

# Michigan Law Review

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Volume 96 | Issue 5

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1998

## Outrageous Fortune and the Criminalization of Mass Torts

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### Recommended Citation

Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121 (1998).

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# OUTRAGEOUS FORTUNE AND THE CRIMINALIZATION OF MASS TORTS

Richard A. Nagareda\*

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The case of the blameworthy-but-fortunate defendant has emerged as one of the most perplexing scenarios in mass tort litigation today.<sup>1</sup> One need look no further than the front page of

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\* Assistant Professor, University of Georgia School of Law. A.B. 1985, Stanford; J.D. 1988, University of Chicago. — Ed. Anne Dupre, Richard Epstein, Mark Gergen, Samuel Issacharoff, Paul Kurtz, John Longwell, Thomas McGarity, Ruth Nagareda, John Robertson, Michael Wells, Patrick Woolley, and participants in a faculty colloquium at the University of Texas School of Law provided helpful comments on earlier drafts.

1. The term “mass torts” refers to conduct alleged both to be tortious in nature and to produce injuries dispersed over time to large numbers of persons nationwide. The discussion here of the appropriate legal treatment of blameworthy conduct by mass tort defendants has potential applications in other tort contexts. I focus here upon mass torts because they, due to their scope and concomitant potential for harm on a catastrophic scale, set forth most starkly the major themes at issue.

the newspaper to find examples of mass tort defendants said to have engaged in irresponsible conduct — even conduct that one might regard as morally outrageous in character<sup>2</sup> — but that nonetheless advance eminently plausible contentions that they have not caused harm to others.

This issue is not merely a matter for abstract speculation. A now-familiar mass tort scenario involves a defendant that markets a product without informing consumers about tentative suspicions of some health hazard. These initial suspicions, however, ultimately may not prove true. In fact, subsequent scientific research may support, perhaps convincingly, a contention by such a defendant that there simply is no causal link between its product and the malady from which the plaintiff suffers. The most prominent example of this first scenario is the ongoing controversy over silicone gel breast implants.<sup>3</sup>

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As Margaret Berger observes in a provocative new essay, mass tort litigation often deals with situations in which a corporation “did not test its product adequately initially, failed to impart information when potential problems emerged, and did not undertake further research in response to adverse information.” Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2135 (1997) (calling for abolition of the usual tort requirement of general causation in such cases). Such misconduct, however, may not necessarily cause harm to consumers. For earlier commentary, drawing attention to the doctrinal problems posed by blameworthy defendants at a time when mass tort litigation was still in its infancy, see David G. Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions*, 10 IND. L. REV. 769 (1977).

2. For front-page accounts of misconduct on the part of the tobacco industry, see Alix M. Freedman, *Cigarette Defector Says CEO Lied to Congress About View of Nicotine*, WALL ST. J., Jan. 26, 1996, at A1 [hereinafter Freedman, *CEO Lied*] (summarizing the deposition of whistleblower Jeffrey Wigand indicating that Brown & Williamson chairman Thomas Sandefur lied to a congressional committee concerning his views about the addictiveness of nicotine); Alix M. Freedman, *Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, WALL ST. J., Oct. 18, 1995, at A1 [hereinafter Freedman, *Ammonia Spurs Delivery*] (discussing internal documents from Brown & Williamson on the addition of ammonia-based compounds to increase the potency of nicotine inhaled by smokers); Philip J. Hilts & Glenn Collins, *Documents Disclose Philip Morris Studied Nicotine's Effect on Body*, N.Y. TIMES, June 8, 1995, at 1 (discussing previously undisclosed research by Philip Morris into the pharmacological effects of nicotine).

As for accounts of misconduct by the leading maker of silicone gel breast implants, see Philip J. Hilts, *Maker of Implants Balked at Testing, Its Records Show*, N.Y. TIMES, Jan. 13, 1992, at A1 (revealing that Dow Corning scientists pressed for further study of implants but that the corporation put off such tests for more than a decade); Philip J. Hilts, *Strange History of Silicone Held Many Warning Signs*, N.Y. TIMES, Jan. 18, 1992, at 1 (discussing Dow Corning's disregard of early indications that silicone might affect the immune system).

3. See *infra* section II.A.1. Although it remains far too early to tell with certainty, there are at least some preliminary indications that manufacturers of diet drugs used in combination under the popular name “fen-phen” may have been aware of the potential for the drugs to damage the heart valves of users. See Laura Johannes & Steve Stecklow, *Heart-Valve Problem That Felled Diet Pills Had Arisen Previously*, WALL ST. J., Dec. 11, 1997, at A1.

A second and even more problematic situation involves a defendant that does not merely fail to warn consumers about a risk that may be associated with its product, but that affirmatively induces repeated use through outright fraud or obfuscation of the product's risk. This second scenario describes the allegations advanced in the current controversy over nicotine in tobacco products.<sup>4</sup> Here, the problem also is one of causation, but of a different sort: the centuries-old awareness of the hazards of smoking, including the widespread recognition that the practice can be exceedingly hard to quit,<sup>5</sup> makes it difficult to attribute the maladies of current smokers to an informational shortfall brought about by the tobacco industry. Fraud is the cause of harm, after all, only when one's fraudulent misrepresentations are apt to be believed and acted upon — only when, at the very least, other people are not saying loudly that one is lying.

In this respect, the causal problem posed by the tobacco litigation is by no means restricted to that particular context. Rather, the same concerns likely would surface with respect to the many variations on the same theme that one might envision in the future for the alcohol industry, the fast-food industry, or the purveyors of other products with long-recognized health risks.

For all their salient differences, the contentions raised in both the tobacco wars and the breast implant litigation reflect a common theme. Both litigations are instances of what I describe here as "outrageous fortune" — situations in which a manufacturer may have engaged in conduct that many might regard as irresponsible or morally culpable, but where that manufacturer, nonetheless, may have had the sheer good luck not to cause harm to consumers.

To put the point mildly, the results thus far in the implant and tobacco litigations have not tracked neatly what one might have expected from substantive tort doctrine. Notwithstanding what appear to be formidable obstacles grounded in the tort requirement of causation, defendants have not emerged unscathed. Quite to the contrary, the leading implant manufacturer, Dow Corning, currently is in the midst of a lengthy reorganization proceeding under Chapter 11 of the Bankruptcy Code.<sup>6</sup>

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4. See *infra* section II.B.1.

5. See *infra* section II.B.2 (detailing public awareness that it is hard to quit smoking), and especially *infra* note 178 (discussing a successful defense along these lines by R.J. Reynolds in a recent individual lawsuit).

6. See *infra* section II.A.2.

The tobacco industry has been affected even more dramatically, in the form of congressional consideration of national legislation. Although its precise parameters remain to be seen, such legislation will seek to build upon the much-debated \$368.5 billion proposal hammered out in the summer of 1997 by the tobacco industry and various state attorneys general.<sup>7</sup> In exchange for more definite limitations upon its long-term financial obligations in tort, the tobacco industry has demonstrated its willingness to embrace measures that not only would require the payment of billions of dollars, but also would entail unprecedented government regulation of the marketing and advertising of tobacco products. Whatever the ultimate fate of any national legislation, both the process that led to its formulation and the treatment that it receives in the political arena are likely to be the subjects of extensive discussion within the legal, public health, and public policy communities for many years to come.

The foregoing developments, I submit, are not readily comprehensible within the framework of existing mass tort scholarship, which has tended to take as its principal focus the ways in which mass tort litigation has pushed at the boundaries of existing legal procedures. The debates over both the desirability of class actions<sup>8</sup> and the merits of bankruptcy proceedings<sup>9</sup> in this area are just two of the more prominent illustrations of this procedural perspective. These certainly remain important and challenging issues, but, in focusing on them, both courts and commentators have devoted too little attention to the ways in which mass tort litigation increasingly pushes at the boundaries between systems of *substantive* law: specifically, the border between tort and criminal law. A blurring of substantive law, and of the institutional roles contemplated by each system, has taken place virtually unacknowledged by courts, litigators, or the legal academy. Put simply, recent developments reflect the use of mass tort litigation as

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7. The proposal, labeled simply "Proposed Resolution" and so cited hereinafter, is reprinted in MEALEY'S LITIG. REP.: TOBACCO, July 3, 1997, at A-1. The proposal also is available on the Worldwide Web, at a site maintained by the state attorneys general: <<http://stic.neu.edu/settlement/6-20-settle.htm>>. As reproduced by both sources, the proposal appears with universal page numbers and, for the sake of uniformity, I use those references here. For the \$368.5 billion figure, see *Proposed Resolution, supra*, at 34.

The terms of the proposal vaguely approximate those originally advanced by Richard Kluger in his comprehensive history of the tobacco industry. See RICHARD KLUGER, *ASHES TO ASHES* 761-63 (1996). Kluger subsequently elaborated upon his suggested approach in Richard Kluger, *A Peace Plan for the Cigarette Wars*, N.Y. TIMES, Apr. 7, 1996, § 6 (Magazine), at 28.

8. See *infra* note 76.

9. See *infra* section II.A.2.

a vehicle for moral condemnation of defendants, wholly apart from the causation of harm to tort plaintiffs. My contention here is that moral condemnation should take place not through the vehicle of tort litigation but, if at all, through democratic deliberation in the political process.

This is not to say that tort litigation and democratic deliberation are completely unrelated to one another. Insofar as the tobacco litigation has provided a significant impetus for debate through legislative channels, that debate itself stands as a desirable and long-overdue effort to grapple seriously with the difficult issues of public policy in the area — potentially in ways that may focus the moral opprobrium of society upon the tobacco industry. By contrast, there has been little public deliberation over the basic question of whether the conduct of implant manufacturers warrants moral condemnation of any sort in the face of formidable doubt about the causation of harm. Tort litigation can play a useful role in identifying product safety issues in a manner independent from political institutions, but such litigation represents an unwieldy vehicle for the societal resolution of such matters, especially when moral condemnation of defendants might be warranted wholly apart from the compensation of tort plaintiffs.

In Part I, I start with the familiar observation that tort law insists upon a causal connection between even a highly blameworthy defendant and some injured plaintiff as the essential predicate for a judgment of liability. By contrast, criminal law has long punished conduct that falls well short of a completed crime, though it does so subject to important institutional and doctrinal limitations.

As detailed in Part II, the practical effect of recent mass tort litigation has been to draw haphazardly and without any apparent acknowledgement upon the moral condemnation function of the criminal law. Here, I analyze two sorts of mass tort disputes: the first, as suggested above, centers upon science — specifically, the question of whether the product at issue is capable of causing harm to anyone. As I explain, the results of the implant litigation are explicable not by any resolution of the debate over scientific causation squarely in plaintiffs' favor; indeed, that debate has largely been resolved to the contrary. Instead, the progress of the implant litigation is explicable more by a concern on the part of manufacturers like Dow Corning — well-grounded in the results of early implant lawsuits — that jurors might be prepared to return

damage verdicts based principally upon a sense of moral outrage over defendants' conduct.

A second type of mass tort dispute also implicates the requirement of causation, but it focuses upon the decision of the plaintiff to use the product in question. Litigation of this sort turns heavily upon the availability of risk information from sources other than the defendant — information that may shed considerable doubt upon the contention that the defendant's silence, or even outright fraud, caused the plaintiff to use the product. To illustrate this second category, I take as my focal point the tobacco litigation. In fact, recent events in the tobacco area stand as the most striking example of the degree to which mass tort litigation has drawn, *sub silentio*, upon criminal notions.

In the same Part, I go on to observe that the breast implant and tobacco litigations — two of the most sharply debated mass tort scenarios in recent years — are not simply the products of idiosyncratic situations. Instead, I contend, the bringing of mass tort claims against arguably blameworthy defendants in the face of substantial causation questions stems from broader and more enduring suppositions — specifically, from the ways in which mass tort litigators conceive of jury decisionmaking and from the interaction between litigation and other means by which to draw public attention to product safety issues. These suppositions are a symptom of a much deeper convergence of tort and criminal law.

