/myth/alice/jabglossary-e.htm (last visited Apr. 18, 2008).

public policy functions[4] increasingly being played by tort law.[5] The crimtort concept grew out of a conversation in which Michael Rustad pointed out that my Northeastern University sociology course, "Corporate Crime," in fact consisted of a series of complex mass tort cases, not criminal prosecutions. My syllabus included cases such as: Times Beach, Agent Orange, DES, Ford Pinto, Dalkon Shield, Bhopal, Love Canal, Thalidomide, Silkwood, and Woburn. I had been teaching this course for years, using an excellent book entitled *Corporate Crime and Violence*,[6] without realizing that the text discussed corporate torts that were punished by punitive damages, not criminal law cases at all.

Michael Rustad also told me that most tort casebooks suffered from the opposite deficiency. These law school texts treated cases pragmatically, as disputes between a single victim and the injurer, with little attention to their broader social impact. Lawyers are trained to parse each individual case on a micro-level because the

---

[4] Economists as well as sociologists generally examine legal practices by identifying their functions—social benefits and harms—rather than through causal analysis. "A famous philosopher, Bertrand Russell, argued that science advanced by replacing the imprecise concept of 'cause' with the precise mathematical concept of a 'function.' " ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 331 (5th ed. 2008).

[5] Green, *supra* note 1, at 267. The crimtort paradigm was inspired by Grant Gilmore's "contort," which was a *portmanteau*, combining the terms "contracts" and "torts." Grant Gilmore conceptualized "contorts" as cases that lie on the borderline between contract law and tort law. A "contort" is a contract-based cause of action where there is an independent tort as well. Contorts, like crimtorts, are prosecuted by private litigants rather than by the state. The disintegration of the boundary between crime and tort parallels the merging of the laws of contract and tort. GRANT GILMORE, THE DEATH OF CONTRACT 87-90 (1974). The sharp division between torts and contracts is breaking down as so many tort causes of action arise out of contractual relationships. In medical malpractice or legal malpractice lawsuits, the tort of professional negligence for example, arises out of the professional/client contract. Premises liability lawsuits increasingly impose tort liability on landlords for failing to disclose dangerous conditions to their tenants or lessees. At common law, property owners did not even have an obligation to maintain the premises so that it was habitable. Today, tenants have successfully sued landlords for failing to provide adequate security to prevent third party crimes. *See, e.g.*, THOMAS C. GALLIGAN, JR. ET AL., TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS (4th ed. 2007).

[6] RUSSELL MOKHIBER, CORPORATE CRIME AND VIOLENCE: BIG BUSINESS POWER AND THE ABUSE OF THE PUBLIC TRUST (1988).

pragmatic goal is to right wrongs. Sociologists, in contrast, take a telescopic view of tort law, examining how patterns of cases reflect or cut against core American societal values. We labeled tort actions that vindicate societal interests as "crimtorts" because the remedy of punitive damages in American law blends the principles of criminal law and tort law.

Our concept of crimtorts is a call to fill the gap between the sociological and legal approaches to punishment by reconceptualizing the ways that tort law can serve broader societal functions. The traditional private/public doctrinal split is an example of a "well-known ailment of lawyers, a hardening of the categories."[7] Legal rules too often suffer from "a type of rigidity inherent in its normative framework. Because legal rules are couched in general, abstract, and universal terms, they sometimes operate as straitjackets in particular situations."[8] Legal thought can "become obsessed and imprisoned" by the attempts of legal scholars "to scale [a] heaven of certainty and universal justice through their doctrinal perfection."[9]

The crimtort paradigm is antidoctrinal because its focus is not on the central mission of torts, which is to settle individual disputes, but rather on the relatively rare cases in which augmented tort remedies fill gaps in the criminal law.[10] Crimtort litigants pursue civil lawsuits that expose and financially punish entities that commit torts causing "group injuries,"[11] that are not rectified

---

[7] E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1353 (1985) (citing John P. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 187 (1959)).

[8] STEVEN VAGO, LAW AND SOCIETY 20 (6th ed. 2000).

[9] G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 151 (expanded ed. 2003) (quoting Green, *supra* note 1, at 268).

[10] The crimtort is a concept that derives from the social justice theory of tort law. *See generally* KOENIG & RUSTAD, *supra* note 2 (documenting how tort law fulfills social justice purposes). John Goldberg first described the social justice theory of tort law in an article about competing perspectives in tort law. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 560-62 (2003) (furnishing an overview of the social justice theory of tort law).

[11] *See* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 95-96 (1992) (developing the idea that women as a group experience

on the criminal side of the docket. Unlike automobile accidents or other routine tort cases, crimtort litigants seek to vindicate grave health, safety, environmental, employment, or other mass tort menaces.[12] The anomalous is increasingly becoming the expected,[13] as crimtorts evolve to fill the interstices between criminal law and tort law.

Crimtort litigation is "public law in disguise,"[14] concurrently fulfilling the private function of compensating injured claimants and the broader purpose of controlling socially harmful behavior.[15] Our earlier publications[16] provide many illustrations of crimtort remedies that serve the common good in toxic torts, cybertorts, medical malpractice, products liability, discrimination law, and

---

injuries due to their gender); *see also* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001).

[12] The Supreme Court of the United States rejects the narrow notion that civil rights litigation involves only the individual litigants. "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." City of Riverside v. Rivera, 477 U.S. 561, 574 (1986).

[13] Punitive damages are a tricky subject because they have this double aspect, both civil and criminal. They belong firmly within tort law insofar as they involve, at root, the plaintiff's right to be punitive. But in the past century, particularly in recent decades, the criminal aspect of punitive damages has taken an increasingly large role within what is still nominally the civil law of torts.

Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 107 (2005).

[14] Green, *supra* note 1, at 257; *see also* Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 4, 8-29 (1995) (chronicling the gendered history of tort doctrine and how it mirrors "changing power relations within American society").

[15] Loughry v. Lincoln First Bank, 494 N.E.2d 70, 74 (N.Y. 1986). "Unlike damages that compensate an individual for injury or loss, punitive damages—damages over and above full compensation, and in that sense a windfall for the plaintiff—serve the societal purposes of punishing and deterring the wrongdoer, as well as others, from similar conduct in the future." *Id.*

[16] *See generally* KOENIG & RUSTAD, *supra* note 2; Thomas H. Koenig & Michael L. Rustad, *"Hate Torts" to Fight Hate Crimes: Punishing the Organizational Roots of Evil*, 51 AM. BEHAV. SCIENTIST 302 (2007); Thomas H. Koenig & Michael L. Rustad, *Toxic Torts, Politics, and Environmental Justice: The Case for Crimtorts*, 26 LAW & POL'Y 189 (2004).

employment law.[17] The crimtort paradigm explicitly recognizes that punitive damages litigation can advance societal interests through civil punishment and deterrence in cases that are beyond the reach of 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.[18]

Over the past two centuries, tort law has evolved from a "rather unimportant field" to a "hybrid institution between public and civil law."[19] Courts and commentators have been slow to recognize the existence of crimtort remedies because of the conceptual blinders created by the false dichotomy between criminal law and tort law.[20] The private/public law split is

---

[17] David Owen pioneered the study of punitive damages in products liability as fulfilling societal purposes. *See* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1278 (1976) (describing "strong historical and functional nexus between tort and crime" and viewing punitive damages "as a particularly flexible tool in the overall administration of justice").

[18] Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 394 (2005).

> Criminal law is regarded as different than torts in several respects. First, the state brings an action for an injury to the general welfare. In torts, a party brings a lawsuit to rectify a wrong to that party. Second, the consequences facing the defendant in a criminal matter include the possible loss of life and liberty. In torts, the defendant can normally only lose money. Third and, for our purposes, most significant, there is general agreement that the purposes of criminal law are deterrence and retribution (punishment). Punishment is not generally regarded as one of tort law's goals.

Id.

[19] Hans-Bernd Schäfer, *3000 Tort Law: General*, *in* 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 569, 570 (Boudewijn Bouckaert & Gerrit De Geest eds., 1999), *available at* http://encyclo.findlaw.com/index.html (follow "3000 Tort Law: General by Hans-Bernd Shäfer" hyperlink).

[20] Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1394 (1993).

> 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.

Id.

enshrined in the law school curricula as well as in legal practice,[21] but criminal law principles were a part of tort law long before this subject was taught in law schools.[22] Criminal law and tort law were not separated at birth, but only became differentiated as separate law school subjects in the latter half of the nineteenth century.[23] In the real world, "public and private conflicts or consequences may arise from a single act."[24]

The fundamental debate is whether tort law remedies should go beyond redressing individual harms in order to protect the public interest.[25] Punitive damages, especially as a remedy in mass torts or class actions, are a uniquely Anglo-American alternative to Europe and Japan's strong regulation and social insurance solutions.[26] In European countries, for example, tort law plays "a rather insignificant role for workplace accidents."[27]

---

[21] Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 2 (2005). "There are few distinctions in Anglo-American jurisprudence more fundamental and consequential than that between the civil law and the criminal law." *Id.*

[22] FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 528 (Cambridge, University Press 1898) (explaining tort law "came of a penal stock").

[23] Robinette, *supra* note 18, at 393.

> 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 was 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.

Id.; *see also* PAUL VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 30, 35 (1920) (noting that Blackstone's Commentaries bifurcates criminal law as concerning the community at large as opposed to private law).

[24] Martin Shapiro, *From Public Law to Public Policy, or The "Public" in "Public Law*," AM. POL. SCI. REV., Fall 1972, at 410, 410 (1972).

[25] PROSSER AND KEETON ON THE LAW OF TORTS § 3, 15 (W. Page Keeton et al. eds., 5th ed. 1984) ("Perhaps more than any other branch of the law, the law of torts is a battleground of social theory.").

[26] 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 system will not cause excessive costs for the legal system as well as insufficient deterrence.

Scholars have questioned the legitimacy 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?[28]

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.[29] For more than two hundred years, crimtorts have

---

Schäfer, *supra* note 19, at 574-75. *Cf.* Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2153 (1997) ("[T]he United States must confront its thalidomide 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.").