In Part III, I evaluate the merits of this convergence, noting initially its potential to lend a welcome degree of flexibility to the treatment of blameworthy-but-fortunate mass tort defendants. The prospect of national legislation in the tobacco area points in a promising direction, insofar as it may create a virtual rehabilitation program for the industry centered upon measures to reduce smoking in the future. In a manner characteristic of criminal sanctions, the goal should be to bring moral condemnation upon defendants through public law that would not entail the transfer of billions of dollars to current smokers. In light of the centuries-old awareness of smoking hazards, it is eminently sensible to place a priority upon prospective measures to reduce smoking over payment to present-day plaintiffs. In fact, one may understand the likely impact of tobacco legislation in terms of the growing recognition among criminal law scholars of the expressive dimension of public law — its capacity to alter the underlying social culture of smoking.

One may draw useful lessons from the tobacco litigation for the appropriate resolution of the breast implant controversy. Given the relative dearth of scientific evidence to link silicone with connective tissue diseases, there are strong grounds to deny compensation to breast implant plaintiffs. At the same time, the burdens of the bankruptcy process itself may serve as a form of punishment for implant makers that, at least arguably, did not take seriously the possibility of a causal link to disease. But decisions of this sort — to leave present-day plaintiffs with little or nothing and to address the conduct of defendants through other means — are appropriately made not by litigation or private negotiation alone, but, rather, upon public deliberation through political channels.

Apart from the appropriate resolution of current disputes, one should not overlook the potential mass tort defendants of the future. The proposals that have arisen from the tobacco litigation have the praiseworthy capacity to overcome political logjams in the regulatory system, but only at the risk of triggering indiscriminate assaults in tort upon other manufacturers that sell products with long-recognized hazards. It is this prospect, not any great sympathy for the tobacco industry, that understandably has led some observers to express formidable discomfort with the tobacco wars.<sup>10</sup>

In light of these concerns, I argue that recent developments in mass tort litigation, if anything, have drawn too little upon the criminal law. Specifically, close attention to both institutional and doctrinal *limitations* upon the application of moral condemnation by way of the criminal system suggests an important caveat that should be heeded in this area. This institutional caveat centers upon the essential role that politically accountable bodies should play in the resolution of mass torts, much the same as legislatures and public prosecutors serve in tempering the moral sentiments of the community in the criminal area. Consideration by political bodies is vastly superior to lawyer- or court-centered mechanisms such as reorganizations in bankruptcy, both to facilitate public debate for its own sake and as a vehicle for appropriate treatment of present-day plaintiffs and prospective defendants. I discuss how deliberation in political fora may come about, adding that familiar criminal doctrines of mens rea and deterrence help considerably to frame the issues for debate.

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10. See, e.g., Richard A. Epstein, *Big Tobacco's Big Mistake*, N.Y. TIMES, June 25, 1997, at A21; Richard Klein, *Prohibition II . . .*, WALL ST. J., June 26, 1997, at A18; *A Tobacco Settlement?*, WALL ST. J., June 23, 1997, at A14 (editorial).



## I. OUTRAGEOUS FORTUNE IN TORT AND CRIME

Both tort and criminal law take as a significant objective the prevention of socially undesirable conduct, through the threat of a damage verdict in tort or of incarceration in criminal law. In fact, a substantial scholarly literature has developed in recent years on various points of contrast between criminal and civil law generally.<sup>11</sup>

On the whole, this literature expresses considerable trepidation over the intermingling of tort and criminal systems. Several commentators have discussed the expansion of criminal sanctions into areas previously dominated by civil controls. A significant concern, for example, is that the criminalization of matters heretofore considered only regulatory infractions might reduce the moral opprobrium needed to induce adherence to criminal prohibitions upon more serious forms of misconduct.<sup>12</sup> Conversely, other commentators have focused upon the application of civil penalties — for example, civil forfeitures — in tandem with criminal prosecutions. The fear is that use of civil actions by the government may undermine the procedural protections afforded to defendants in the criminal context.<sup>13</sup> Indeed, this second concern is likely to loom even larger in the literature after the Supreme Court's recent decision upholding a Kansas statute for the indefinite commitment of sexually violent predators on the ground that the law does not implicate

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11. See, e.g., John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) [hereinafter Coffee, *Reflections*]; John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models — And What Can Be Done About It*, 101 YALE L.J. 1875 (1992) [hereinafter Coffee, *Paradigms*]; Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997); Symposium, *The Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES at 1 (1996); Symposium, *The Intersection of Tort and Criminal Law*, 76 B.U. L. REV. 1 (1996). But cf. JULES L. COLEMAN, RISKS AND WRONGS 222 (1992) ("The differences between torts and the criminal law are so fundamental that the net result of applying one's understanding of the criminal law to torts is bad philosophy and total confusion.").

For scholarship on the same subject by an earlier generation of commentators, see, e.g., Jerome Hall, *Interrelations of Criminal Law and Torts* (pts. 1 & 2), 43 COLUM. L. REV. 753, 967 (1943); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

12. See Coffee, *Reflections*, *supra* note 11, at 234-38. As Coffee acknowledges, this view echoes the concerns voiced earlier by Hart, *supra* note 11, at 423.

13. See Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 189 (1996) (criticizing the Supreme Court's civil forfeiture jurisprudence as undermining the Fifth Amendment protection against double jeopardy); Steiker, *supra* note 11, at 814-19 (arguing that many procedures labeled as civil are more properly understood as implicating longstanding justifications for criminal punishment); see also Mann, *supra* note 11, at 1869-71 (arguing for a "middleground" approach that would call for application of at least some criminal procedures).

the distinctive constitutional protections required in the criminal context.<sup>14</sup>

I draw upon this comparative approach to shed new light upon problems of mass tort litigation. As set forth in greater depth in Part III, the handling of outrageous fortune in the mass tort setting may benefit in several significant respects from a rethinking of the conventional tort-crime distinction. At the same time, however, I share quite strongly the concern expressed in the recent literature about the serious potential for abuse that may accompany the indiscriminate intermingling of tort and criminal concepts.

### A. *Linking Plaintiffs and Defendants in Tort*

One of the fundamental differences between tort and criminal law lies in the legal consequences that flow from conduct — however irresponsible, blameworthy, or manifestly evil — that does not produce a proscribed result that the law is prepared to attribute to the defendant. As a matter of hornbook doctrine, the absence of causation in a tort suit means that the plaintiff should lose.<sup>15</sup> In principle, that result should not change, even if the defendant ignored the possibility of a causal link or sought affirmatively to promote it without success.

This emphasis upon causation stems from the foundations of tort law as a system to resolve disputes that arise from interactions between strangers that are not otherwise governed by contract. In fact, some have contended that the element of causation represents the crucial link that identifies a particular injured plaintiff as the person to whom a particular defendant owes compensation.<sup>16</sup> This link between plaintiffs and defendants accounts for many other features of the tort system — for example, the characteristic tort remedy in the form of damages paid from the defendant to the plaintiff.<sup>17</sup> As John Coffee aptly observes, “the question in [the

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14. See *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997).

15. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 41, at 263 (5th ed. 1984).

16. Ernest Weinrib defends the traditional approach to causation in tort on the ground that “[c]ausation particularizes the plaintiff against the background of the defendant’s wrongful risk creation, and wrongdoing particularizes the defendant against the background of the totality of the injury’s causes.” Ernest J. Weinrib, *Causation and Wrongdoing*, 63 *CHI.-KENT L. REV.* 407, 430 (1987). Other commentators, however, have argued that corrective justice in tort does not require such a matching of wrongful risk creation and injury. See, e.g., Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 *J. LEGAL STUD.* 421, 426 (1982); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 466, 468-69 (1990).

17. As Gail Heriot observes,

tort] context is not whether to impose a substantial penalty on the defendant, but rather how to divide losses actually incurred between plaintiff and defendant."<sup>18</sup>

Given the importance of causation in tort law generally, it comes as no surprise that mass tort litigation has served to highlight the many subtle shadings of that general concept. In the mass tort context, causation issues have arisen in two forms. In its most familiar guise, causation simply may be a question of science. In particular, causation often turns upon the science of toxicology, a body of learning that governs the methods by which scientists test hypotheses of causal links between external forces and human disease. Such methods usually consist of laboratory studies on cells or animals and, in more advanced stages of research, epidemiological studies that compare the incidence of disease in persons exposed to the disputed product against the incidence in a group of unexposed persons.<sup>19</sup> Before one can say that a product caused a given disease in a particular person, for example, one first must show that the product is capable of causing that disease in humans generally. In the parlance of mass tort litigation, one must show general causation before one even gets to the question of specific causation.<sup>20</sup>

Relatively few mass torts, however, center upon diseases that stem from a single, distinctive source.<sup>21</sup> Rather, the challenge for both scientists and litigants is to identify the risk, if any, associated with the defendant's product, as distinct from the background risk of the particular disease. Specifically, the plaintiff might have developed the disease from some other source or simply as a result of

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the causation requirement severely curtails the ability of the plaintiffs and courts to determine the appropriate level of "punishment." The appropriate remedy [in tort] will be an order requiring the defendant to pay to plaintiff an amount designed to compensate plaintiff for his damages — not twice his damages, not three times his damages, but precisely his damages.

Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43, 59 (1996).

18. Coffee, *Paradigms*, *supra* note 11, at 1878.

19. On the basics of toxicology for purposes of mass torts, see MICHAEL D. GREEN, BENEDICTIN AND BIRTH DEFECTS 26-37 (1996). See also Gerald W. Boston, *A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 COLUM. J. ENVTL. L. 181, 234-37 (1993).

20. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988) (distinguishing between general causation and specific causation); Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1227-28 (1987) (same). For an argument to do away with the requirement of general causation in mass tort cases, see Berger, *supra* note 1, at 2132-34, 2143.

21. Mesothelioma — an especially deadly form of cancer in the lining of the lung — is a notable exception. It is virtually always associated with the inhalation of asbestos. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 740 (Bankr. E. & S.D.N.Y. 1991), *revd. on other grounds*, 982 F.2d 721 (2d Cir. 1992).

random chance.<sup>22</sup> The combination of product use and the subsequent onset of disease, in other words, does not prove the existence of a causal relationship as distinct from a mere coincidence. Tort defendants must pay for the former, but not the latter.

A second kind of mass tort dispute centers not upon science *per se* but, instead, upon the risk decision made by the plaintiff.<sup>23</sup> Here the question is whether the plaintiff would have used the product — for example, whether the plaintiff would have started or continued to smoke — even if the defendant had not misrepresented the associated risks. For present purposes, it is illuminating to consider such a dispute as a problem of causation — whether the plaintiff would have suffered the same harm but for the alleged misdeeds of the defendant.<sup>24</sup> Such a conception usefully underscores the affinity between this second situation and mass tort cases centered upon scientific causation: both require one to separate the effects of the defendant's misconduct from those that stem from background phenomena, whether the background risk of disease as a scientific matter or the information otherwise available in society as a whole on the subject of product risk.<sup>25</sup>

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22. See *infra* note 54 and accompanying text (illustrating this problem by reference to the breast implant litigation).

23. A case of scientific causation certainly may raise further questions about the risk decision of the plaintiff. In addition to establishing whether the disputed product causes disease in humans generally, there may be some dispute as to whether a particular plaintiff would have used the product even if warned that usage would entail some health risk.

Some forms of mass tort litigation, however, do not involve serious disputes over scientific causation. Certain products, such as cigarettes, pose well-documented risks of disease. Mass tort litigation over such a product nonetheless may raise substantial questions about the influence, if any, of the defendant's misdeeds upon the plaintiff's decision to use the product. Some products known to be harmful nonetheless remain on the market, because they also provide significant utility to consumers — what may amount to very powerful reasons for consumers to use the product, notwithstanding the attendant risks. Cf. *infra* notes 122-24 (discussing the benefits of nicotine).

24. There are, of course, alternate labels that one might use. One might say that this second kind of mass tort dispute implicates the affirmative defense of assumption of risk, insofar as the plaintiff was aware of the risk from other sources and still proceeded to use the product, wholly apart from the defendant's misdeeds. See KEETON ET AL., *supra* note 15, § 68, at 481; cf. Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987) (defending the concept of assumption of risk against modern critics). Alternatively, one might cast the dispute in terms of tort duties, by positing that defendants are under no obligation to warn with respect to risks that are well known from other sources. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (Proposed Final Draft 1997). Whatever the doctrinal label, however, it is crucial in this second sort of case to ascertain the influence, if any, that the withholding or misstating of information by the defendant has had upon the likelihood of product use by the plaintiff.

25. Even when the plaintiff's claim is not predicated upon the content of a product warning, but instead focuses upon some fraudulent misrepresentation by other means, it still remains necessary to evaluate the purported fraud in light of the other information available to the plaintiff. See *infra* note 162.