[27] Schäfer, *supra* note 19, at 570.

[28] Zipursky, *supra* note 13, at 106. 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 106-07; *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 have illegitimately invaded the province of civil law).

[29] United States 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, Comment, *Where Antitrust Ends and IP Begins – On the Roots of the Transatlantic Clashes*, 9 YALE J.L. & TECH. 44, 57 (2007) (comparing United States market-based approach to European "thick regulation" of competition). *See generally* LESTER THUROW, HEAD TO HEAD: THE COMING ECONOMIC BATTLE AMONG JAPAN, EUROPE, AND AMERICA (1992) (arguing that America is falling behind Japan and Europe because of its preference for market based economic policies in contrast to Japan's and Europe's strong regulatory regimes).

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.[30] Conservatives warn of the dangers of heavy-handed government regulation:

> [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 also by handicapping smaller domestic firms by increasing their regulatory costs.[31]

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.

Crimtorts feature individual litigants, serving as private attorneys general,[32] rather than unbending bureaucrats. The private attorneys general's pursuit of punitive damages is a key incentive

---

[30] *See generally* MILTON & ROSE FRIEDMAN, TYRANNY OF THE STATUS QUO 35-36 (1984) (asserting that already existing interest groups subordinate market forces by lobbying the government to protect their interests).

[31] James A. Dorn, *Toxic Toys: Congress Risks Making Things Worse*, MILWAUKEE J.-SENTINEL, Nov. 24, 2007, *available at* http://www.cato.org/pub_display.php?pub id+8808.

[32] Private attorney general is a concept coined by Circuit Judge Jerome Frank in *Associated Industries of New York State, Inc. 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, so authorized, are, so to speak, private Attorney Generals." *Id.* at 704. Private attorneys general supplement but do not supplant public law enforcement.

for exposing, publicizing, litigating, and punishing patterns and practices of corporate wrongdoing.[33] Crimtort remedies that strip illicit profits from wrongdoers provide the financial deterrent power to constrain powerful organizational actors.[34] A system of inflexible government penalties lacks the deterrent power of wealth-calibrated civil punishment.

This Article takes a structural-functional[35] approach to explaining the social impact of tort law in American society. I use the Chinese-import safety crisis and the recent litigation filed against Blackwater for unprovoked shootings in Iraq to illustrate the multiple societal functions played by the crimtort remedy. Crimtorts serve as a necessary mechanism of social control that punishes and deters corporate practices and policies that threaten the well-being of American society.

II. THE MULTIPLE FUNCTIONS OF CRIMTORTS

> I am a functionalist. That is, I believe law, and particularly tort law, does not exist in a vacuum or as a self-contained and self-concerned system. It is there to instead serve quite specific and definable human goals. As such, I believe its doctrines, and how they are applied, can be evaluated -and criticized or confirmed - on the basis of how well they do their jobs and serve their functions.[36]
>
> Guido Calabresi

---

[33] Tort remedies have long had a public policy dimension. *See* Green, *supra* note 1, at 2-3.

[34] *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).

[35] Structural-functionalist theory emphasizes the need for the major social institutions to work together to achieve social equilibrium. Chantal Thomas, *Max Weber, Talcott Parsons and the Sociology of Legal Reform*: *A Reassessment with Implications for Law and Development*, 15 MINN. J. INT'L L. 383, 403 (2006). Like the cells of a giant body, individuals unconsciously play the roles necessary to produce and maintain society's social consensus. The behavior of both individuals and institutions are analyzed in terms of their functional value in advancing social harmony and their dysfunctional role in disrupting social stability.

[36] Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, *in* EXPLORING TORT LAW 333-34 (M. Stuart Madden ed. 2005).

A. Crimtorts for the Information Age

The crimtort is an invaluable supplement to fill the enforcement gap created by the inherent limitations of criminal law.[37] 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.[38] To paraphrase Sóren Kierkegaard, crimtorts are always in the "process of becoming"[39] because United States society evolves so rapidly. Public law develops at a snail's pace and is thus unable to restore equilibrium, given America's amazing dynamism.

Crimtort law, in contrast, possesses the flexibility necessary to redress the new vulnerabilities continually being created by our swiftly globalizing information society.[40] Hackers, for example,

---

[37] " 'As Lord Mansfield said, "The common law works itself pure through rules drawn from the fountain of justice . . . ." Tort Law has been progressive and dynamic.' " Michael L. Rustad, *The Jurisprudence of Hope: Preserving Humanism in Tort Law*, 28 SUFFOLK U. L. REV. 1099, 1100 (1994) (quoting Tom F. Lambert, Jr., *Touchstones of Tort Liability*, 24 NACCA L.J. 25, 25 (1959)).

[38] Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 86, 96-99 (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.* at 86, 96.

[39] 1 SØREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT TO *PHILOSOPHICAL FRAGMENTS* 307 (Howard V. Hong & Edna H. Hong eds. & trans., 1992), *available at* http://www.buf.no/en/read/txt/?page=oo-sk-en.

[40] "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 defendant and avoid an overburdensome one where the defendant is not as wealthy . . . . In short, "[a]lthough a quantitative formula would be comforting, it would be undesirable."

Tuttle v. Raymond, 494 A.2d 1353, 1359 (Me. 1980) (quoting Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 657, 666 (1980)). *See, e.g.*, Michael L. Rustad & Thomas H.

have recently 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."[41] Online enablement of identity theft is a boom industry that takes advantage of the low probability of prosecution by public authorities:

> [G]ifted 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.[42]

Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335 (2005) (discussing the need to alter tort liability to help consumers redress online injuries); Nicolas P. Terry, *When the "Machine That Goes 'Ping' " Causes Harm: Default Torts Rules and Technologically-Mediated Health Care Injuries*, 46 ST. LOUIS U. L.J. 37 (2002) (arguing that constantly-evolving technology in health care will test current tort rules); Debra Wong Yang & Brian M. Hoffstadt, *Countering the Cyber-crime Threat*, 43 AM. CRIM. L. REV. 201, 204-05 (2006).

[41] Scott Berinato, *The Cybercrime Service Economy*, HARV. BUS. REV., Feb. 2008, at 26.

[42] *Id.* ("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 don't 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.").

Few prosecutors possess the training and resources to even identify, much less punish, these sophisticated cybercriminals. Cybercrimtorts, by incentivizing private attorneys general who have specialized internet security training, potentially have the deterrent power to constrain theft that crosses national borders at the click of a mouse.[43] Functionalists evaluate crimtorts according to their success in evolving to meet this type of novel social challenge that endangers the network of trust that is the glue of societal cooperation, stability, and prosperity.[44]

B. A Functional Approach to Crimtorts

Structural-functionalists envision society as a system of mutually supporting institutions that must work in unison to preserve the stability of the social order.[45] Law's balancing role is to preserve equilibrium among such societal components as family, polity, religion, and the economy.[46] Legal systems serve "to mitigate potential elements of conflict and to oil the machinery of social intercourse."[47] Social stability requires a predictable legal

---

[43] Berinato, *supra* note 41.

> 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.

[44] FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 151-56 (1995) (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).

[45] Hugh Baxter, *Habermas's Discourse Theory of Law and Democracy*, 50 BUFF. L. REV. 205, 263-64 (2002) ("[M]odern societies are differentiated into a plurality of functional subsystems, such as the economy, politics, law, and science, each of which is a self-producing and self-reproducing network of communication."). Benjamin Zipursky describes legal academics as using the methodology of functionalism in an instrumental, less nuanced way: "The particular form of functionalism and instrumentalism that has held sway in tort has, for these reasons, pushed hard against categorizing in tort theory." Zipursky, *supra* note 13, at 132.

[46] Talcott Parsons, *The Law and Social Control*, *in* LAW AND SOCIOLOGY: EXPLORATORY ESSAYS 56, 70-72 (William M. Evan ed. 1962).

[47] *Id.* at 58.

regime in which persons and entities understand and obey essential social norms.[48]

As American society becomes increasingly differentiated and multifaceted,[49] its legal system must adapt to mediate relationships between strangers with dissimilar values, backgrounds, and societal interests.[50] As the nineteenth-century French sociologist, Émile Durkheim, argued, "Life in general within a society cannot enlarge in scope without legal activity similarly increasing in a corresponding fashion. Thus we may be sure to find in the law all the essential varieties of social solidarity."[51] America's rapid rise over the past two centuries has required a coevolving legal order that facilitates far-reaching technological and economic change while preserving the social fabric.[52]

---

[48] Critics from the conflict perspective accuse structural-functionalism of being innately conservative because it legitimizes the existing power arrangements. Robert K. Merton responded to this critique:

> To adopt a functional outlook is to provide not an apologia for the political machine but a more solid basis for modifying or eliminating the machine, *providing* specific structural arrangements are introduced either for eliminating these effective demands of the business community or, if that is the objective, of satisfying these demands through alternative means.

ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 76 (1957).

[49] As the society has become increasingly complex, and the harms a single producer or segment of the economy could create ever more dramatic, the challenges for a civil justice system justified by an ideology of individualistic dispute-resolution have been profound. When the issue is the liability of someone who raises a stick to separate two fighting dogs and who accidentally hits a bystander, the impact of the decision whether to hold the actor liable to the bystander does not radically impact the rest of the economy—at least not immediately. If courts find manufacturers of a class of major drugs liable to thousands of injured patients, however, the effects are profound—and dramatic.

John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1038-39 (2005).

[50] VAGO, *supra* note 8, at 18.

> [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.

Id.

[51] Émile Durkheim, *The Division of Labour in Society*, *in* DURKHEIM AND THE LAW 34 (Steven Lukes & Andrew Scull eds., 1983).

[52] A legal system attains the end of the legal order, . . . by recognizing

Throughout Anglo-American history, crimtort remedies have evolved to defend each era's core social norms and values. Most eighteenth-century American punitive damages verdicts punished and deterred reprehensible conduct between members of the local community.[53] The *TVT Records v. Island Def Jam Music Group* court noted that early punitive damages 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.[54]

> 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 65 (Transaction Publishers 1997) (1942).