These two aspects of causation in mass tort disputes — scientific and risk-decisional causation — both ask whether the plaintiff would have suffered harm in the absence of the defendant's alleged misdeeds. Both pose a counterfactual question, in that both require one to imagine a world in which the defendant's misdeeds did not occur.<sup>26</sup> In cases that center upon scientific causation, the answer to this question will be essentially independent from the gravity of the defendant's misconduct. Either the product causes the particular disease in question, or it does not. Though the limitations of science may make it difficult to answer that question,<sup>27</sup> the answer will not change even if the defendant behaved in an egregiously irresponsible manner in the face of suspicions of a causal link. Indeed, it is precisely such a defendant that one fairly may regard as the unwitting beneficiary of outrageous fortune, in the event that the product ultimately turns out to be innocuous. Good things occasionally happen to bad people.

Risk-decisional causation is different in that it is inherently interactive. As noted earlier, it focuses upon the effect of the defendant's misconduct upon the plaintiff's risk decision. Here, at least potentially, the defendant's misconduct can influence quite significantly the likelihood that the plaintiff will use the product; indeed, the whole point of the misconduct may be to induce such behavior. Insofar as one might consider a defendant of this sort to be the beneficiary of outrageous fortune, such a characterization will arise only upon the defendant's *failure* to achieve its objective — a failure that might stem, for example, from the availability, from other sources, of accurate information about the risks of the product.<sup>28</sup>

### B. Causation, Crime, and Moral Condemnation

Issues of causation are not unknown to criminal law. When one of the elements of a crime consists of producing a particular result

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26. One must approach this counterfactual exercise with considerable care:

One creates a mental picture of a situation identical to the actual facts of the case in all respects save one: the defendant's wrongful conduct is now "corrected" to the minimal extent necessary to make it conform to the law's requirements. It is important to stress that the mental operation performed . . . must be careful, conservative, and modest; the hypothesis must be counterfactual only to the extent necessary to ask the but-for question.

David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEXAS L. REV. 1765, 1770 (1997).

27. See Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 777-80 (1997) (explaining why methodological, ethical, and technical limitations upon scientific techniques may make some causal questions difficult or impossible to answer).

28. See *infra* section II.B.2 (considering the tobacco litigation in this light).

— for example, the crime of murder necessarily entails the death of the victim<sup>29</sup> — criminal law applies much the same concepts of causation as the law of torts.<sup>30</sup> Unlike tort law, however, the strictures of criminal law do not end in the absence of a causal link to some harm suffered by some victim.

As Henry Hart stated eloquently in his classic article on the relationship between criminal and civil law, the distinctive feature of the criminal system lies in its moral dimension — its focus not upon the reshuffling of money from one private person to another, but instead upon the bringing to bear of moral condemnation from the community upon culpable behavior.<sup>31</sup> As others have echoed to the present day, “the factor that most distinguishes the criminal law is its operation as a system of moral education and socialization.”<sup>32</sup> This moral dimension of the criminal law manifests itself in any number of familiar aspects of substantive doctrine that stand in sharp contrast to the law of tort. Take just two prominent examples.

First, unlike tort law, criminal law generally is not concerned with the level of care taken by victims. A criminal defendant will not be heard to say, for example, that the victim of a robbery should not have been walking obliviously down the street with \$100 bills dangling from his pockets.<sup>33</sup> Contributory negligence, in short, is not a criminal defense. This feature of substantive criminal doctrine makes eminent sense, given the focus upon the culpability of the defendant rather than upon a comparison between his conduct and that of a person seeking monetary recompense from him. The

29. See MODEL PENAL CODE § 210.1(1) (1985) (providing that all crimes of homicide require that the defendant “cause[ ] the death of another human being”).

30. See MODEL PENAL CODE § 2.03 (1985).

31. In Hart’s words,

[a crime] is not simply anything which a legislature chooses to call a “crime.” It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a “criminal” penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.

Hart, *supra* note 11, at 405 (emphasis added).

32. Coffee, *Reflections*, *supra* note 11, at 193.

33. Law and economics scholars have criticized the lack of attention to caretaking by the victims of crime, especially with regard to crimes of attempt. See, e.g., Omri Beh-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299, 301 (1996) (“Criminal law norms can induce victims to take efficient levels of precaution by graduating the sanctions imposed upon criminals in accordance with the behavior of their victims.”). This view has yet to have an impact upon criminal doctrine, however, and itself has encountered criticism. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 385-86 (1997) (arguing that public enforcement and private precautions do not necessarily “convey public aversion to crime” with the same degree of effectiveness).

prohibition on robbery reflects a moral judgment that people should be punished for robbing others, regardless of whether those others might have made themselves vulnerable to robbers.

Second, criminal law punishes attempted as well as completed crimes.<sup>34</sup> It does so even if there has been harm whatsoever to the would-be victim, much less a causal link between any such harm and the culpable conduct of the defendant. In fact, with rare exceptions, modern criminal law punishes attempts even when completion of the crime would have been impossible under the circumstances.<sup>35</sup>

Attempt crimes, however, are not simply completed crimes with a reduced actus reus; rather, relaxation of the actus reus otherwise required for a completed crime comes only with a considerable heightening of the mens rea element.<sup>36</sup> Completed crimes ordinarily require a mental state of recklessness, unless the legislature specifies otherwise.<sup>37</sup> Attempt crimes, by contrast, generally call for proof that the defendant acted purposely<sup>38</sup> — that it was his “conscious object[ive]” to complete the crime in question, not simply that he proceeded forward in disregard of some “substantial and unjustifiable” risk that he might complete the crime.<sup>39</sup> The conventional rationale for this heightened mens rea requirement rests upon the need to draw lines between what is and is not worthy of moral condemnation: absent an insistence upon a purposeful state of mind, sanctions for attempt crimes would extend to conduct that might be wholly innocent or, at least, that the community would not regard as quite so blameworthy as to call for moral opprobrium.<sup>40</sup>

Apart from the contrasts in doctrine illustrated above, the moral dimension of criminal law also gives rise to significant contrasts in

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34. See, e.g., MODEL PENAL CODE § 5.01 (1985).

35. See, e.g., PAUL H. ROBINSON, CRIMINAL LAW § 13.1, at 680-87 (1997) (tracing the evolution of criminal law in this regard from early efforts, now largely abandoned, to distinguish between permissible defenses of factual impossibility and impermissible defenses of legal impossibility). The major exceptions that remain, in which impossibility is a defense to a charge of attempt, consist of situations in which the attempt was inherently unlikely to succeed — for example, sticking pins in a voodoo doll in an effort to commit murder — or would not have constituted a crime at all even if completed. See *id.* § 13.1, at 687-89.

36. Criminal law also insists upon the existence of conduct amounting to a “substantial step” toward completion of the crime. See, e.g., MODEL PENAL CODE § 5.01(1)(c) (1985).

37. See, e.g., MODEL PENAL CODE § 2.02(3) (1985).

38. See, e.g., MODEL PENAL CODE § 5.01(1) (1985) (defining criminal attempt). Some jurisdictions refer to the same mental state as “specific intent.” See ROBINSON, *supra* note 35, § 11.2, at 636.

39. Compare MODEL PENAL CODE § 2.02(2)(a)(i) (1985) (defining “purposely”) with MODEL PENAL CODE § 2.02(c) (defining “recklessly”).

40. See ROBINSON, *supra* note 35, § 11.2, at 631-32.

institutional roles. In the tort system, the power to articulate new standards of conduct lies primarily in the hands of politically unaccountable actors — namely, common law judges. It is not considered illegitimate for courts to recognize new theories of tort liability, even to the shock of defendants in the very case that serves as the vehicle for doctrinal change.<sup>41</sup> The criminal system, by comparison, allocates power to politically accountable institutions — legislatures — to set forth, in advance, criminal standards of conduct. In modern America, courts have no authority to create common law crimes,<sup>42</sup> and even the legislature lacks the authority to enact *ex post facto* laws.<sup>43</sup> Given the importance of moral condemnation as an objective of the criminal system, it is essential for the community to deliberate as to whether, and under what circumstances, to bring public disapproval upon defendants. Political institutions are the natural vehicles for such deliberation.

There also is an institutional aspect to the identification of defendants. Tort suits begin at the behest of private persons; one need not ask the government's permission to sue. Indeed, the absence of governmental control over claim initiation remains one of the major strengths of the private law of tort.<sup>44</sup> A tort plaintiff cannot sue just anyone, however, even if the target of the suit has acted abominably. In particular, a tort plaintiff cannot "select [a] defendant[] based largely on the likelihood of [its] unattractiveness" to a jury, but instead may sue only those defendants whose misdeeds are causally linked to some harm that the plaintiff has suffered.<sup>45</sup>

The criminal system is radically different. It lodges the power to bring criminal charges in the hands of politically accountable prosecutors who, due to limited enforcement resources, necessarily exercise broad discretion in the selection of those to be charged.<sup>46</sup>

41. A legislature might enact a statute to define a new theory of tort liability, but the possibility of legislative intervention has never been thought to preclude or to make illegitimate the development of tort doctrine through common law decisions.

42. This is true at both federal and state levels. See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416 (1816) (holding that federal judges have no authority to create common law crimes); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32-34 (1812) (same); ROBINSON, *supra* note 35, at 67 (observing that "no state continues to permit judges to create crimes").

43. See, e.g., U.S. CONST. art. I, § 9; CAL. CONST. art. I, § 9; TEX. CONST. art. I, § 16.

44. See Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987).

45. See Gail L. Heriot, *The Practical Role of Harm in the Criminal Law and the Law of Tort*, 5 J. CONTEMP. LEGAL ISSUES 145, 153 (1994).

46. This is not to deny the potential for abuse of prosecutorial discretion. The point simply is that such discretion itself originated as a source of constraint insofar as it tempers the effects of broad criminal statutes. This remains among the most powerful justifications for



Moreover, apart from the identity of the party empowered to bring suit, criminal trials themselves carry a panoply of protections with no analogue in ordinary civil law. Most prominent among these protections is the insistence upon proof beyond a reasonable doubt rather than by a simple preponderance of the evidence.<sup>47</sup>

Causation of harm, in short, is not essential when the objective is the moral condemnation of the defendant rather than the reallocation of losses between two private parties. The lack of insistence upon causation, however, comes only with significant doctrinal and institutional constraints.

## II. BLAME, FORTUNE, AND MASS TORTS

The previous discussion identifies the two sorts of disputes that have come to be the focus of widespread public attention upon mass tort litigation in recent years. The breast implant litigation poses a problem of scientific causation, while the tobacco litigation poses a question of risk-decisional causation. I discuss each in turn. As I explain in this Part, these examples illustrate the degree to which mass tort litigation has come to disregard considerations of causation in the interest of serving, in practical effect, as a vehicle for punishment based largely upon outrage over defendants' behavior. Mass tort litigation has done so, however, with little regard for the constraints upon the process of moral condemnation that lie at the core of criminal law.

It would be noteworthy enough if the foregoing developments represented the response of the law to anomalous situations. As I explain at the end of this Part, however, recent events are not simply the products of unusual circumstances; rather, there are strong grounds upon which to believe that both the phenomenon of outra-

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the political accountability of prosecutors to the present day, as the authors of one leading treatise summarize,

[w]here appropriate decisionmaking requires consideration of numerous factors that vary with each case, an attempt to regulate that decision as to all of the situations likely to arise (assuming that they all could be envisioned) would require an elaborate statute, containing many detailed provisos, exceptions, and qualifications. Such a statute would often be cumbersome . . . . [E]ven where the law can appropriately regulate by reference to a few factually-based circumstances, it must be recognized that other circumstances generally deemed irrelevant may nonetheless have a just bearing on the exercise of authority in the exceptional case. . . . That need is exacerbated by the legislative tendency in the area of crime control to frame legislation with an eye to its political symbolism, to focus on the wors[t] scenario, and to overgeneralize . . . .

WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 7-8 (2d ed. 1992).

47. See *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged.”).

geous fortune and the associated influx of moral condemnation will persist in the mass tort disputes of the twenty-first century.

### A. *Scientific Causation*

Mass torts characteristically involve allegations of latent disease — harmful medical conditions that do not immediately manifest themselves upon exposure to the product in question. In this connection, the law of torts looks to the science of toxicology. As commentators have recognized, toxicology generates only aggregate estimates of risk, such as an estimate of the number of lung cancers that one would expect in a large group of smokers relative to the number that one would expect in a group of nonsmokers similar in other relevant respects.<sup>48</sup> The early scholarly literature on mass torts, in fact, explored the difficulties posed for plaintiffs by the insistence in conventional tort doctrine upon proof by a preponderance of the evidence that the product in question caused a particular, individual case of disease.<sup>49</sup>

Until recently, however, commentators have devoted relatively little attention to a different aspect of the problem: What if scientific research ultimately shows that the product does not increase the risk of disease at all? Illustrating this situation, several commentators have recounted in considerable detail the controversy surrounding the safety of silicone gel breast implants.<sup>50</sup> For present purposes, an overview of the essential events in this area will more than suffice.

#### 1. *When Initial Suspicions Prove Wrong*

The central question posed by lawsuits involving silicone gel breast implants is whether that product causes connective tissue diseases, either as conventionally conceived or in some new “atypical” form involving a constellation of symptoms not previously defined

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48. For an explanation of relative risk, see GREEN, *supra* note 19, at 28.

49. The leading article of this sort remains David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 851 (1984).

50. See MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE 50-68, 79-89 (1996); JOHN A. BYRNE, INFORMED CONSENT 71-81, 93-107, 165-85 (1996); Rebecca S. Dresser et al., *Breast Implants Revisited: Beyond Science on Trial*, 1997 WIS. L. REV. 705, 709-15; Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 330-39 (1996); see also Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 992-98 (1993).

by scientists.<sup>51</sup> All such diseases center upon the immune system. In essence, the fear is that silicone leaching from a breast implant somehow might trigger a response by the body that would turn the immune system against itself.<sup>52</sup>

For purposes of scientific causation, two additional facts stand out: Approximately one in every hundred women will develop some form of connective tissue disease for reasons that science has yet to understand fully; and roughly the same ratio of women in this country have received silicone gel breast implants.<sup>53</sup> As a result, one would expect "on the basis of chance alone" that some ten thousand women would have both connective tissue disease and implants.<sup>54</sup> From a scientific standpoint, then, the implant litigation turns upon the separation of causal relationships, if any, from mere coincidences.

As is typical of many mass tort disputes, the legal controversy surrounding breast implants started with multimillion-dollar verdicts in early, pathbreaking lawsuits: first for plaintiff Marcia Stern in 1984 and then for plaintiff Mariann Hopkins in 1991.<sup>55</sup> At the time, scientists had yet to initiate epidemiological studies that would compare the incidence of connective tissue diseases in women with and without implants.<sup>56</sup> In the absence of such studies, plaintiffs instead relied upon expert testimony that conveyed pre-

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51. For an explanation of connective tissue diseases, see ANGELL, *supra* note 50, at 21-22. As to the notion of "atypical" connective tissue diseases, see *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1402 (D. Or. 1996) (emphasizing that scientists have yet to settle upon the criteria by which to define such atypical forms of disease).

The fears regarding connective tissue diseases are distinct from the local complications that may result from the hardening or rupturing of the implant itself. See generally Sherine E. Gabriel et al., *Complications Leading to Surgery After Breast Implantation*, 336 NEW ENG. J. MED. 677, 681 (1997) (finding that nearly 24% of women with implants suffer complications serious enough to warrant reoperation within five years). Though certainly problematic in their own right, these local complications have not been the driving force of mass tort litigation against implant manufacturers. See ANGELL, *supra* note 50, at 21.

52. For a more detailed explanation of this asserted effect, see *Hall*, 947 F. Supp. at 1401.

53. See ANGELL, *supra* note 50, at 111. The absolute number of women in the United States who have received breast implants has been estimated to be between 815,000 and 2 million. See Joseph Sanders & D.H. Kaye, *Expert Advice on Silicone Implants: Hall v. Baxter Healthcare Corp.*, 37 JURIMETRICS J. 113, 114 n.4 (1997).

54. See ANGELL, *supra* note 50, at 111-12 (basing the 10,000 figure on a population estimate of 100 million U.S. adult women).

55. For a more detailed account of these lawsuits, see BYRNE, *supra* note 50, at 93-107, 165-71.

56. See ANGELL, *supra* note 50, at 27 ("[M]edical researchers did not systematically begin to collect evidence on breast implants until around the time of the FDA ban [in 1992], when several large [epidemiological] studies were initiated.").

liminary suggestions of causation drawn from animal studies, biophysical data, and the experts' own clinical observations.<sup>57</sup>

The pathbreaking implant lawsuits are noteworthy not simply for their outcomes but, even more significantly, for the revelation of troubling conduct on the part of implant makers — particularly the leading manufacturer, Dow Corning.<sup>58</sup> The essence of these revelations is that manufacturers, based upon their own internal experiments on laboratory animals during the 1960s and 1970s, had reason to suspect that silicone might trigger some sort of response in the immune systems of mammals but nonetheless proceeded forward with the marketing of breast implants.<sup>59</sup> The Stern case also featured evidence to suggest that Dow Corning had altered experimental data to disguise the results of one internal study indicating that silicone implants produced a response in the immune systems of laboratory dogs.<sup>60</sup>

The generation of a response in the immune system, of course, does not necessarily amount to the causation of disease; the whole point of immune systems, after all, is to keep the body healthy by combating intrusions of various sorts. Likewise, risks identified in laboratory animals do not necessarily translate into similar risks for humans.<sup>61</sup> Legitimate debate certainly remains over whether the benefits of implants — essentially psychological — are sufficiently great as to justify the availability of the product, even in the face of the early concerns about some form of immune system response. It is one thing, however, to press forward with the marketing of a

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57. See, e.g., *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1123-25 (9th Cir. 1994) (upholding the admission of such testimony under the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in the course of upholding the verdict for Hopkins). For a critical assessment of this testimony, see ANGELL, *supra* note 50, at 118-25.

58. See *In re Dow Corning Corp.*, 86 F.3d 482, 485 (6th Cir. 1996) ("Until it ceased their manufacture in 1992, Dow Corning was the predominant producer of silicone gel breast implants, accounting for nearly 50% of the entire market.").

59. See BYRNE, *supra* note 50, at 175-77 (summarizing documents used in Hopkins's lawsuit); see also *Hopkins*, 33 F.3d at 1119, 1127 (same). These documents later would form the basis for front-page news stories in the general-interest press. See *supra* note 2.

60. See BYRNE, *supra* note 50, at 103-04. Counsel for plaintiff Marcia Stern regarded this evidence as "a key reason . . . that the jury . . . [found] the company guilty of fraud." *Id.* at 104. Along similar lines, the jury in a class action in Louisiana state court recently found that Dow Corning's parent corporation, Dow Chemical, did "knowingly or intentionally remain silent, conceal or suppress information about the harms and dangers of using silicone in the human body." Thomas M. Burton, *Dow Chemical Found Negligent in Silicone Case*, WALL ST. J., Aug. 19, 1997, at A3 (quoting a question posed to the jury). The Louisiana court subsequently dissolved the class prior to the next anticipated phase of trial, which was to have focused upon damages. See *Judge Limits Lawsuits over Breast Implants in a Louisiana Case*, N.Y. TIMES, Dec. 3, 1997, at A23.

61. On the difficulties associated with inferring risk in humans based upon research on laboratory animals, see GREEN, *supra* note 19, at 35-36.

product with disclosure to consumers of any lingering uncertainty about its long-term effects; it is quite another to put the product on the market while saying nothing in the face of what were, at the very least, red flags. In any event, from the apportionment of compensatory and punitive damages in the pathbreaking implant lawsuits, one can sense the impact that these revelations had upon juries, as compared to the more murky issue of scientific causation: Stern received \$211,000 in compensatory damages coupled with \$1.5 million in punitive damages;<sup>62</sup> Hopkins received \$840,000 in compensatory damages plus \$6.5 million in punitive damages.<sup>63</sup>

The documentary evidence of implant manufacturers' conduct, however, had implications far beyond individual cases. Media attention brought the controversy to the public eye in 1990, "convey[ing] the clear message that implants were dangerous devices foisted off on unsuspecting women."<sup>64</sup> The documents themselves soon found their way by back channels to federal Food and Drug Administration (FDA) Commissioner David Kessler,<sup>65</sup> whose agency subsequently imposed a moratorium on silicone gel implant sales that remains in effect to the present day.<sup>66</sup> By then, Dow Corning had ceased to manufacture the product.<sup>67</sup>

Regulatory action, however, was not the end of the story. As one observer has remarked,

once it got out that a link between [implants and connective tissue diseases] had been accepted in court, women who had both . . . would be bound to consider whether they, too, should sue. Even those who only thought they might have connective-tissue-like disease also began to take notice.<sup>68</sup>

The understandable suspicions of women with implants coincided with the economic opportunity that implant litigation offered both to mass tort plaintiffs' attorneys, some of whom set up "assembly

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62. See BYRNE, *supra* note 50, at 105.

63. See *Hopkins*, 33 F.3d at 1119-20.

64. ANGELL, *supra* note 50, at 53 (describing a report on the CBS television program *Face to Face with Connie Chung*); see also BYRNE, *supra* note 50, at 121 (quoting one pathologist interviewed on the same program as stating, as a scientific fact, that "[s]ilicone gets right into the heart of the immune system").

65. There is considerable doubt about the propriety of the transfer of documents from Hopkins's attorney to Dr. Kessler via an intermediary in the public health community. Much of the documentation ostensibly was under a protective order at the time. See BYRNE, *supra* note 50, at 175.

66. On the decisionmaking process and justification for the FDA's action, see generally David A. Kessler, *The Basis of the FDA's Decision on Breast Implants*, 326 NEW ENG. J. MED. 1713 (1992).

67. See *supra* note 58.

68. ANGELL, *supra* note 50, at 112.

line" office procedures to conduct the legal representation of such women,<sup>69</sup> and to members of the medical profession, some of whom would earn millions of dollars for the handling of "bulk referrals" from plaintiffs' lawyers.<sup>70</sup>

Within two years of the FDA moratorium and the revelations about the behavior of manufacturers, approximately 16,000 women had filed suit nationwide.<sup>71</sup> The sheer number of actions led initially to the consolidation of federal implant suits by the Panel on Multidistrict Litigation (MDL Panel) before District Judge Sam Pointer<sup>72</sup> and later, in 1994, to an attempt to resolve all present and future implant claims through a multibillion-dollar class action settlement.<sup>73</sup> The settlement sought to establish a private compensation scheme that promised specific payments for particular diseases, subdivided by severity.<sup>74</sup> Claimants would be required to submit little more than documentation that they had received a silicone gel breast implant; no further showing of causation was required,<sup>75</sup> the settlement having factored the uncertainty on that score into the compensation scheme.

Subsequent guidance from the Supreme Court sheds considerable doubt upon the legal basis for certification of settlement class actions, particularly in the mass tort area.<sup>76</sup> In its time, however,

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69. See Max Boot, *Queen of Torts*, WALL ST. J., May 16, 1996, at A14 (characterizing the law firm of Williams & Troutwine as such); see also Max Boot, *A Tale of Silicone City*, WALL ST. J., Nov. 29, 1995, at A14 (characterizing similarly O'Quinn, Kerensky, McAninch & Laminack).

70. See Gina Kolata & Barry Meier, *Implant Lawsuits Create a Medical Rush To Cash In*, N.Y. TIMES, Sept. 18, 1995, at A1.

71. See Gina Kolata, *Details of Implant Settlement Announced by Federal Judge*, N.Y. TIMES, Apr. 5, 1994, at A16. The most significant individual verdict during this period came in an action brought in Texas by plaintiff Pamela Johnson. The jury awarded \$5 million in compensatory damages and \$20 million in punitive damages. See Amy Singer, *Look over Here*, AM. LAW., Mar. 1993, at 86, 87. Indeed, shortly thereafter, *The American Lawyer* offered readers a videotape detailing how Johnson's lawyer, John O'Quinn, had managed to "direct[] the jury's attention . . . toward the least assailable aspects of his case" and away from the uncertainties surrounding scientific causation. See *id.*

72. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

73. See *Lindsey v. Dow Corning Corp.*, No. CV94-P-11558-S, 1994 U.S. Dist. LEXIS 12521, at \*1 (N.D. Ala. Sept. 1, 1994). But cf. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2238-39 & n.3 (1997) (holding that the consolidation of pending federal lawsuits by the MDL Panel does not, in itself, provide authority for the disposition of future claims).