[53] 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). In an early nineteenth century intentional torts case arising out of a neighbor's unlawful attachment of property, the Supreme Court of Pennsylvania explicitly stated that punitive damages served to supplement the work of criminal law: "There are offences against morals to which the law has annexed no penalty as public wrongs, and which would pass without reprehension did not the providence of the courts permit the private remedy to become an instrument of public correction." M'Bride v. M'Laughlin, 5 Watts 375, 376 (Pa. 1836), *available at* 1836 WL 3051 (noting that the plaintiff "may recover vindicatory damages, although the meditated oppression was not intended for the plaintiff but for another").

[54] TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 419 (S.D.N.Y. 2003) (citing Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (2d Cir. 1967); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (1993)).

In the nineteenth century, punitive damages extended to punish railroads that recklessly endangered passengers and other corporate wrongs.[55] In the post-World War II era, punitive damages further stretched to punish and deter grossly negligent medicinal practice, malicious activities by inadequately supervised employees, and dangerously defective products.[56] Contemporary punitive damages cases generally redress organizational harms and penalize detested individuals such as O.J. Simpson, when the criminal law fails to properly punish and deter. 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, 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*.[57]

Legal lag becomes a problem because threats emerge more rapidly than criminal law statutes can be drafted, let alone enforced.[58] For the structural functionalists, law expresses, teaches, and enforces society's basic norms and sentiments.[59] In a well-functioning

---

[55] KOENIG & RUSTAD, *supra* note 2, at 40 ("Railroads were frequently assessed punitive damages in their capacity as common carriers of passengers.").

[56] *Id.* at 46-59.

[57] PITIRIM A. SOROKIN, SOCIETY, CULTURE, AND PERSONALITY: THEIR STRUCTURE AND DYNAMICS: A SYSTEM OF GENERAL SOCIOLOGY 82 (1947).

[58] Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 78, 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). *See also* David Sanders & Jesse Dukeminier, Jr., *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 UCLA L. REV. 357, 371-80 (1968).

[59] The central purpose of law in this framework is to integrate various roles

society, "law and morality, at their best, move like a person's two legs: they are never far apart."[60] A fluid remedy is needed to fill the "blind spot of functional differentiation."[61]

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 social stability.[62] Legislators cannot possibly be aware of all of the consequences that may arise from a new statute,[63] while common-law remedies are constantly being tested and refined through judicial wisdom and practical experience.[64] Conservative icon Friedrich Hayek extolled the common law for its ability to adjust to changing circumstances, arguing that, "[t]he common law is superior because it builds

---

> and institutions for the smooth functioning of the whole society. Parsons, for example, has stated that the "primary function of a legal system is integrative." Laws are not necessarily written. For example, Malinowski, an anthropologist, has shown how rules stand out because of their felt obligatory nature (i.e., claims made on another and readily respected by the other as obligatory), are rooted in "mutual dependence" and "reciprocal services," in a society where one finds oneself in many interconnected relationships.

DRAGAN MILOVANOVIC, A PRIMER IN THE SOCIOLOGY OF LAW 114 (1988).

[60] AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY 146 (1996).

[61] Gunther Teubner, *In the Blind Spot: The Hybridization of Contracting*, 8 THEORETICAL INQUIRIES L. 51, 63 (2007).

[62] > Owing to its 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).

[63] 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* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 902 (1938).

[64] *See generally* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW (1921) (looking at the historical and theoretical explanation of what common law is and how it operates).

piecemeal in response to immediate situations, with regular feedback – the supply of new cases reactions to previous decisions – and having the capacity to make adjustments."[65]

The inventor of "sociological jurisprudence," Roscoe Pound, also championed the common law's ability to maintain social stability while adapting to changing social circumstances.[66] As Pound observed, flexible doctrines are necessary because the "[l]aw must be stable and yet it cannot stand still."[67] In the next part, a functional analysis of crimtorts will reveal the multiple ways in which this remedy serves as a societal guardian.

C. Crimtorts for the Twenty-First Century

1. Evolving to Counter Emergent Social Problems

Sociologists view law as performing functions rather than having purposes. The functions of a remedy are often different

---

[65] TAMANAHA, *supra* note 62, at 70 (summarizing Hayek's view of the superiority of the common law over statutes). Hayek argues:

> The 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 process of selection by upholding those rules which, 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 was be possessed by anyone.

FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY: VOLUME 1: RULES AND ORDER 119 (1978).

[66] ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1967)

> Perhaps no institution of the modern world shows such vitality and tenacity as our Anglo-American legal tradition which we call the common law. Although it is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules, it succeeds everywhere in molding rules, whatever their origin, into accord with its principles and in maintaining those principles in the face of formidable attempts to overthrow or to supersede them. In the United States it survives the huge mass of legislation that is placed annually upon our statute books and gives to it form and consistency.

Id.

[67] *Id.*

from the purpose for which the rule was originally constructed.[68] For example, at early common law, judges applied the tort of trespass to chattels to farm animals.[69] Today, "[l]itigants eager to block certain people from accessing their servers have increasingly turned to an antique legal doctrine called 'trespass to chattels.' "[70] Courts have stretched this ancient tort to punish and deter commercial spam e-mailers who defraud service providers as well as the American public.[71] Judges who ruled on "trespass to chattels" cases two centuries ago that revolved around neighbors intermeddling with cows and hay bales could not have imagined that this medieval tort would be reborn as a remedy to constrain spammers, data extractors, and the propagators of computer viruses.[72]

---

[68] ROGER COTTERRELL, THE SOCIOLOGY OF LAW 72 (2d ed. 1992).

> The purpose of the Statute of Frauds is historically located in the motivations of the English legislators who enacted it in 1677. The *function* of the Statute, in sociological terms, is, however, a very different matter, not dependent on the will of its creators but on its present contribution to the maintenance of existing social and economic institutions. . . . [F]unctions themselves can be seen to change over time.

Id.

[69] "In early cases, courts limited trespass to chattels claims to common goods that could be carried away by another and somewhat later began to include property that could be damaged even if not taken (such as farm animals that were killed or injured)." Michael R. Siebecker, *Cookies and the Common Law: Are Internet Advertisers Trespassing on Our Computers*, 76 S. CAL. L. REV. 893, 913 (2003) (tracing the doctrine of trespass to chattels from cattle to computers).

[70]

> "Trespass to chattels" basically prohibits others from substantially interfering with your personal property ("chattel"). Generally speaking, there must be an intentional physical contact with the chattel, and the contact must result in some substantial interference or damage.
>
> . . .
>
> Several cases have imported this antiquated common law doctrine into the digital world, reasoning that "electrical signals" impinging on networked servers can be enough "contact" to support a trespass claim."

Electronic Frontier Foundation, *EFF Analysis of Trespass to Chattels Legal Theory: As Applied to the Internet in* Intel v. Hamidi, http://w2.eff.org/spam/20011218_eff_trespasstc_analysis.html (last visited Apr. 18, 2008).

[71] *Id.*

[72] Internet Law Treatise, *Trespass to Chattel*, http://ilt.eff.org/index.php/Trespass_to_Chattels (last visited Apr. 18, 2008) ("According to the Restatement (Second) of Torts § 217, a trespass to chattel is defined as 'intentionally dispossessing another of the chattel or using or intermeddling with

2. Crimtorts to Protect Society from Defective Imports

Tort law is just beginning to address the swiftly escalating problem of hazardous consumer products manufactured by Chinese companies, which do not follow United States' safety standards. A Massachusetts jury recently awarded $3.35 million[73] to a four-year-old American boy whose hand was mangled in a Chinese department store escalator malfunction.[74] The plaintiff's attorney was able to hold Otis liable for the boy's injuries because the United States company was a joint venturer with the Chinese firm.[75] Otis' escalators in other countries had a "Guardian Skirt Panel" that prevented the "possibility of entrapment."[76] The plaintiff's attorney declared, "Business and travel is global, and the law must recognize these changes—and it does."[77] 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.

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 boarders. Already, hardly a week goes by[78] without

---

a chattel in the possession of another.' The common law form of trespass requires actual harm with intent to harm and physical contact without the plaintiff's consent. Trespass to chattels 'lies where an intentional interference with the possession of personal property has proximately cause[d] injury. *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559 (1996).' ").

[73] The compensatory award included special damages of $200,000. Noah Schaffer, *Escalator Accident in China Leads to $ 3.35M Verdict Here: Worcester Jury Ties Boy's Hand Injury to Co. Based in U.S.*, MASS. LAW. WKLY, Jan. 7, 2008, at 3, *available at* http://www.masslaw.com/010408.cfm. The remainder of the award was noneconomic 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.

[74] *Id.* at 1.

[75] *Id.*

[76] *Id.* at 3.

[77] *Id.* at 1.

[78] *See* Dangerous Made-In-China Products: 2007 Timelime: Who Sucks?, http://www.who-sucks.com/business/made-in-china-2007-danger-timeline (last

another report of a consumer recall of a product originating in China.[79] Early in 2007, an estimated 39,000 United States household pets died because of dangerous chemicals in pet food manufactured in China.[80] A New York company recently recalled an imported children's snack food from China that caused "60 salmonella cases, mostly in toddlers in 19 states."[81] American retailers recalled millions of Chinese toys during the 2007 Christmas season because of dangerous levels of lead used in cheap paints.[82] 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.[83]

American consumers will find it difficult to boycott Chinese goods because so many United States consumer goods are manufactured in that country.[84] The outsourcing of toy production, for example, has become so all-embracing that "almost everything on the wish lists of the nation's children - dolls, action figures,

---

visited Apr. 18, 2008) (providing a time-line of Chinese important product defects during the first half of 2007).

[79] 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.

Posting of Don Mays to ConsumerReports.org, http://blogs.consumerreports.org/safety/2007/06/can-you-trust-c.html (June 28, 2007, 12:05 EST).