74. See Breast Implant Litigation Settlement Notice at 6, *Lindsey v. Dow Corning Corp.*, No. CV94-P-11558-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (on file with author).

75. See *Lindsey*, 1994 U.S. Dist. LEXIS 12521, at \*5.

76. Certification of a nationwide class of implant recipients for purposes of settlement suffers from virtually all of the same flaws that the Supreme Court recently found to doom a class action settlement in the asbestos context. See *Amchem Prods.*, 117 S. Ct. at 2249-52 (holding that formidable differences amongst class members' claims, circumstances of expo-

the settlement fell apart for a more practical reason: an unexpectedly large number of claims — by then, some 440,000 — quickly made it clear that the fixed sum of \$4.2 billion set aside by manufacturers for purposes of the settlement would be grossly insufficient to fund the compensation payments described therein.<sup>77</sup> Shortly before the collapse of the settlement, Dow Corning sought protection under Chapter 11 of the Bankruptcy Code,<sup>78</sup> and the proceedings thereunder continue to grind slowly forward.<sup>79</sup>

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sure, and financial interests preclude class certification under Federal Rule of Civil Procedure 23(b)(3)). In light of the Court's reasoning in *Amchem Products*, academic commentators have opined that nationwide class action settlements in the mass tort area rarely, if ever, will satisfy the requirements for class certification set forth in the current Rule 23 of the Federal Rules of Civil Procedure. See John C. Coffee, Jr., *After the High Court Decision in 'Amchem Products Inc. v. Windsor,' Can a Class Action Ever Be Certified Only for the Purpose of Settlement?*, NATL. L.J., July 21, 1997, at B4; Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. Rev. 1773, 1778 (1997).

The prospects for revision of Rule 23 in such a way as to loosen, much less undo, the strictures of *Amchem Products* likewise appear slim. See Linda S. Mullenix, *Court Settles Settlement Class Issue*, NATL. L.J., Aug. 11, 1997, at B12 (considering it "highly unlikely" that a preexisting proposal to revise Rule 23 will continue forward as formulated and speculating that, even if it did, "it is highly dubious that the same nine justices will then approve a rule they apparently have rejected in *Amchem*"). Indeed, the Court itself has alluded to serious questions about the viability of any class action settlements that would seek to resolve future mass tort claims — which any settlement must attempt to do in order to offer peace of mind to defendants. In contrast to the text of Rule 23, these concerns are not amenable to legislative tinkering, for they go to constitutional limitations upon both personal jurisdiction and the authority of the federal courts. Cf. *Amchem Prods.*, 117 S. Ct. at 2252 (declining to rule upon the adequacy of notice to class members under the Due Process Clause, but noting that "[m]any persons" who merely have been exposed to asbestos "may not even know of their exposure, or realize the extent of the harm they may incur"); 117 S. Ct. at 2244 (acknowledging but finding it unnecessary to resolve objections based upon Article III).

77. See *In re Dow Corning Corp.*, 86 F.3d 482, 485, 486 n.4 (6th Cir. 1996). By its terms, the settlement afforded implant recipients the opportunity to opt out of the deal in the event of such a precipitous reduction of compensation levels. See *Lindsey*, 1994 U.S. Dist. LEXIS 12521, at \*22-24.

78. See *Dow Corning*, 86 F.3d at 486. On the major features and significance of Chapter 11, see *infra* section II.A.2. As to the reasons for use of this particular chapter of the Bankruptcy Code in the mass tort context, see DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 90 (rev. ed. 1993) ("Most bankruptcy cases involving mass torts are filed under Chapter 11 [providing for reorganization of the debtor], rather than Chapter 7 [providing for liquidation of the debtor's assets]."). Whether the Bankruptcy Code should provide a reorganization alternative to liquidation in the first place remains a debated point. See generally THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY* 209-24 (1986); Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127 (1986).

79. For their part, manufacturers other than Dow Corning proposed a revised settlement to compensate those women who received implants made by those particular companies. See Barry Meier, *3 Implant Companies Offer a New Settlement*, N.Y. TIMES, Oct. 3, 1995, at A1. Compensation from the non-Dow Corning manufacturers would not come from a fixed sum set aside for that purpose. Rather, the companies would be obligated to pay compensation at the levels specified in the settlement, though those levels would be less than the ones described in the original deal. Claimants also would have to "submit more medical documentation than required by the first settlement and could have to undergo new tests." *Id.*

In the meantime, however, a substantial body of epidemiological studies failed to demonstrate a causal connection between implants and connective tissue diseases, as conventionally defined — so extensive a body of research that observers began to ask whether the implant litigation is “a case of justice, or a total travesty.”<sup>80</sup> A 1996 review of the epidemiological literature by FDA scientists — including Dr. Kessler himself — arrived at much the same conclusion on scientific causation,<sup>81</sup> as did professional scientific organizations in this country and regulatory agencies in other Western nations.<sup>82</sup> The weakness of any remaining indications to the contrary is reinforced by two recent district court opinions, rejecting as insufficiently grounded in science expert testimony offered to show that implants cause connective tissue diseases — either in a conventional or an atypical form.<sup>83</sup> Both courts, however, declined to dismiss implant plaintiffs’ cases outright, pending review of the available scientific research by a national committee of experts appointed by Judge Pointer to assist the federal judiciary in determining the admissibility under the Federal Rules of Evidence of expert

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80. Gina Kolata, *A Case of Justice, or a Total Travesty?*, N.Y. TIMES, June 13, 1995, at C1 (surveying the epidemiological literature). For an even more alarmed assessment, see Max Boot, *The Tort Case That Killed the Truth*, WALL ST. J., June 26, 1996, at A16.

81. See Barbara G. Silverman et al., *Reported Complications of Silicone Gel Breast Implants: An Epidemiologic Review*, 124 ANNALS INTERNAL MED. 744, 754-55 (1996) (noting that epidemiological research has “tended to rule out large increases in risk for connective tissue disease” but could not yet exclude completely the prospect of atypical disease).

82. See ANGELL, *supra* note 50, at 201-02.

83. In *Hall v. Baxter Healthcare Corp.*, Judge Robert Jones flatly deemed “irrelevant any testimony or evidence of . . . ACTD [atypical connective tissue disease]” or of “any systemic illness or syndrome or autoimmune disorder of any kind.” 947 F. Supp. at 1414. Likewise, in *In re Breast Implant Cases*, Judges Harold Baer and Jack Weinstein, in a joint opinion, emphasized not only that current science “supports the conclusion that the silicone implants at issue do not cause classical recognized [connective tissue] diseases,” but also that science has yet to offer more than a “scintilla of plausibility” for the further claim of atypical disease. 942 F. Supp. 958, 960-61 (E. & S.D.N.Y. 1996). In these judges’ words,

[t]he hundreds of symptoms associated with [atypical connective tissue] disease, the lack of any acceptable agreed upon definition, the inadequacy of any satisfactory supporting epidemiological or animal studies, the lack of a scientifically acceptable showing of medical plausibility, and the questionable nature of the clinical conclusions of treating doctors, all point to a failure of proof in making a prima facie case that silicone implants cause any of the [atypical] syndromes claimed . . . .

942 F. Supp. at 961 (acknowledging, however, that implants may lead to local complications).

As a procedural matter, *Hall* arose from 15 consolidated cases brought by Oregon women against manufacturers other than Dow Corning. In the wake of the collapse of the class action settlement, Judge Pointer had remanded these cases for trial in the District of Oregon. See 947 F. Supp. at 1392. Likewise, the judges in the *Breast Implant Cases* issued their opinion in anticipation of similar action with respect to cases originally filed in New York. See 942 F. Supp. at 959.



testimony as to the existence of causation in the face of extensive research to the contrary.<sup>84</sup>

One could draw upon the breast implant experience as a vehicle through which to address any number of important questions, from the wisdom of permitting juries to render verdicts in early, path-breaking lawsuits when the then-available scientific research on causation is sketchy and preliminary at best,<sup>85</sup> to the need for improved coordination of the tort system and regulatory agencies like

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84. See *Hall*, 947 F. Supp. at 1415; *Breast Implant Cases*, 942 F. Supp. at 961. The notion that tentative fears of scientific causation ultimately might prove untrue is not confined to mass tort litigation over breast implants. One may find an earlier illustration of the same phenomenon in the litigation over Bendectin, a drug prescribed to reduce morning sickness during pregnancy. Early lawsuits generated mixed results, with some notable victories for plaintiffs who alleged that Bendectin caused birth defects in children in the form of horrible limb deformities. See Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 6 tbl.1 (1993) (summarizing results in Bendectin lawsuits).

These early lawsuits had the salutary effect of bringing to light conduct that, if anything, exceeds that of implant manufacturers in its lack of concern for consumer safety. See GREEN, *supra* note 19, at 128 (noting that the results of internal experiments on rabbits resembled early indications of the disastrous birth defects previously associated with the sedative thalidomide); *id.* at 129 (noting the reclassification of reports that children exposed to Bendectin had suffered birth defects so as to deflect further inquiry from doctors). Later lawsuits, undertaken in the face of a growing epidemiological literature that failed to show scientific causation, ultimately turned the tide in favor of the defense. See *id.* at 274; Sanders, *supra*, at 4-12.

The early Bendectin verdicts did not precipitate an avalanche of lawsuits on a scale similar to the implant litigation and, hence, did not create a need to resort to either bankruptcy or a class action settlement. But this feature is attributable to factors that distinguish the Bendectin experience from the implant example and, if anything, support the inference that the latter is more likely to be characteristic of future disputes over scientific causation. The Bendectin litigation arose in the early 1980s, before the full-fledged development of a highly coordinated mass tort plaintiffs' bar with the capacity quickly to bring forth claims in large numbers and on a national scale. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480 (1994) (attributing "[t]he speed with which the number of breast implant cases exploded on the scene" in part to "a well-organized plaintiffs' bar, which now has the capital, organizational skills, and advertising techniques to seek clientele"); *cf.* Hensler & Peterson, *supra* note 50, at 1026 (discussing the innovative techniques developed by the mass tort plaintiffs' bar to support implant litigation, including the creation by some 150 lawyers of an "information clearing-house" on the subject). Moreover, even if all potential Bendectin claims had been litigated, they would have amounted to roughly 115,000-168,000 in total, see GREEN, *supra* note 19, at 221, as compared to the over 440,000 implant claims, the defense of which pushed Dow Corning into bankruptcy in the wake of the proposed class action settlement.

In short, the Bendectin experience further attests to the notion that suspicions of scientific causation may prove unfounded, without dispelling the need to assess the merits of bankruptcy as a vehicle of resolution.

85. A full-scale exposition of this significant question is beyond the scope of this article. At least with respect to early breast implant cases such as *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994), the problem does not appear to be one of slipshod scientific methodology, insofar as the plaintiffs' experts appear to have relied upon modes of inquiry that reputable toxicologists use to identify products that may warrant closer examination through more elaborate toxicological studies. See *supra* note 57 and accompanying text. At this early juncture, the problem is not so much one of admissibility as it is one of sufficiency: whether scientific knowledge in such a preliminary state should be considered sufficient to permit the case to go to the jury at all.

the FDA.<sup>86</sup> For present purposes, the implant litigation is equally notable for the light that it sheds upon the similarity between mass tort litigation and criminal law objectives and remedies.

## 2. *Bankruptcy as Moral Condemnation*

Reorganization proceedings under Chapter 11 have become a familiar feature of the mass tort landscape and are likely to remain so.<sup>87</sup> In fact, a recent report to Congress by the National Bankruptcy Review Commission counsels the enactment of measures to facilitate even greater use of Chapter 11 in this area.<sup>88</sup>

The most widely known application of Chapter 11 in the mass tort context remains the lengthy reorganization of the Johns-Manville Corporation, the leading member of the asbestos industry.<sup>89</sup> By the time the asbestos litigation had advanced to that point, however, the harmful nature of the underlying product was beyond serious dispute. No substantial doubt remained as to the existence of a causal relationship, extensively documented in the scientific literature, between the inhalation of asbestos and any number of serious diseases.<sup>90</sup> The same was true with respect to the tort claims concerning the Dalkon Shield contraceptive device that precipitated the bankruptcy of the A.H. Robins Company.<sup>91</sup> In these situations, with the underlying merits of tort claims against the debtor corporation well established, bankruptcy serves its accustomed role simply as a procedure for the orderly resolution of competing claims — in essence, as a way to avoid a madcap rush of meritorious creditors upon the debtor.<sup>92</sup>

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86. For my prescriptions on this subject, see Nagareda, *supra* note 50, at 351-67.