[80] WorldNetDaily, *China's Toy Sweatshop Pays 36 cents an Hour: Christmas Product Safety Recalls Continue Along with Import Mania*, Dec. 20, 2007, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=59309.

[81] Paul A. Dame, *Recent Trends in Food and Product Defect Litigation*, Sept. 2007, http://www.wileyrein.com/publication.cfm?publication_id=13303.

[82] *Id.*

[83] Curtiss Gibson, *China: A Scapegoat for Unsafe Toys*, THE ORACLE (FLA.), Nov. 20, 2007, *available at* http://media.www.usforacle.com/media/storage/paper880/news/2007/11/20/Opinion/China.A.Scapegoat.For.Unsafe.Toys-3111792.shtml.

[84] *Id.*

video games - are mostly made in China."[85] Corporate supply chain specialists are troubled that "[e]merging markets especially, have increased risk, due to fast paced growth and a young regulatory climate that has not put adequate controls in place [for] product safety, intellectual property rights, piracy, counterfeiting, and more."[86]

Neither Chinese exporters nor their American trading partners set out to injure individual consumers. The gross nonfeasance of United States 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."[87]

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.[88]

---

[85] Sara Bongiorni, *Why My Family Stopped Boycotting Chinese Goods*, CHRISTIAN SCI. MONITOR, Dec. 21, 2007, *available at* http://www.csmonitor.com/2007/1221/p09s01-coop.html.

[86] The Secure Chain: China to North America, Business & Technology Summit, Now, More Than Ever –It's Vital to Develop Strategies to Build a Secure Supply Chain, www.thesecurechain.com (last visited Apr. 18, 2008) ("The U.S. imports some $2 trillion worth of products from more than 150 countries. This is expected to triple by 2015. US Health and Human Services (HHS) Secretary Mike Leavitt reported that for American consumers to continue to enjoy the highest levels of food and product safety, our import safety strategy needs to shift from the current point-of-entry intervention model to a prevention model with verification model that addresses product safety at every step of the producer to consumer import cycle.").

[87] Michael D. Sorkin, *Which Toys are Safe?*, ST. LOUIS POST-DISPATCH, Dec. 9, 2007, at A1.

[88] [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

American corporations 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: "[T]here 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."[89] 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 ("CPSC") for protection from dangerously defective products imported from China. Imports of consumer products have quadrupled since 1980, yet Congress cut the CPSC budget by a third.[90] 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."[91] 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."[92] The law of products liability in China is as underdeveloped as its manufacturing safety standards.[93] China's civil code gives

---

> continue to import Chinese goods, it is inevitable that more class actions will be filed.

Many Lawsuits Filed Against Chinese Defective Products, http://www.lawyersandsettlements.com/case/chinese-defective-products.html (last visited Apr. 18, 2008).

[89] *See* Dame, *supra* note 81.

[90] *New Report: 'Santa's Sweatshop: Made in D.C. with Bad Trade Policy,' Documents Root Causes of Imported Toy Crisis*, Dec. 19, 2007, http://www.citizen.org/pressroom/release.cfm?ID=2576.

[91] *Cummings Holds Press Conference on Toxic Toys, Congressman Calls on Mattel to Stop Using Lead, Discusses New Legislation to Protect Children*, Dec. 20, 2007, *available at* http:// www.house.gov/list/press/md07_cummings/20071320lead.shtml.

[92] *Lou Dobbs' This Week: Toxic Toys Still on Shelves* (CNN television broadcast Dec. 23, 2007) (quoting consumer advocate Laurie Wallach).

[93] *See* George W. Conk, Translation, *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*

consumers rights that are expressed as aspirational principles, but no concrete remedies.[94]

Santa's sweatshop has its roots in United States corporate decisions to place profits over the health of consumers.[95] The average Chinese worker who made the dangerously defective toys recalled shortly before Christmas 2007 was "paid a meager 36 cents an hour."[96] Toy companies shifted "production to countries without adequate safety systems – and [supported] trade policies [that] companies pushed through Congress that limit import safety standards and inspection."[97]

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. Crimtorts supplement anemic public enforcement by imposing punitive damages against reckless organizational activities that threaten the larger public.[98]

---

the People's Republic of China, 30 FORDHAM INT'L L.J. 935, 952-53 (2007) (noting that Chinese officials have an interest in product liability but have not yet addressed other legal infrastructure).

[94] "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." A. Brooke Overby, *Consumer Protection in China After Accession to the WTO*, 33 SYRACUSE J. INT'L L. & COM. 347, 355 (2006) (contending that Chinese law codifies protections without providing consumer remedies).

[95] The potential liability for United States companies is catastrophic, as an attorney for a corporate defense firm acknowledged recently:

> The sheer volume of recent adulteration and product recall cases involving food, and the likelihood of litigation brought by consumers injured by tainted food products, has raised the profile of this issue for food growers, manufacturers, and distributors and their insurers. Understanding the potential scope and impact of these situations is imperative for insurers who may be faced with significant exposures involving food and product safety issues.

Dame, *supra* note 81.

[96] *See* WorldNetDaily, *supra* note 80.

[97] *See New Report*, *supra* note 90.

[98] "[T]he criminal system cannot always adequately fulfill its role as an enforcer of society's rules . . . ." Tuttle v. Raymond, 494 A.2d 1353, 1358 (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

Crimtort remedies assessed against United States companies that enable Chinese manufacturers to endanger the consuming public are necessary to administer a legal spanking that demonstrates that "tort does not pay."[99]

To date, no United States company has been the subject of a criminal prosecution from the bad tires, toys, food, and pet food cases because of the limited resources and expertise of public prosecutors and the enormous influence of large companies. Crimtort lawsuits initiated by private citizens will be the only meaningful way to make United States companies answerable for their negligent 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."[100] The current China recall disaster will potentially bankrupt some American importers, who may find themselves saddled with products liability.[101]

---

safety. *See* Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, CORP. CRIME REP., *available at* http://www.corporatecrimereporter.com/top100.html (last visited Apr. 21, 2008) (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).").

[99] Rookes v. Barnard, [1964] A.C. 1129, 1227 (H.L.).

[100] PROSSER AND KEETON, *supra* note 25, at 9 ("[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.").

[101] "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." MICHAEL J. KEATING & THOMAS H. CASE, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE PRODUCTS LIABILITY COMPLIANCE PROGRAM § 3:8 (2007), *available at* WL CORPC-PL § 3:8.

3. Crimtorts to Redress Societal Harm from Reckless Private Armies

Blackwater Worldwide is a multi-billion dollar complex web of companies that provides armed mercenary personnel[102] and security services to the United States Department of State and other government agencies.[103] The United States government has paid Blackwater and its associated companies nearly a billion dollars since the invasion of Iraq.[104] The crimtort paradigm of

---

[102] *See* Complaint at 2-3, Estate of Albazzaz v. Blackwater Worldwide, No. 1:07-cv-02273-RBW (D.D.C. Dec. 19, 2007). Blackwater USA was founded in 1997 by Erik Prince, a former Navy SEAL. In October 2007, Blackwater USA rebranded itself as Blackwater Worldwide. To avoid confusion, the firm will be referred to as "Blackwater" throughout the text of this article. *See* Blackwater USA, http://blackwaterusa.com/company_profile/comp_history.html (last visited Apr. 18, 2008). Moyock, North Carolina 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 HOUSE OF REPRESENTATIVES COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 110TH CONG., MEMORANDUM: ADDITIONAL INFORMATION ABOUT BLACKWATER USA 3 (2007), *available at* http://oversight.house.gov/documents/20071001121609.pdf. The company offers a wide range of services including personal security, military training, and "its own line of armored vehicles," to United States government and non-United States government affiliates, though the former has proven most lucrative. *Id.* Blackwater's current contract with the Department of State, known as Worldwide Personal Protective Services II ("WPPS II"), has a maximum value of $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.

[103] The Department of State requires specific training experience, depending on position, from each of its independent contractors. *Private Security Contracting in Iraq and Afghanistan: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 4-5 (2007) (statement of Richard J. Griffin, Ambassador, Assistant Secretary of State, Bureau of Diplomatic Security). WPPS II was initiated in 2005 to provide Protective Security Specialist, or bodyguard, details throughout Iraq. JENNIFER K. ELSEA & NINA M. SERAFINO, CONGRESSIONAL RESEARCH SERVICE, 110TH CONG., PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 6 (2007), *available at* http://www.fas.org/sgp/crs/natsec/RL32419.pdf.

[104] Posting of Michael A. DeMayo to North Carolina Injury Lawyer Blog, http://www.northcarolinainjurylawyerblog.com (Dec. 10, 2007, 18:24 EST).

public enforcement through private litigation[105] is being tested in litigation recently filed against Blackwater and its affiliated companies for using excessive force against Iraqi civilians. Lawyers for the Center for Constitutional Rights filed a lawsuit in the United States District Court of the District of Columbia under the Alien Tort Claims Act[106] on behalf of Ali Albazzaz, a young father shot by Blackwater employees while he was standing outside his carpet store.[107] Albazzaz's estate is seeking "punitive damages in an amount sufficient to strip Defendants of all of the revenue and profits earned from their pattern of constant misconduct and callous disregard for human life."[108]

---

[105] Posting of Michael A. DeMayo, *supra* note 104.

[106] Complaint in Albazzaz v. Blackwater Worldwide, *supra* note 102, at 5, 12; *see generally* Carmel Sileo, *Suit Against Blackwater Invokes Little-used Human Rights Law*, TRIAL, Dec. 2007, at 18, 18-19 (describing how the Alien Tort Claims Act ("ATCA") enabled Iraqi and other non-U.S. citizens to file lawsuits in United States federal district courts for actions violating United States treaties or international law).