87. On the challenges of Chapter 11 bankruptcies in the mass tort context, see, e.g., Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984); Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367 (1994).

88. See NATIONAL BANKR. REVIEW COMM., *BANKRUPTCY: THE NEXT TWENTY YEARS* 315-50 (1997). For example, the Commission recommends amendment of the Bankruptcy Code to provide explicitly for the appointment of "a mass future claims representative," *id.* at 329, and for authority on the part of the bankruptcy court "to make determinations of the present value of mass future claims," *id.* at 342. Perhaps most strikingly, the Commission's proposal contemplates the possibility that property of the debtor might be transferred to a successor corporation "free and clear of mass future claims" under certain circumstances. See *id.* at 347. I leave for another day the wisdom of these recommendations.

89. See generally Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 596-617 (1996) (recounting the history of the Manville reorganization).

90. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 739 (Bankr. E. & S.D.N.Y. 1991) ("The capacity of asbestos fibers to cause serious injuries is no longer disputed."), *revd. on other grounds*, 982 F.2d 721 (2d Cir. 1992).

91. See generally RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALCON SHIELD BANKRUPTCY* (1991).

92. See JACKSON, *supra* note 78, at 12-13.

When the merits of the underlying tort claims are open to doubt, the reorganization process set forth in Chapter 11 takes on a different light. Here, the process itself acts as a vehicle for condemnation of the defendant manufacturers' conduct, wholly apart from the causation of harm. In fact, those who defend the application of Chapter 11 in the mass tort context lapse, on occasion, into rhetoric vaguely familiar to the criminal law. For example, it is commonplace to see bankruptcy described as a vehicle with a praiseworthy "capacity for debtor rehabilitation."<sup>93</sup> In criminal law, notions of rehabilitation are closely connected to the moral condemnation of the defendant's earlier conduct. The whole point of rehabilitation, of course, is not merely to deter future misdeeds through the fear of punishment, though deterrence too is a familiar objective of criminal sanctions. Instead, rehabilitation seeks to change the defendant's moral compass itself, such that he will make better choices in the future. Consistent with a notion of promoting change in the way a debtor corporation conducts its business, Chapter 11 proceedings often coincide with the replacement of corporate managers,<sup>94</sup> though that is not actually required by the Bankruptcy Code.<sup>95</sup> Indeed, invocation of Chapter 11 can be the source of considerable public shame for the corporation,<sup>96</sup> even as it stays tort litigation.<sup>97</sup> As one commentator has observed, there is a long-term "stigma of Chapter 11 in the marketplace."<sup>98</sup>

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93. *E.g.* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1460 n.468 (1995).

94. There is some uncertainty in the empirical literature as to the precise rate of turnover. Compare Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597, 610 (1993) (reporting a 70% turnover rate for the chief executive officer during or in contemplation of reorganization, based upon a study of 43 bankruptcies under Chapter 11 involving large, publicly traded firms) with Stuart C. Gilson & Michael R. Vetsuypens, *CEO Compensation in Financially Distressed Firms: An Empirical Analysis*, 48 J. FIN. 425, 442 (1993) (reporting a 39.2% turnover rate before or during reorganization, based upon a study of 77 publicly traded firms that either filed for bankruptcy under Chapter 11 or restructured their debt outside of bankruptcy).

95. The presumption of Chapter 11 "is the reverse: namely, that Chapter 11 allows the debtor-in-possession to retain management and control of the debtor's business operations unless a party can prove that appointment of a trustee is warranted." Coffee, *supra* note 93, at 1460 n.468.

96. Dow Corning's action in this regard met with formidable adverse coverage from the general-interest press. See, e.g., Stephen Labaton, *Don't Sue, They Say. We Went Bankrupt.*, N.Y. TIMES, May 21, 1995, § 4, at 16; Don Lee et al., *Twice Distressed*, L.A. TIMES, May 16, 1995, at D1.

97. See 11 U.S.C. § 362(a)(1) (1994). This, of course, is the major advantage to Chapter 11 from the standpoint of a manufacturer that otherwise would have to fund the defense of tort suits.

98. Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J. FIN. 1067, 1071 (1984).

The principal feature of a Chapter 11 proceeding consists of the formulation of a reorganization plan<sup>99</sup> that satisfies principles of absolute priority — that tort creditors shall be paid ahead of many other sorts of creditors, including shareholders — and temporal equity — that “creditors within the same class [shall] be treated equally, regardless of when their claims mature.”<sup>100</sup> In fact, some commentators have pointed specifically to these limitations as grounds for the superiority of Chapter 11 over other means, such as class action settlements, for the safeguarding of future mass tort claimants.<sup>101</sup> In addition, the Bankruptcy Code limits the business operations of the debtor corporation during the formulation of a reorganization plan, such that initiatives beyond the ordinary course of business cannot go forward to the detriment of creditors’ interests.<sup>102</sup>

Although the objective behind Chapter 11 is to enable the debtor corporation to continue as a going concern on the theory that this will produce more value for creditors than outright liquidation of the debtor’s assets,<sup>103</sup> the wrangling over the reorganization plan itself can be lengthy.<sup>104</sup> Dow Corning reportedly invoked Chapter 11 as part of a strategy to obtain a quick, definitive determination of whether breast implants are capable of causing auto-

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99. For an overview of the reorganization process under Chapter 11, see BAIRD, *supra* note 78, at 230-46.

100. Coffee, *supra* note 93, at 1458; see also Roe, *supra* note 87, at 852-54. For an explanation of how these principles affect the voice that creditors will be given in the reorganization plan, see BAIRD, *supra* note 78, at 81.

101. See Coffee, *supra* note 93, at 1459 (“Although in practice bankruptcy reorganizations may not always fully comply with these two normative principles, mass tort class action settlements violate both principles openly and egregiously.”).

102. See DAVID G. EPSTEIN ET AL., BANKRUPTCY § 10-5, at 738 (1993) (“The court may condition or prohibit use of various forms of collateral including buildings, machinery, equipment, fixtures, inventory, or cash and accounts receivable generated by the business; pass on certain business decisions of the debtor; and approve or disapprove financing arrangements and credit transactions made outside of the ordinary course of business.”); Altman, *supra* note 98, at 1071 (noting that the indirect costs of bankruptcy include “lost managerial opportunities”).

103. See Lucian Arye Bebchuk, *A New Approach to Corporate Reorganization*, 101 HARV. L. REV. 775, 776 (1988); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1043-44 (1992).

104. Even absent questions of scientific causation, the trust ultimately established to compensate tort creditors of Johns-Manville took some 13 years to become operational. See Macchiarola, *supra* note 89, at 583, 598 (reporting that Manville filed for bankruptcy in 1982 but that the trust did not begin substantial operation until 1995).

immune disorders,<sup>105</sup> but such a determination has yet to come.<sup>106</sup> Today, more than two years after the filing of Dow Corning's Chapter 11 petition, competing reorganization plans continue to be tossed back and forth between representatives of the debtor corporation and those of tort claimants.<sup>107</sup> In fact, the bankruptcy court recently rejected the proposals put forward by both groups, calling upon them to hammer out a joint reorganization plan.<sup>108</sup> Here, the process itself — even one that someday might deem tort claims to be worthless — operates as a kind of purgatory.

This experience is consistent with the growing empirical literature that has led some to question the wisdom of Chapter 11 as a whole.<sup>109</sup> Estimates of the direct costs associated with Chapter 11 proceedings — legal and other administrative costs involved in the formulation and approval of a reorganization plan — have been in the neighborhood of three to six percent of the firm's prebankruptcy value.<sup>110</sup> Indirect costs — a notoriously difficult phenomenon to measure, consisting of the business opportunities lost due to the pendency and stigma of reorganization proceedings<sup>111</sup> — may be even higher.<sup>112</sup>

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105. See Alison Frankel, *Dow Corning Goes for Broke*, AM. LAW., Jan.-Feb. 1996, at 78, 80. Scientific causation is the crucial consideration in the determination of the value, if any, that the bankruptcy court should assign to tort claims against Dow Corning.

106. See *In re Dow Corning Corp.*, 187 B.R. 919, 929 (Bankr. E.D. Mich. 1995) (declining to place the initial focus of reorganization proceedings upon the valuation of pending tort claims).

107. See Thomas M. Burton, *Dow Corning Creditors Offer Proposal That Would Give Them Stake in Firm*, WALL ST. J., Dec. 18, 1996, at A4 (comparing reorganization plans offered by Dow Corning and tort creditors).

108. See *In re Dow Corning Corp.*, 211 B.R. 545, 602-03 (Bankr. E.D. Mich. 1997). In the aftermath of the bankruptcy judge's decision to reject both proposals, Dow Corning has put forth yet another reorganization plan under which it would pay \$2.4 billion to implant recipients. "Under the [proposed] plan, women could receive \$650 to \$200,000, based on their claims of injury, how well the claims were documented and how many women voted to accept the settlement." Gina Kolata, *Dow Corning Seeks to Settle Implant Cases*, N.Y. TIMES, Aug. 26, 1997, at D1.

109. For overviews of the empirical literature supporting criticism of Chapter 11, see, e.g., Barry E. Adler, *A Theory of Corporate Insolvency*, 72 N.Y.U.L. REV. 343, 350 & n.24 (1997); Douglas G. Baird, *Revisiting Auctions in Chapter 11*, 36 J.L. & ECON. 633, 641-45 (1993).

110. Compare Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 J. FIN. ECON. 285, 290 (1990) with Altman, *supra* note 98, at 1077-78. See also Michelle J. White, *Bankruptcy Costs and the New Bankruptcy Code*, 38 J. FIN. 477, 484 (1983) (estimating direct costs as six percent of the amount paid to creditors by way of reorganization).

111. See Altman, *supra* note 98, at 1071 (citing examples of indirect costs); *id.* at 1072 (acknowledging that "indirect costs are illusive and difficult to specify, let alone measure"); Weiss, *supra* note 110, at 288 (offering a similar description of indirect costs and calling them "unmeasurable").

112. See Altman, *supra* note 98, at 1077-78 (estimating indirect costs at 10% of prebankruptcy value). *But cf.* Adler, *supra* note 109, at 351 n.25 (cautioning that Altman's data constitute "a rough estimate").

For many firms . . . simply preserving the status quo for two or three years will come at a large cost. Managers preoccupied with a Chapter 11 reorganization may not make the bold and innovative decisions needed to remain competitive, or they may not make them soon enough. Even if Chapter 11 only slows down the development of a new product, such a delay may itself be fatal in some industries. In some high-technology industries, a product that is only a step behind the competition may not even be marketable.

Costs such as these, however, are not easy to measure.<sup>113</sup>

Taking a slightly different approach, other commentators have pointed to dramatic reductions in returns to shareholders in bankrupt firms under the current Chapter 11 as evidence of “the stock market’s expectation that the reorganization process itself will exact greater losses . . . than under prior law.”<sup>114</sup> The process of Chapter 11 thus is costly in itself.

It is a familiar adage in criminal law that a defendant might “beat the rap, but he can’t beat the ride”<sup>115</sup> — in other words, that the process for the determination of guilt in the criminal system can be arduous in itself, even if the jury ultimately finds the defendant not guilty. With regard to mass tort bankruptcies, the foregoing analysis of Chapter 11 indicates that “the ride” can be quite severe in its own right. It is one thing for a mass tort defendant to be put in the position of invoking Chapter 11 as a way to provide, admittedly at considerable transaction cost, for the orderly disposition of thousands of meritorious claims. As commentators have observed, individuals who happen to manifest disease years or decades in the future as a causal result of the defendant’s product might stand little chance of recovery absent the establishment of a viable framework for the payment of claims over such an extended time period.<sup>116</sup> It is quite another thing for a defendant to be put in the position of invoking Chapter 11 to deal with a deluge of litigation predicated largely upon the perceived blameworthiness of its conduct, apart from whether its product actually caused harm to anyone.<sup>117</sup> That is a use of bankruptcy whose practical effect is to serve as a vehicle for moral condemnation in its own right and for its own sake, not simply as a process for the orderly payment of claims that

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113. Baird, *supra* note 109, at 643-44.