[107] Complaint in Albazzaz v. Blackwater Worldwide, *supra* note 102, at 5. On September 9, 2007, at Al Watahba Square in Baghdad, heavily armed Blackwater contractors opened fire on a crowd of Iraqi civilians, resulting in five deaths and multiple injuries. *Id.* The plaintiff charged that the attacks were without justification. *Id.* The family of one victim, Ali Hussamaldeen Albazzaz, approached Susan Burke, a human rights attorney known for her work with the Center for Constitutional Rights. *Id.* Burke, of Burke O'Neil, LLC, along with Shereef Hadi Akeel of Akeel & Valentine, P.C. and the Center for Constitutional Rights filed suit in the U.S. District Court for the District of Columbia on December 19, 2007. *Id.* The complaint against Blackwater was for violation of the Alien Tort Statute ("ATS"), assault, battery, wrongful death, the intentional infliction of emotional distress, the negligent infliction of emotional distress, and negligent hiring, training, and supervision. *Id.* at 12-15. The complaint sought compensatory damages for the family of the victim, as well as punitive damages against Blackwater and its founder, Erik Prince. *Id.* at 15. Recently, another case was filed against Blackwater arising out of a shooting on September 16, 2007, at Nisoor Square, Baghdad. In the September 16 shooting, a group of Blackwater contractors opened fire again at a group of civilians, resulting in seventeen deaths and multiple injuries. Complaint at 2, Estate of Atban v. Blackwater USA, No. 1:07-cv-01831 (D.D.C. Oct. 10, 2007). In the second case, families of three of the victims filed suit in the U.S. District Court for the District of Columbia on October 11, 2007, against Blackwater and Erik Prince alleging similar violations under ATS. *Id.*

[108] Complaint in Albazzaz v. Blackwater Worldwide, *supra* note 102, at 15. A congressional report found Blackwater's private soldiers fired their weapons a

Punitive damages will be appropriate if Albazzaz's attorneys produce smoking gun evidence of the company's enablement of a subculture of excessive, preventable violence against civilians.[109] The plaintiff's complaint alleges that the Blackwater shooting of September 9, 2007, was just one incident in a "lengthy pattern of egregious misconduct" by these private companies in Iraq.[110] The plaintiff accuses Blackwater of placing "heavily-armed 'shooters' into the streets of Baghdad with [full] knowledge that [their judgment would be impaired] by steroids and other judgment-altering substances."[111] Blackwater turned over "437 internal 'incident reports' " to the U.S. House of Representative's

---

total of 195 times from the beginning of 2005 to September 2007. In eighty percent of the shootings, Blackwater employees shot first. CNN.com, *Blackwater Most Often Shoots First, Congressional Report Says*, http://www.cnn.com/2007/WORLD/meast/10/01/blackwater.report/index.html (last visited Apr. 18, 2008). This "smoking gun" memorandum and other documents uncovered during the course of discovery would be relevant to the question of whether the contractors were reckless or intentionally disregarded the rights of Iraqi civilians. Blackwater's response to this Report was that "its employees responded properly to an insurgent attack on a convoy, and the State Department 'spot report' written by the Blackwater contractor underscores that and doesn't mention civilian casualties." *Id.*

[109] Trial lawyers frequently use the term "smoking gun" to refer to documentary evidence showing that a corporation knew or had reason to know of a developing profile of danger. The "smoking gun" in punitive damages litigation is reminiscent of Watergate in describing corporate misconduct. Woodward and Bernstein's description in *The Final Days* would not seem out of place in the colorful descriptions of the "smoking guns" uncovered in products cases where punitive damages were awarded: "He had heard the President approve the plan, he had heard him suggest the exact wording. Buzhardt had found the 'smoking pistol.' He had heard the President load it, aim and fire." BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS 271 (1976). *See generally* KOENIG & RUSTAD, *supra* note 2 (examining the social, legal, and policy dimensions of the tort reform debate).

[110] Complaint in Albazzaz v. Blackwater Worldwide, *supra* note 102, at 2. Since the commencement of WPPS II, Blackwater incident reports reveal an estimated "195 escalation of force incidents" in Iraq, though its contract permits only defensive use of force. *Hearing on Blackwater USA Before Comm. on Oversight and Government Reform*, 110th Cong. 25 (2007). Among these incidents are two separate September shooting incidents allegedly initiated by Blackwater, which have resulted in federal lawsuits against the contractor. *See* Complaint in Albazzaz v. Blackwater, *supra* note 102, at 5, 7.

[111] *Id.* at 6.

Committee on Oversight and Government Reform, which the plaintiffs believe demonstrate "that Blackwater forces in Iraq consistently use excessive and unnecessary force that results in unnecessary deaths, injuries, and property damage."[112]

This Blackwater litigation is emblematic of many features of crimtort lawsuits. If the jury determines that Blackwater killed innocent Iraqi civilians and retained the services of steroid-impaired armed guards, the remedy of punitive damages "expresses the community's abhorrence at the defendant's act . . . [turning] indignation into a kind of civil fine, civil punishment."[113] Recently, Iraqi civilians filed a federal court lawsuit against the employees of another United States military contractor, Titan Corporation, "in the Abu Ghraib prisoner abuse scandal."[114] As with many crimtort cases, the Blackwater litigation involves difficult discovery and many unresolved legal issues that will ratchet up the cost of litigation.[115]

---

[112] Complaint in Albazzaz v. Blackwater, *supra* note 102, at 6.

[113] Judge Posner described the functions of punitive damages in *Kemezy v. Petters*, 79 F.3d 33 (7th Cir. 1996):

> An award of punitive damages expresses the community's abhorrence at the defendant's act. We understand that otherwise upright, decent, law-abiding people are sometimes careless and that their carelessness can result in unintentional injury for which compensation should be required. We react far more strongly to the deliberate or reckless wrongdoer, and an award of punitive damages commutes our indignation into a kind of civil fine, civil punishment.

Id. at 35.

[114] Katherine Jackson, Comment, *Not Quite a Civilian, Not Quite a Soldier: How Five Words Could Subject Civilian Contractors In Iraq And Afghanistan To Military Jurisdiction*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 255, 260 (2007).

[115] Title 28, section 1350 states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). However, the undecided question is whether Blackwater Worldwide or any of its subsidiaries are subject to the Alien Tort Act. In 2005, United States District Judge James Robertson decided in *Ibrahim* that the law of nations does not apply to private contractors working for the military. Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 12-14 (D.D.C. 2005). In that case, two government contractors, Titan Corporation and CACI International, Inc. ("CACI"), who had provided translation and interrogation services, respectively, to the United States government in Iraq, were sued for their alleged involvement in the Abu Ghraib prison torture scandal of 2004. *Id*. at 12. The judge dismissed the ATS claims,

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 United States foreign

---

stating that the Supreme Court of the United States has not answered the question of whether international laws apply to private actors, but that the answer of the D.C. Circuit is "no." *Ibrahim*, 391 F. Supp. 2d at 14. Although the Supreme Court in *Sosa* did not expressly answer the question, they did address it, and therefore, may have left the question open for the lower courts. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004). "The majority implied that private government contractors may, for some international law violations, be held liable to plaintiffs under the ATS despite their status as private corporations." Valerie C. Charles, Note, *Hired Guns and Higher Law: A Tortured Expansion of the Military Contractor Defense*, 14 CARDOZO J. INT'L & COMP. L. 593, 613 (2006). The private attorneys general litigating the Blackwater claims originating in Iraq will also face difficult problems serving process, obtaining jurisdiction, and enforcing judgment, assuming that the threshold jurisdictional issues are resolved in their favor. The Federal Tort Claims Act, for example, provides for a waiver of the federal government's sovereign immunity in cases "where the United States, if a private person, would be liable to the [plaintiff] in accordance with the law of the place where the act occurred." 28 U.S.C. § 1346(b)(1) (2006). There are several exceptions to this waiver including a discretionary function provision and a combatant activities exception. § 2680(a), (j). The former formed the basis for explanation of the government contractor defense in *Boyle*. Boyle v. United Tech. Corp., 487 U.S. 500, 511-13 (1988). The issue will be whether Blackwater's employees will be able to claim that they are within the control of the military and, thus, immune from tort claims. In *Ibrahim*, the court held that military supervision was sufficient to establish preemption of claims against Titan Corporation, but has allowed the case against CACI to proceed on the issue of whether the federal interest underlying the combatant activities exception requires the preemption of state tort claims against CACI. Ibrahim v. Titan Corp., 2007 WL 3274784, at *9 (D.D.C. Nov. 6, 2007). It is unlikely that the family members of the decedents will recover from the United States government. Pursuant to Order 17 of the Coalition Provisional Authority, government contractors are "immune from Iraqi legal process with respect to acts" covered by their contracts. Status of the Coalition Provisional Authority ("CPA"), MNF – Iraq, Certain Missions and Personnel in Iraq, CPA Order 17 § 4(3) (June 2004), *available at* http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__wih_Annex_A.pdf.
Under this order, the Iraqi families of victims of the September 2007 incidents have no chance for redress in their own nation. While it is possible that the plaintiffs may recover under the Alien Tort Act, creative lawyering will be required to recover punitive damages against these private contractors.

policy objectives.[116] The United States military, the "State Department, and the nation of Iraq"[117] 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.

The criminal law is ill-suited to restrain uncontrolled military contractors working in Iraq. Ali Albazzaz was just one of a number of civilians killed by Blackwater employees, yet there have been no criminal prosecutions against the company or employees under Iraqi criminal law. The victims of military contractor lawlessness in Iraq are not in any position to call the police because Iraq's penal code does not address any potential crimes perpetrated by United States military contractors.[118] Blackwater's attorneys claim that none of their entities or employees are subject to either Iraqi law or its courts.[119] American criminal prosecutors are powerless to take legal action against private employees of the United States military.

---

[116] Jackson, *supra* note 114, at 260 (describing the Abu Ghraib 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.").

[117] Jen Nessel, *Blackwater Accused of Another Civilian Killing in New Lawsuit, According to Legal Team for Family of Slain Baghdad Man*, (2007), *available at* http://www.ccrjustice.org/newsroom/press-releases/blackwater-accused-another-civilian-killing-new-lawsuit,-according-legal-tea (quoting Susan L. Burke).

[118]
> To help fill the vacuum after the Saddam Regime toppled, the CPA orchestrated the transition of power for the Iraqi people. Even though the CPA has now been disbanded, some of its work may still be relevant for certain legal issues . . . . Since the CPA was under considerable time constraints, it used the existing Iraqi penal code to begin building a modern legal system. As illuminated in CPA Order No. 7 that states, [w]ithout prejudice to the continuing review of Iraqi laws, the Third Edition of the 1969 Iraqi Penal Code with amendments shall apply. Although the Penal Code was retained, the CPA suspended certain methods of justice used in the former regime, including torture and inhuman treatment.

J.T. Mlinarcik, Note, *Private Military Contractors & Justice: A Look at the Industry, Blackwater, & the Fallujah Incident*, 4 REGENT J. INT'L L. 129, 142-43 (2006) (internal citations omitted).

[119] Sileo, *supra* note 106, at 19.

The House of Representatives voted in favor of H.R. 2740, the MEJA Expansion and Enforcement Act of 2007,[120] which would extend the extraterritorial jurisdiction of United States criminal law to apply to the illegal activities of military contractors, but this bill is unlikely to be enacted in the near future.[121] The George W. Bush Administration has threatened to veto measures that would extend United States criminal law to reach military contractors,[122] expressing concern about the "sweeping expansion of extraterritorial" criminal law jurisdiction.[123] The White House argues that enforcing the criminal law against contractors would "raise suspicion of misconduct by personnel" and burden the Department of Defense in supporting criminal investigations of contractors.[124]

The Alien Tort Claims Act 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."[125]

The Supreme Court of the United States' downsizing of punitive damages over the past two decades marginalizes the remedy's capacity to address social problems arising out of this

---

[120] H.R. 2740, 110th Cong. (2007).

[121] ELSEA & SERAFINO, *supra* note 103, at 35.

[122] The White House and Justice Department are trying to limit the reach of U.S. criminal law on Blackwater and other private war contractors. With a potential veto threat looming, several senators now want to alter the bill in a way that satisfies both the Bush administration and members of the House of Representatives, who overwhelmingly passed similar legislation last month.

Michael Roston, *White House Trying to Limit Reach of Criminal Law on Blackwater, Contractors*, THE HUFFINGTON POST, Nov. 8, 2007, http://www.huffingtonpost.com/2007/11/08/white-house-trying-to-lim_n_71624.html.

[123] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 2740-MEJA EXPANSION AND ENFORCEMENT ACT OF 2007 1 (2007).

[124] *Id.*

[125] T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, at A1.

type of organizational misconduct.[126] The Court has held that the Due Process Clause of the United States Constitution forbids juries from awarding punitive damages designed to punish a corporate defendant for harming nonparties in other cases not directly involved in the lawsuit.[127] This ruling weakens the ability of punitive damages to evolve to meet challenges, such as out-of-control mercenaries. The plaintiffs in the Blackwater case would risk reversal by presenting evidence of other shootings because the jury is not permitted to consider Blackwater's other shooting incidents in setting the size of punitive damages in favor of the named plaintiff.

III. THE MANIFEST AND LATENT FUNCTIONS OF CRIMTORTS

Crimtorts arise out of "the evolving and open-ended nature of tort causes of action, a quality that permits tort plaintiffs to bring to light, and seek remedies for, new forms of domination and exploitation as they emerge."[128] The crimtort paradigm embraces the multiplicity of functions that punitive damages litigation plays in American society.[129] Crimtorts is not a doctrinal approach, but rather a way of focusing on tort law's underlying public law purpose.

---

[126] The punishment and deterrence function of punitive damages is a well-established example of a tort remedy serving a public purpose. *See* PROSSER AND KEETON, *supra* note 25, at 9 (describing punitive damages as an instance where "the ideas underlying the criminal law have invaded the field of torts").

[127] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-33 (2003).

[128] Goldberg, *supra* note 10, at 561 (referencing Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 51-53 (2000)).

[129] My purpose is not to develop a unitary theory of punitive damages but rather to argue that this remedy mutates to fill the enforcement gaps that appear because of the inadequacies of the criminal law in every historical era. As Christopher Robinette reminds us, the search for a unitary theory of tort law is a fool's errand. Professor Robinette writes: "In light of tort law's status as an *ad hoc*, residual category of the common law inundated with doctrines from other legal areas, it seems unlikely there is an integrating principle for torts." Robinette, *supra* note 18, at 398.

A. Manifest Versus Latent Functions

Sociologist Robert Merton's theory of manifest and latent functions provides a useful heuristic device for explaining the multiple functions of crimtorts. Manifest functions are the obvious, discernible, and official justifications for a social phenomenon.[130] Latent functions, on the other hand, are hidden and nonobvious social roles.[131] As Merton notes:

> The introduction of the concept of latent function in social research leads to conclusions which show that "social life is not as simple as it first seems." For as long as people confine themselves to *certain* consequences (*e.g.* manifest consequences), it is comparatively simple for them to pass moral judgments upon the practice or belief in question. Moral evaluations, generally based on these manifest consequences, tend to be polarized in terms of black or white. But the perception of further (latent) consequences often complicates the picture. Problems of moral evaluation (which are not our immediate concern) and problems of social engineering (which are our concern) both take on the additional complexities usually involved in responsible social decisions.[132]

Merton uses the Hopi Indian snake dance[133] as an illustration of the distinction between manifest and latent functions of a social

---

[130] Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 518 (2005).

[131] *Id.* at 518-19 (arguing that there is a gap between the manifest functions of punitive damages, which are those recognized by the Supreme Court of the United States in its punitive damages jurisprudence, and the latent functions that the remedy has historically fulfilled).

[132] Robert K. Merton, *Manifest and Latent Functions*, *reprinted in* SOCIAL THEORY: THE MULTICULTURAL AND CLASSICAL READINGS 309 (Charles Lemert ed., 2d ed. 1999).

[133] Hopi Snake Dance, http://www.inquiry.net/outdoor/native/dance/hopi_snake.htm (last visited Apr. 20, 2008).

> The Snake Dance is performed by the Hopi Indians on their Reservation in the northeastern part of Arizona. It takes place every year, but at alternate places-one year at Walpi and Mishongnavi, the next at Oraibi, Shungopavi, and Hotevilla. It is the closing public exhibition of a nine-days' secret ceremony in the kivas of the Antelope and Snake Clans.

Id.

practice. The manifest function of the snake dance is to bring rain, but the latent function is to increase group solidarity within the tribe:

> Ceremonials may fulfill the latent function of reinforcing the group identity by providing a periodic occasion on which the scattered members of a group assemble to engage in a common activity . . . . [S]uch ceremonials are a means by which collective expression is afforded the sentiments which . . . are found to be a basic source of group unity. Through the systematic application of the concept of latent function, therefore, apparently irrational behavior may at times be found to be positively functional for the group.[134]

The manifest functions of the crimtort remedy are to punish and deter defendants that endanger the public. The latent functions are the remedy's expansive societal functions such as enabling private enforcement of the public law, educating the larger community about the limits of appropriate conduct, allowing public stigmatization of the wrongdoer, and producing a sense of fairness within the larger society. The next section will compare the manifest to the latent functions of crimtorts.[135]

---

[134] Merton, *supra* note 132, at 307-08.

[135] Institutions or social policies may also produce negative societal consequences, which are called "dysfunctions." Critics of punitive damages argue that the remedy's dysfunctions outweigh its benefits, such as the claim that:

> Aggressive personal injury lawyers target certain professions, industries, and individual companies as profit centers. They systematically recruit clients who may never have suffered a real illness or injury and use scare tactics, combined with the promise of awards, to bring these people into massive class action suits. They effectively tap the media to rally sentiment for multi-million-dollar punitive damage awards. This leads many companies to settle questionable lawsuits just to stay out of court.

American Tort Reform Association: About ATRA, http://www.atra.org/about/ (last visited Apr. 20, 2008).

B. The Manifest Functions of Crimtorts

The well-established manifest functions of punitive damages are punishment and deterrence.[136] As the Supreme Court recently noted in *Philip Morris USA v. Williams*,[137] "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[138] Nearly every state or federal court employs these twin rationales when imposing punitive damages.[139]

Crimtorts on behalf of consumers injured by perilous imports from China can function to punish and deter major United States companies who have externalized excessive, preventable dangers "by moving production to sweatshop venues"[140] where they cannot ensure the safety of products.[141] In contrast, few jurists or academics have focused on the latent, below the surface, social functions of punitive damages. The following section will examine

---

[136] Zipursky, *supra* note 13, at 105 ("Courts routinely state that the 'punishment' delivered by punitive damages is justified by both deterrent and retributive concerns."). As Ben Zipursky notes: "The standard answer is that punitive damages are intended to punish a defendant who has engaged in a form of tortuous conduct that is particularly egregious." *Id.*; *see also* Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1239 (Kan. 1987) (confirming the functions of punishment and deterrence as the express function of punitive damages); Rustad & Koenig, *supra* note 54, at 1318-20 (describing punishment and deterrence functions of punitive damages); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 356-57 (2003) (documenting that punishment and deterrence are the two principal functions of punitive damages). *See generally* Hylton, *supra* note 34 (providing economic rationale for deterrence function).

[137] Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

[138] *Id.* at 1062 (citations omitted).

[139] RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE § 3.2, at 88-97 (2005) (documenting predominance of punishment and 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 noneconomic damages. Rustad & Koenig, *supra* note 54, at 1321.

[140] PUB. CITIZEN'S GLOBAL TRADE WATCH, SANTA'S SWEATSHOP: "*MADE IN D.C.*" WITH BAD TRADE POLICY 5 (2007), *available at* http://www.citizen.org/hot_issues/issue.cfm?ID=1782 (follow "Download the full report" hyperlink).

[141] *Id.* at 4.

some of the latent societal benefits provided by the crimtort remedy.