114. Bradley & Rosenzweig, *supra* note 103, at 1069.

115. I am grateful to John Robertson for drawing my attention to this adage.

116. On the difficulties of providing adequately for the compensation of future claimants, see, e.g., Smith, *supra* note 87, at 383-97.

117. See *infra* section II.C (explaining the strategic considerations and expectations about jury decisionmaking that lead to the bringing of such lawsuits in the first place and to the invocation of Chapter 11 by defendants, notwithstanding serious doubts about causation).

satisfy the substantive requirements of some *other* body of law: namely, tort.<sup>118</sup>

Some might say that manufacturers like Dow Corning did not act in a manner worthy of moral rebuke when they declined to scare consumers with tentative — now, in retrospect, unfounded — suspicions about adverse effects upon the immune system. Others might say that the marketing of implants without a peep about such a possibility is eminently worthy of moral condemnation. Whatever one's personal reaction, however, it is clear that there has been no determination that moral condemnation is warranted through the process of public deliberation and political accountability on which the law ordinarily relies when condemnation is the dominant objective. As I discuss in greater depth later,<sup>119</sup> however one reads the record, it clearly was not the conscious objective of Dow Corning to cause connective tissue disease; here, there is not the culpable mental state that criminal law ordinarily would demand for the condemnation of conduct that falls short of a completed crime.<sup>120</sup>

Insofar as the reorganization process under Chapter 11 has served as a vehicle for the condemnation of defendants, it has done so without any of the salient constraints that characterize criminal law. One hardly could have anticipated that Chapter 11 would become a vehicle for such a reworking of the conventional tort-crime distinction. That it has so served, by all appearances unwittingly, suggests deeper forces at work. But the breast implant litigation is not the only indication that the conventional tort-crime distinction has eroded. The most remarkable evidence has come elsewhere.

### B. *Risk-Decisional Causation*

The tobacco litigation is perhaps the most prominent illustration of the influx of criminal law principles into mass tort litigation.<sup>121</sup> It combines what many consider to be shockingly high levels of blameworthiness with substantial questions of risk-decisional causation. I identify below the major features of the conduct at the heart of the tobacco wars, noting the strategic considerations on the part of the mass tort plaintiffs' bar that have led it to focus upon defend-

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118. The typical claims against a debtor corporation, of course, arise under the law of contract.

119. See *infra* section III.B.2.

120. See *supra* note 38 and accompanying text (observing that purposeful conduct is ordinarily required for attempt crimes).

121. Cf. Anita Bernstein, *Better Living Through Crime and Tort*, 76 B.U. L. REV. 169, 172 (1996) (alluding, in passing, to the similarities between aspects of the tobacco litigation and criminal law principles).

ants' blameworthiness. I then discuss the existence of independent sources of information concerning the risks of smoking — especially the notion that smoking can be difficult to quit — and relate the debate on that score to the tort requirement of causation.

### 1. *Addiction and Fraud*

Nicotine is why people smoke, at least as a matter of biochemistry. Nicotine triggers the release of dopamine in the brain, a neurotransmitter associated with sensations of pleasure.<sup>122</sup> For this reason, cigarettes “have served generations of men and women, in periods of acute distress, as an incomparable tool for managing and mitigating anxiety.”<sup>123</sup> Nicotine also improves mental efficiency and information processing.<sup>124</sup> Although nicotine is by no means innocuous in its own right, tar is the major cause of smoking-related disease.<sup>125</sup> In recent years, the tobacco industry has moved increasingly to the production of low-tar cigarettes in light of public concern over lung cancer, emphysema, and other diseases, but inhalation of at least some tar still remains inherent in the act of smoking a conventional cigarette;<sup>126</sup> and smoking remains the method by which to get nicotine into the bloodstream “more efficiently than almost anything else.”<sup>127</sup>

Early efforts to sue the tobacco industry in tort based simply upon the link between smoking and lung cancer, among other diseases, proved dismally unsuccessful.<sup>128</sup> In its landmark decision in *Cipollone v. Liggett Group, Inc.*,<sup>129</sup> the Supreme Court held that government-mandated warnings on cigarettes preempt tort actions predicated upon the failure to provide warnings with content other

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122. For concise explanations in lay terms of the basic biochemistry of nicotine in the brain, see, e.g., JORDAN GOODMAN, *TOBACCO IN HISTORY: THE CULTURES OF DEPENDENCE* 5-6 (1993); *The Science of Smoking*, *ECONOMIST*, May 11, 1996, at 22.

123. RICHARD KLEIN, *CIGARETTES ARE SUBLIME* 184 (1993).

124. See generally Keith Wesnes, *Nicotine Increases Mental Efficiency: But How?*, in *TOBACCO SMOKING AND NICOTINE: A NEUROBIOLOGICAL APPROACH* 63-79 (William R. Martin et al. eds., 1987).

125. See Barry Meier, *Hunt for Safe Cigarettes: Study in Failure*, *N.Y. TIMES*, July 3, 1997, at A8.

126. Cf. *id.* (discussing efforts to develop new types of cigarettes that would reduce tar intake).

127. *The Science of Smoking*, *supra* note 122, at 22; cf. GOODMAN, *supra* note 122, at 6 (comparing nicotine absorption from cigarette smoking with that from the use of other forms of tobacco).

128. On these early attacks, see Robert L. Rabin, *Institutional and Historical Perspectives in Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS, & CULTURE* 110 (Robert L. Rabin & Stephen D. Sugarman eds., 1993); Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS, & CULTURE*, *supra*, at 131.

129. 505 U.S. 504 (1992).



than that required by federal law.<sup>130</sup> The Court, however, notably left open the possibility of lawsuits that center upon fraud accomplished through other means — for example, the fraudulent misrepresentation of a material fact or the concealment thereof in ways that do not turn upon product warnings.<sup>131</sup> Apart from the technical niceties of federal preemption law, an even more significant practical barrier existed to suits against the tobacco industry: plaintiffs' lawyers came away with the distinct impression that jurors were unsympathetic to their clients' demands — specifically, that jurors tended to believe that, however harmful smoking might be, individuals choose to smoke and thus should have to face the consequences of their own actions.<sup>132</sup>

The recent legal assaults upon the tobacco industry have taken several forms, including conventional tort suits brought by individuals, class actions, suits by state attorneys general seeking to recoup Medicaid expenditures for smoking-related diseases, and regulatory initiatives by the federal FDA directed to the marketing and advertising of cigarettes.<sup>133</sup> The common theme, replayed in each of these contexts and virtually invited by the holding in *Cipollone*, centers upon information about the nature of nicotine. In essence, the argument is that the tobacco industry did not simply fail to warn consumers about the addictiveness of nicotine, but that the industry committed outright fraud by conveying misinformation as part of a strategy to produce and maintain addiction in smokers, including the young.<sup>134</sup>

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130. See 505 U.S. at 530-31 (plurality opinion); see also 505 U.S. at 544 (Scalia, J., concurring in part and dissenting in part) (concluding that federal labeling requirements preempt all tort actions).

131. See 505 U.S. at 528 (plurality opinion); see also 505 U.S. at 531 (Blackmun, J., concurring in part and dissenting in part) (concluding that federal labeling requirements do not preempt common law tort actions in any form).

132. See Rabin, *supra* note 128, at 124; Benjamin Weiser, *Tobacco's Trials*, WASH. POST, Dec. 8, 1996, Magazine at 19.

133. For a summary of these various attacks, see Paul A. LeBel, "Of Deaths Put on by Cunning and Forced Cause": Reality Bites the Tobacco Industry, 38 WM. & MARY L. REV. 605, 615-35 (1997) (reviewing STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996); PHILIP J. HILTS, *SMOKESCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* (1996); and KLUGER, *supra* note 7).

134. For an overview by two prominent antitobacco activists of the allegations with regard to nicotine addiction as they relate to both tort litigation and state Medicaid actions, see Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POLY. REV. 63, 73-82 (1997). Virtually all of the complaints filed by state attorneys general, as well as a handful of localities, are available on the Worldwide Web at <<http://stic.neu.edu>>.

On the significance of nicotine addition for FDA jurisdiction, see *Coyne Beahm, Inc. v. FDA*, 958 F. Supp. 1060, 1074-75 (M.D.N.C. 1997) (upholding FDA jurisdiction), *appeal pending*, No. 97-1581 (4th Cir.).

The plaintiffs' bar has focused upon nicotine addiction specifically in order to overcome juror resistance to damage verdicts against the industry.<sup>135</sup> This observation, if anything, lends a degree of support to the far broader contention — hotly debated by scholars — that one may explain much of the doctrinal development of tort law based upon the economic incentives of the practicing bar.<sup>136</sup> This is not to say that the recent legal challenges have forsaken the basic contention that smoking causes disease; far from it, the hubbub about Medicaid expenditures for smokers continues to center upon smoking-related diseases.<sup>137</sup> Instead, the significance of the focus upon nicotine addiction is more subtle in four respects.

First, and most important, it is an effort to strike directly at the supposition that individuals choose to smoke. It is one thing to say that the industry simply made available a product that people know causes disease but choose to use anyway. It is quite another for that industry to have sought to addict consumers to a harmful product while publicly disclaiming any such intention, any capability to put such an intention into effect, and — until recently — even any prospect of addiction itself.<sup>138</sup> Arguments along these lines fit neatly

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In the face of this onslaught and as part of a settlement with both tobacco plaintiffs' attorneys and state attorneys general in March 1997, one relatively minor player in the industry — the Liggett Group — acknowledged both the addictiveness of nicotine and the industry's attempts to market cigarettes to underage consumers. See John M. Broder, *Cigarette Maker Concedes Smoking Can Cause Cancer*, N.Y. TIMES, Mar. 21, 1997, at A1. Among other obligations under this separate settlement, Liggett must add to its cigarette packs warnings that refer to addictiveness expressly. See *id.*

135. See Weiser, *supra* note 132, at 15, 30-31. In the words of this source,

[New Orleans plaintiffs' attorney Wendell] Gauthier decided that the industry's manipulation of nicotine was the best way to rebut its claim that smokers knew their risks: Addiction was a risk that the industry had not warned about. If the industry secretly maintained nicotine at addictive levels, smoking was no longer a matter of personal choice; the industry was seeing to it that smokers could not stop.  
*Id.* at 30.

136. For such a sweeping claim, see Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994). For criticism, see Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 EMORY L.J. 523 (1996).

137. Cf. Stanton A. Glantz, *Tobacco Litigation: Issues for Public Health and Public Policy*, 277 JAMA 751, 752 (1997) ("The total US Medicaid costs due to tobacco were \$6.3 billion . . . in 1993.")

138. Under the proposal for federal legislation negotiated this past summer with the state attorneys general, the industry indicated its willingness to use labels that would state explicitly that "[c]igarettes are addictive." See *Proposed Resolution, supra* note 7, at 10. In the context of congressional hearings after the announcement of the proposal, the industry initially characterized such a statement simply as a "true and acceptable reflection[] of the predominant public health view." See Jeffrey Taylor & Suein L. Hwang, *Tobacco Firms' Cautious Letters Deny That Nicotine Is Addictive*, WALL ST. J., Oct. 6, 1997, at B4 (quoting the industry's statement). In subsequent testimony, however, industry executives have "acknowledged that nicotine is addictive, as the term is commonly understood," and have "said that smoking either caused lung cancer or was a risk factor in the disease." Barry Meier,

into the exception to federal preemption left open by *Cipollone* for fraud-based actions.<sup>139</sup>

The evidentiary support for this first dimension of the nicotine addiction argument is voluminous and comes virtually entirely from the industry's own files. Look at only the most prominent examples. First, based upon internal documents, medical researchers have concluded that the Brown & Williamson Tobacco Company and its parent British American Tobacco "had a sophisticated and scientifically accurate understanding of nicotine's pharmacology, including an explicit recognition of nicotine's addictiveness, more than thirty years ago."<sup>140</sup> The same researchers offer a stark comparison between these manufacturers' awareness of the addictiveness of nicotine, as revealed in internal documents, and their simultaneous public denials thereof.<sup>141</sup>

Such conduct is by no means confined to a single manufacturer.<sup>142</sup> In the regulatory context, the FDA has put forward essentially the same claim with regard to the industry as a whole. In fact, proof of conduct that would support allegations of fraud in tort dovetails with the FDA's assertion of jurisdiction over nicotine as a "drug" under the Food, Drug, and Cosmetic Act, given that the statutory definition of that term speaks of articles "*intended* to affect the structure or any function of the body."<sup>143</sup> It is now abundantly clear that the tobacco industry controls the level of nicotine

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*Tobacco Executives Wax Penitent Before House Panel in Hopes of Preserving Accord*, N.Y. TIMES, Jan. 30, 1998, at A15.