C. Latent Functions

1. Crimtorts to Supplement Criminal Law

Perhaps the most significant latent function of punitive damages is to supplement criminal law.[142] Public authorities seldom prosecute corporations or their officers for deaths and serious injuries created by defective products or practices.[143] The Chinese-import safety crisis, the complexity of bringing members of mercenary armies to justice, and the difficulty of prosecuting cybercriminals are just a few examples of the need for a civil supplement to punish and deter organizational misdeeds. As the Supreme Court of Maine observed:

> [C]ivil law effectively augments the criminal law in deterring intolerable conduct. The doctrine of punitive damages encourages the use of civil actions by private parties in response to such conduct, especially when the prospective compensatory recovery is low or the expected cost of litigation is high.[144]

---

[142] Crimtorts can provide a backup to public law enforcement in situations in which government enforcement fails to adequately protect the public. For example, the Consumer Product Safety Commission (CPSC) assessed a mere $5.09 million in fines between 1980-91 against only approximately 50 companies that did not comply with the CPSC's reporting requirements even though thousands of firms actually failed to meet those same reporting requirements . . . . The total of all CPSC fines in the quarter century of its existence would be the functional equivalent of a parking ticket to a Fortune 500 firm.

Koenig & Rustad, *supra* note 2, at 295 n.22. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1979) (stating that the purpose of punitive damages is the same as the purpose of criminal fines); *see also* Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L.J. 31, 48 (2001) ("The purpose of awarding punitive damages is to compensate victims for losses that standard compensatory damages do not cover, to act as punishment for bad acts, and to supplement the deterrent functions of both tort and criminal law.").

[143] Koenig & Rustad, *supra* note 2, at 295 nn.23-24.

[144] Tuttle v. Raymond, 494 A.2d 1353, 1358-59 (Me. 1985).

Crimtort litigation can redress individual misdeeds that are sufficiently widespread to constitute a societal dilemma. Drunk driving is an example of a grave social issue that is not adequately punished and deterred by the criminal side of the law. Driving while intoxicated is not only an individual wrong, but is also a manifestation of a larger social problem that threatens the larger public.[145] In Maryland, for example, an estimated "10,000 injuries and deaths occur as a result of drunk driving accidents [even though] thousands of Maryland drivers are arrested for alcohol-related driving offenses."[146] Punitive damages litigation in drunken driving cases is an example of a private law remedy used for social control.

Public law enforcement, unfortunately, has a dismal record of accomplishment in prosecuting crimtorts. "Corporate crime is underprosecuted by a factor of say – 100. And the flip side of that – corporate crime prosecutors are underfunded by a factor of say – 100."[147] Government regulators are understaffed and often lack the political will to tackle corporate malfeasance on the borderline

---

[145] C. Wright Mills noted that private troubles are frequently the consequences of public issues. An individual's unemployment is a private trouble but a high unemployment rate is a public issue:

> [M]any personal troubles cannot be solved merely as troubles, but must be understood in terms of public issues—and in terms of the problems of history-making. Know that the human meaning of public issues must be revealed by relating them to personal troubles—and to the problems of the individual life. Know that the problems of social science, when adequately formulated, must include both troubles and issues, both biography and history, and the range of their intricate relations. Within that range the life of the individual and the making of societies occur; and within that range the sociological imagination has its chance to make a difference in the quality of human life in our time.

C. WRIGHT MILLS, THE SOCIOLOGICAL IMAGINATION 226 (1959).

[146] Note, *Torts—Punitive Damages Are Not Recoverable in a Negligence Action Against an Intoxicated Driver Absent a Showing of Actual Malice.* Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993), 24 U. BALT. L. REV. 353, 353 (1995) (citing Ann E. Singleton, *Initiatives to Combat Drunk Driving*, MD. BAR J., May/June 1990, at 17).

[147] Russell Mokhiber, *Twenty Things You Should Know About Corporate Crime*, *reprinted in* 21 CORP. CRIM. RPTR. 25 (2007), *available at* http://www.corporatecrimereporter.com/twenty061207.htm.

between criminal law and tort law.[148] Prosecutors rarely have either the expertise or the financial resources to prosecute corporate wrongdoers who endanger public health and safety.[149] No criminal prosecution for corporate manslaughter has been successful in any United States 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.[150] The automobile manufacturer was acquitted despite evidence that Ford failed to recall their hazardous vehicles.[151] Ford's punishment was the punitive damages awarded to private attorneys general, whose actions led to the recall and redesign of an entire line of automobiles.

2. Crimtorts for Boundary Maintenance

A society maintains and reinforces its sense of unity and cultural integrity through the establishment of social boundaries of tolerable behavior.[152] Crimtorts develop and safeguard social

---

[148] *See* KOENIG & RUSTAD, *supra* note 2, at 175-76 (documenting how tort remedies bridge the gap left by long decades of weak enforcement by federal government agencies).

[149] 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.

[150] 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)).

[151] Rustad & Koenig, *supra* note 54, at 1328 n.296 ("The 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.").

[152] KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 10 (1966) ("When one describes any system as boundary maintaining, one is saying that it controls the fluctuation of its constituent parts

synchronization by teaching the general population about society's norms and the penalties for violating its rules of proper behavior. Émile Durkheim observed that a common sense of morality develops through public disapproval of deviants:

> Crime brings together upright consciences and concentrates them. We have only to notice what happens, particularly in a small town, when some moral scandal has just been committed. They stop each other on the street, they visit each other, they seek to come together to talk of the event and to wax indignant in common. From all the similar impressions which are exchanged, from all the temper that gets itself expressed, there emerges a unique temper . . . which is everybody's without being anybody's in particular. That is the public temper.[153]

Agent Orange, Dalkon Shield, Times Beach, Love Canal, Ford Pinto, Silkwood, Erin Brockovich, and asbestos-related disease have entered the common vocabulary as examples of corporate wrongdoing in which punitive damages raised consciousness of corporate wrongdoing.

Elite deviance that goes unpunished creates public cynicism, alienation, and disrespect for the law. Immigrants were "made lawless by America rather than . . . America [being] made lawless by them,"[154] perhaps because our nation's great emphasis on economic success encourages Americans to cut legal corners as the best path to prosperity.[155] Crimtort punishments often receive enormous publicity, teaching the defendant and the wider society the limits of acceptable behavior:

---

so that the whole retains a limited range of activity, a given pattern of constancy and stability, within the larger environment.").

[153] ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 102 (George Simpson trans., 4th prtg., Free Press 1960) (1933).

[154] JAMES TRUSLOW ADAMS, OUR BUSINESS CIVILIZATION 102 (1929).

[155] *See, e.g.*, Robert K. Merton, *Social Structure and Anomie*, *reprinted in* THEORIES OF DEVIANCE 114 (Stuart H. Traub & Craig B. Little eds., 4th ed. 1994) (arguing that America produces criminal "innovators" because of the U.S. culture's strong emphasis on achieving economic success which leads to law breaking).

> Punitive 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.[156]

Sociologists employ the term "mores" to describe norms that are vital to the survival of a society.[157] Individuals need a clear set of social guidelines or they experience a state of anomie, a state of harmlessness, which can lead to mental illness and even to suicide.[158] The crimtort remedy of punitive damages, from this perspective, accomplishes an educative purpose by teaching and reaffirming America's mores:

> Much more so than with assessments of responsibility for actual damages, punitive damages assessments sensationalize the consequences of improper behavior in a manner that informs and reminds defendants and society at large that a particular right-duty legal value not only exists, but that it is given staunch protection by the law. Society's most important

---

[156] David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374 (1994) (discussing the multiple functions and aims of punitive damages).

[157] Professor Sumner conceptualized as critically important societal norms in WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS (1906):

> [The mores constitute the social code. Mores] includes the notion of what ought to be done, for all should cooperate to bring to pass, in the order of life, what ought to be. All notions of propriety, decency, chastity, politeness, order, duty, right, rights, discipline, respect, reverence, cooperation, and fellowship, especially all things in regard to which good and ill depend entirely on the point at which the line is drawn, are in the mores.

Id. at 231.

[158] *See generally* ÉMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY (John A. Spaulding & George Simpson trans., George Simpson ed., Free Press 1951) (1897) (arguing that suicide grows out of underlying societal conditions rather than individualistic decisions).

> rules governing how people are to live together, and the boundaries of their respective spheres of freedom to pursue their personal interests that sometimes conflict, are publicly declared and certified as fundamental by punitive damage awards. This form of judicial punishment serves to publicize the community's condemnation of flagrant breaches of the rules of proper behavior which reaffirms society's commitment to its moral and legal standards.[159]

As the Supreme Court of Maine 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.' "[160] Crimtort remedies are not anomalies; they are a functional necessity for flexibly teaching and reinforcing societal mores.

3. Crimtorts to Redress Societal Injuries

Judge Guido Calabresi argues that punitive damages fulfill multiple functions, including compensation to society, because they are " 'designed to make society whole' " as opposed to compensatory damages, which are " 'assessed to make an individual victim whole.' "[161] In the Blackwater cases, American society and its foreign policy suffered a loss of credibility throughout the world. Protests erupted in Baghdad after Blackwater security forces killed seventeen Iraqi civilians at a city traffic circle, "provoking protests over the role of security contractors in Iraq."[162] This alleged incident "so angered Iraqis, however, that the Iraqi government is proposing a measure that would overturn the American rule and subject Western private

---

[159] 2 DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, MADDEN & OWEN ON PRODUCTS LIABILITY § 18:2, at 223-24 (3d ed. 2007).

[160] Tuttle v. Raymond, 494 A.2d 1353, 1355 (Me. 1985) (quoting Mallor & Roberts, *supra* note 40, at 641).

[161] Rustad, *supra* note 130, at 538 (quoting Ciraola v. City of New York, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring)).

[162] Steve Fainaru, *U.S. Ignored Blackwater Warnings: Government Knew Hired Guns Were out of Control, Memos Indicate*, GRAND RAPIDS PRESS (Mich.), Dec. 24, 2007, at A3.

security companies to Iraqi law."[163] A year earlier, Kurdish Iraqis demonstrated against the United States, protesting another Blackwater incident:

> On Feb. 7, 2006, Blackwater guards allegedly killed three Kurdish civilians outside the northern city of Kirkuk. That incident triggered demonstrations outside the U.S. Consulate and led Rizgar Ali, president of the Kirkuk provincial council, to complain to U.S. authorities in Kirkuk and Baghdad.[164]

A Blackwater security guard, who is said to have been "drinking heavily" at a company Christmas party, shot and killed one of the Iraqi Vice President's bodyguards: "The Blackwater employee was spirited out of the country, with the help of the U.S. State Department. He has so far faced no criminal proceedings. He was not subject to any Iraqi laws or to U.S. military jurisdiction."[165] Congress has yet to enact legislation that would make the company liable for the torts of its employees committed abroad, but "[e]ven if the law passes, the damage is done. A heavy-handed occupation has alienated much of the Middle East."[166]

The recent surge in dangerously defective product recalls resulted from "a long-term corporate strategy of seeking ever-cheaper wages and raw materials offshore while avoiding oversight and legal liability."[167] American importers' failure to properly monitor their supply chains enable foreign bad-actors to intentionally violate United States law, making millions of dollars in profits at the expense of the Unites States 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. Crimtorts send a message to even the wealthiest organizations that they are not above the law.

---

[163] John M. Broder & James Risen, *Blackwater Tops All Firms in Iraq in Shooting Rate*, N.Y. TIMES, Sept. 27, 2007, at A1.

[164] Fainaru, *supra* note 162.

[165] Cynthia Tucker, *The Damage Is Done*, BALT. SUN, Oct. 8, 2007, at 1.

[166] *Id.*

[167] *New Report*, *supra* note 90.

4. Crimtorts as Incentives for Private Enforcement

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 possibility of winning augmented damages,[168] creates crucial incentives for trial lawyers to pursue complex cases on the frontier of the litigation landscape.[169] "Augmented compensation is frequently justified on the ground that the contingency fee system ensures that plaintiffs will be systematically undercompensated because they must pay substantial legal fees" out of their awards.[170]

---

[168] Congress has enacted hundreds of statutes permitting multiple statutory damages on behalf of the public interest. Examples of well-known multiple damages 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, attorney's fees and costs." MICHAEL L. RUSTAD, EVERYDAY LAW FOR CONSUMERS 15 (2007). Many environmental statutes contain provisions awarding multiple damages to individuals who win toxic tort cases in order to incentivize private attorneys general. Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 84 (2002) ("Citizen suit provisions are included in all of the major pollution control statutes and have successfully encouraged vigorous citizen enforcement of environmental laws."). The crimtort public law remedy, like its private tort law counterpart, enables consumers to vindicate private rights "while benefiting the larger public by exposing systematic consumer abuses." RUSTAD, *supra*, at 15.

[169] 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, 1490 (2006) (reviewing TOM BAKER, THE MEDICAL MALPRACTICE MYTH (2005); WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004); HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004)).

[170] Rustad & Koenig, *supra* note 54, at 1321.

The contingent fee was adopted originally "by mid-nineteenth century American jurists, some of whom were impressed by their potential for efficiency, more of whom decided that they were necessary from a humane perspective, as the only way poor men or women would gain their day in court."[171] The Court of Appeals of California, in *Grimshaw v. Ford Motor Co.*,[172] explained the governance role enabled by the private attorney general in the famous Ford Pinto exploding-gas-tanks case:

> In the traditional noncommercial intentional tort, compensatory damages alone may serve as an effective deterrent against future wrongful conduct but in commerce related torts, the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the defect. . . . Governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. . . . [Punitive damages] provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and [are] not otherwise recoverable.[173]

Punitive damages are not an undeserved bonus payment, but rather an extra recovery afforded to plaintiffs that serves a useful purpose. The potential for recovering an exemplary award provides an incentive for private civil enforcement of important social norms. The United States Court of Appeals for the Ninth Circuit noted the social function of punitive damages in incentivizing private attorneys general: "So far is this opportunity from being a fundamental personal right that it is an interest not truly personal in nature at all. It is rather a public interest . . . ."[174]

Neither the criminal law nor the civil law alone, for example, can adequately protect the public from the growing hazards of

---

[171] Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 259 (1998).

[172] 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

[173] *Id.* at 382-83 (internal citations omitted).

[174] *In re* Paris Air Crash, 622 F.2d 1315, 1319-20 (9th Cir. 1980).

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.

Any litigation against a United States military contractor such as Blackwater is likely to be extremely expensive. The role of the private attorneys general will be to conduct discovery on whether the mercenary force has been involved in prior comparable incidents of unjustifiable "escalation of force."[175] The plaintiffs' attorneys are operating in an unknown legal landscape:

> Civilian contractors serving alongside the armed services in combat zones in Iraq and Afghanistan have created a jurisdictional nightmare for politicians and prosecuting authorities. While there is at least a century's worth of Supreme Court precedent sorting out when civilians can and cannot be subject to court-martial jurisdiction, the situation the United States now faces seems unprecedented.[176]

The private attorneys general conducting discovery will find unmatched difficulties in deposing non-English speaking witnesses in an unfamiliar and frightening overseas venue.

In a 2006 Blackwater case filed by the estate of employees killed and dismembered by insurgents, *In re Blackwater Security Consulting, LLC*,[177] the plaintiff's attorney needed considerable financial resources to conduct discovery in a far away land and respond to scores of motions filed by Blackwater. The *Blackwater Security Consulting* court described the highly publicized incident that led to the litigation as follows: "The decedents ultimately became lost in the city of Fallujah. Armed insurgents ambushed the convoy; murdered the decedents; and beat, burned, and dismembered their remains. Two of the mutilated bodies were

---

[175] ADDITIONAL INFORMATION ABOUT BLACKWATER USA, *supra* note 102, at 6.

[176] Jackson, *supra* note 114, at 256.

[177] 460 F.3d 576 (4th Cir. 2006).

hung from a bridge."[178] The estate of the plaintiffs alleged that Blackwater was negligent in failing "to provide the decedents with the armored vehicles, equipment, personnel, weapons, maps, and other information that it had promised, or with the necessary lead time in which to familiarize themselves with the area."[179]

Attorneys pursuing pioneering crimtort actions against powerful organizations often face a highly aggressive defense. In the United States Court of Appeals for the Fourth Circuit, the decedent's estate filed suit for wrongful death and fraud in state court, and Blackwater filed motions to remove to federal court, citing the Defense Base Act.[180] Once Blackwater had removed the state action to federal court, Blackwater then moved to dismiss all state tort claims on preemption grounds.[181] The United States Court of Appeals for the Fourth Circuit concluded that it lacked jurisdiction to grant the plaintiff's motion to dismiss Blackwater's appeal, denying its motion for mandamus.[182]

Under the crimtort remedy of punitive damages, a rich corporation such as Blackwater may be required to pay more than a Mom-and-Pop security business. Blackwater and its affiliated companies have earned millions of dollars from lucrative Department of Defense contracts:

> After September 11, Blackwater's services were in high demand, and, in 2003, they were paid at least $18.9 million by the U.S. government. As of July 2004, they had 450 people in Iraq and even guarded Ambassador L. Paul Bremer, one of the highest-profile American targets in Iraq. The lucrative Bremer contract was worth twenty-one million dollars. Besides Bremer, Blackwater also contracted to protect the U.S. Ambassador to Iraq, John Negroponte. The increased reliance upon civilian contractors allowed Blackwater to grow rapidly and make significant income by handling work that the military once did on its own.[183]

---

[178] *Blackwater Security*, 460 F.3d at 581.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at 582.
[183] Mlinarcik, *supra* note 118, at 135-36.

If Blackwater is assessed punitive damages, a jury can consider the company's considerable wealth in setting the level of punishment in nearly every jurisdiction.[184] Private enforcement will be crippled if punitive damages are capped at too low a level, although trial courts have the ability to award attorneys' fees under many private attorneys general statutes.[185] Trial courts have the option to grant attorneys' fees in cases of great "societal importance" where the litigation advances important public policies.[186]

IV. CONCLUSION

The crimtort paradigm is our 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.[187] Plaintiffs' lawyers representing

---

[184] In some jurisdictions, introduction of the company's financial evidence is mandated for assessing punitive damages. California reviewing courts need to know the defendant's wealth to determine whether an award should be struck down on the grounds of the defendant's inability to pay. In *Adams v. Murakami*, the Supreme Court of California declared, "an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition." Adams v. Murakami, 813 P.2d 1348, 1349 (Cal. 1991). California juries are asked, "In view of [name of defendant]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct?" JUDICIAL COUNCIL OF CALIFORNIA, CIVIL JURY INSTRUCTIONS No. 3940 (2005), *available at* http://www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf (alterations in original). If the recent case on behalf of Iraqi civilians goes to trial, the wealth of Blackwater (or its affiliated companies) should not be admitted into evidence until the fact-finder finds punishment is appropriate. Blackwater, if found liable for punitive damages, should have an opportunity to explain the reasons for so many shooting incidents and what steps it has taken to fortify training, discipline rogue employees, and institute other remedial measures.

[185] Anderson v. Ethington, 651 P.2d 923, 925 (Idaho 1982).

[186] Hellar v. Cenarrusa, 682 P.2d 524, 530 (Idaho 1984).

[187] *See* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 403 (5th Cir. 1986) ("[P]unitive damages reward individuals who serve as 'private attorneys general' in bringing wrongdoers to account."). The private attorneys general function of crimtorts was well-established at early common law:

consumers injured by lead-based toys from China or Iraqi civilians killed by overseas contractors 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 inadequately monitored globalized supply chains, international human rights violations, online oppression, environmental degradation, negligent enablement of third-party crimes, and numerous other emergent mass harms. 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.

> The principal argument adduced in favor of vindictive damages bases itself on the necessity that every community is under of affixing some punishment to violations of the law, which, though partaking more or less of the character of crimes, are yet not of importance enough to demand, or too subtle in their nature to admit of criminal prosecution.

Vindictive Damages, 4 AM. L.J. 61, 73 (1852) (arguing that to allow only compensatory damages would be to put law under control of wealthier classes).