139. See *supra* note 131.

140. GLANTZ ET AL., *supra* note 133, at 15 tbl.1.1 (comparing "public versus private statements made by the tobacco industry" concerning "nicotine and addiction"). The underlying documents are summarized in *id.* at 58-107. As to whether research into the precise pharmacology of nicotine represents much of a revelation at all, see *infra* section II.B.2 (discussing the centuries-old awareness that smoking is hard to quit as well as scientific research on addictiveness dating from the 1930s).

The publicizing of the Brown & Williamson materials is itself the subject of considerable controversy, the documents having been removed from one of the law firms representing the company by a paralegal acting without authorization. See Max Boot, *On the Trail of the Cigarette Papers*, WALL ST. J., Apr. 10, 1996, at A17 (noting that tobacco plaintiffs' attorney Richard Scruggs "paid \$109,600 in cash to buy a house" for paralegal Merrell Williams after he obtained the Brown & Williamson documents and, further, that Scruggs "helped Mr. Williams buy two cars and a sailboat").

141. See GLANTZ ET AL., *supra* note 133, at 58.

142. See HILTS, *supra* note 133, at 42-56; Freedman, *CEO Lied*, *supra* note 2, at A1; Hilts & Collins, *supra* note 2, at A1; Kelder & Daynard, *supra* note 134, at 77-80.

143. 21 U.S.C. § 321(g)(1)(C) (1994) (emphasis added); cf. Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619, 44,912 (1996) [hereinafter FDA Jurisdictional Determination].

in cigarettes in order to maintain desirable levels of that substance, at the same time that the industry has reduced levels of tar.<sup>144</sup>

The industry's efforts have taken some quite surreptitious forms, including the addition of ammonia to boost the concentration of nicotine inhaled by smokers in a manner heretofore beyond the detection capabilities of government smoking machines.<sup>145</sup> One recent scientific study, for example, finds that "the role of ammonia in tobacco smoke is analogous to what occurs when . . . cocaine is 'free-based', or used in 'crack' form."<sup>146</sup>

Second, the focus on nicotine addiction lends favorable atmospherics to the demands of the vast majority of states for Medicaid reimbursement.<sup>147</sup> Though not enacted with the tobacco industry in

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144. See *id.* at 259-61 (discussing industry research to "[o]ptimize" delivery of nicotine); *id.* at 266-67 (efforts by Philip Morris to maintain nicotine levels while removing tar); *id.* at 270 (similar efforts by R.J. Reynolds); *id.* at 295-307 (use of "[n]icotine-[r]ich" tobacco in low-tar cigarettes); *id.* at 324-30 (control of nicotine to satisfy consumer preferences); cf. *infra* note 216 (discussing the multibillion-dollar libel action by Philip Morris against the television network ABC based upon similar allegations in a television news program).

145. See FDA Jurisdictional Determination, 61 Fed. Reg. at 44,970-75; Freedman, *Ammonia Spurs Delivery*, *supra* note 2, at A1.

Apart from the production of cigarettes, allegations of fraud also have swirled around industry-funded organizations such as the Council for Tobacco Research and the Tobacco Industry Research Committee, ostensibly established to get to the bottom of the various health controversies surrounding smoking but, instead, deployed simply as a virtual "disinformation machine." See HILTS, *supra* note 133, at 8. For detailed accounts of the efforts by these organizations to suppress adverse research and to disseminate reassurances that even the industry did not regard as truthful, see GLANTZ ET AL., *supra* note 133, at 288-338; HILTS, *supra* note 133, at 8-22; KLUGER, *supra* note 7, at 164-67, 205-12, 466-68.

The allegation of fraud in connection with such organizations has gained a degree of judicial acceptance in the context of disputes over the application of evidentiary privileges to internal industry documents. Under the law of privilege, a litigant may obtain otherwise protected documents from an opposing party upon a showing of probable cause that the requested documents were part of a scheme to defraud. See *United States v. Zolin*, 491 U.S. 554, 563 (1989). Applying this framework, several courts have deemed various forms of privilege inapplicable to industry documents or, at least, have found the allegation of fraud sufficiently plausible to warrant the submission of disputed documents for *in camera* review. See, e.g., *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 367-69 (E.D.N.Y. 1996); *Burton v. R.J. Reynolds Tobacco Co.*, 167 F.R.D. 134, 142-44 (D. Kan. 1996); *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 688-92 (D.N.J.), *revd. on other grounds*, 975 F.2d 81 (3d Cir. 1992).

Adverse publicity also surrounds the tenacious industry pursuit — some would say persecution — of industry-researcher-turned-whistleblower Jeffrey Wigand, among other former insiders who have publicly challenged the industry's account of nicotine. See Marie Brenner, *The Man Who Knew Too Much*, VANITY FAIR, May 1996, at 170, 211-13; Suein L. Hwang & Milo Geyelin, *Brown & Williamson Has 500-Page Dossier Attacking Chief Critic*, WALL ST. J., Feb. 1, 1996, at A1.

146. James F. Pankow et al., *Conversion of Nicotine in Tobacco Smoke to Its Volatile and Available Free-Base Form Through the Action of Gaseous Ammonia*, 31 ENVTL. SCI. TECH. 2428, 2429 (1997).

147. Thus far, no state Medicaid reimbursement action has proceeded to verdict. Mississippi, Florida, and Texas settled their respective lawsuits with the industry on the eve of trial. See Barry Meier, *Acting Alone, Mississippi Settles Suit With 4 Tobacco Companies*, N.Y. TIMES, July 4, 1997, at A1; Barry Meier, *Cigarette Makers Agree to Settle Florida Lawsuit*, N.Y. TIMES, Aug. 26, 1997, at A1; Barry Meier, *Tobacco Concerns Settle Texas Case for \$14.5 Billion*, N.Y. TIMES, Jan. 16, 1998, at A1.

mind, a longstanding provision of federal law requires states to “take all reasonable measures to ascertain the legal liability of third parties” to pay for services available under the Medicaid program<sup>148</sup> and, most notably, to have in effect laws that will consider the state to have “acquired the rights of” individuals to recover against such third parties.<sup>149</sup> The upshot is that the states have an ordinary subrogation action — one that simply puts them in the shoes of individual plaintiffs in tort.<sup>150</sup> To the extent that the focus upon nicotine addiction makes individual tort actions more palatable to juries, the same applies to litigation by state officials in their stead.

Third, efforts to undercut the notion that smoking is the product of individual choice make more plausible the regulation of tobacco as a policy matter. As Justice Stephen Breyer has observed, federal regulatory programs in the environmental and occupational safety areas, among others, often seek to abate risks to human health that are lower by orders of magnitude than the well-documented risks

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148. 42 U.S.C. § 1396a(a)(25)(A) (1994); *cf.* New York State Dept. of Social Serv. v. Bowen, 846 F.2d 129, 131 (2d Cir. 1988) (discussing the legislative history of this provision and noting that states were permitted, but not required, to pursue third parties prior to the amendment of the Medicaid statute in the mid-1980s).

149. The relevant statutory language requires state Medicaid plans to provide that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services . . . .

42 U.S.C. § 1396a(a)(25)(I) (1994).

150. Apparently with the tobacco industry very much in mind, one state enacted controversial legislation to go beyond a conventional subrogation action. The Florida Medicaid Third-Party Liability Act strips defendants of “all . . . affirmative defenses normally available,” including “assumption of risk.” FLA. STAT. ANN. ch. 409.910(1) (Harrison 1997); *see also* Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239, 1250-53 (Fla. 1996) (upholding this provision on its face, but leaving open the possibility for challenges to its application); Milo Geyelin, *Tallahassee Tussle: Many Businesses Side with Tobacco Industry to Fight a Florida Law*, WALL ST. J., Mar. 5, 1996, at A1 (describing the law as directed specifically against the tobacco industry and noting that “[n]o other state has passed a law like Florida’s”). Even under the Florida statute, however, the state still would have had to prove causation. *See Agency for Health Care Admin.*, 678 So. 2d at 1243 (noting that the state so conceded). Moreover, the Florida Supreme Court held that, as a matter of due process under the Florida Constitution, the state would have had to identify the specific Medicaid recipients for whom it sought recovery in order to enable defendants to dispute whether the benefits paid to those particular individuals were “necessitated by the defendant’s product.” 678 So. 2d at 1254 (striking down a statutory provision to the contrary). As previously noted, *see supra* note 147, the parties settled the Florida lawsuit prior to trial.

A second state, Massachusetts, recently enacted legislation that provides the state with “a separate and independent cause of action to recover, from any third party, assistance provided to a claimant.” MASS. GEN. LAWS ch. 118E, § 22 (West 1996). Acknowledging that the Massachusetts courts have yet to rule definitively on the question, a federal district court sitting in that state has characterized the law as simply providing a subrogation action. *See Philip Morris, Inc. v. Harshbarger*, 946 F. Supp. 1067, 1077-78 (D. Mass. 1996).

from smoking.<sup>151</sup> Such a focus arguably makes sense to the extent that the risks of smoking are voluntarily assumed, whereas many environmental and occupational risks are not. The discrepancy becomes less readily justifiable on policy grounds, however, if smokers are the unwitting dupes of the tobacco industry.

Fourth, and perhaps most significant, the focus on nicotine addiction enables both litigants and regulators in whatever forum to advance the further, explosive allegation of industry efforts to market cigarettes to underage consumers — teenagers and even children — in order that they ultimately might replace those who die annually from smoking-related diseases.<sup>152</sup> This contention has taken its most visible form in the rancor over the now-defunct industry icon Joe Camel.<sup>153</sup> In fact, the concern is much broader, extending to the promotion of cigarettes through collectible items that may be especially appealing to youth,<sup>154</sup> printed advertisements in magazines with substantial underage readership,<sup>155</sup> billboards located near schools,<sup>156</sup> and industry sponsorship of sporting events as a vehicle for “free advertising” to children via television coverage.<sup>157</sup> In fact, recently released internal documents from Camel manufacturer R.J. Reynolds refer explicitly to the marketing of cig-

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151. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 13 tbl.2, 14-15 (1993).

152. See HILTS, *supra* note 133, at 80 (“The tobacco market has this difficulty: it must be recreated in each generation. Each crop of young people must be addressed anew. The children must choose to smoke and they must choose brands.”); Kelder & Daynard, *supra* note 134, at 65 (“Tobacco industry promotional activities aimed at minors lure generation after generation of underage Americans into beginning what will become for most of them a lifelong and deadly addiction.”). For a history of the tobacco industry and children, see HILTS, *supra* note 133, at 63-101.

153. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,480 (1996) (to be codified at 26 C.F.R. § 801) [hereinafter FDA Preamble] (summarizing internal R.J. Reynolds documents that “illustrate the creation of and execution of a decidedly youth-oriented campaign” centered around Joe Camel); John M. Broder, *F.T.C. Charges ‘Joe Camel’ Ad Illegally Takes Aim at Minors*, N.Y. TIMES, May 29, 1997, at A1 (reporting similar charges by the Federal Trade Commission).

In the aftermath of the recent proposal to end the tobacco wars, R.J. Reynolds terminated the Joe Camel advertising campaign. See Stuart Elliott, *Joe Camel, a Giant in Tobacco Marketing, Is Dead at 23*, N.Y. TIMES, July 11, 1997, at C1.

154. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,336 (1995) (to be codified at 26 C.F.R. § 897) [hereinafter FDA Notice of Proposed Rulemaking] (citing examples of promotional items obtained upon redemption of “Camel cash” or “Marlboro miles”); cf. Sally Goll Beatty, *Alcoholic-Drinks Marketers Face Scrutiny*, WALL ST. J., July 14, 1997, at B2 (reporting criticism of the Anheuser-Busch promotional program involving “Bud Gear”).

155. See FDA Preamble, 61 Fed. Reg. at 44,513-14.

156. See FDA Preamble, 61 Fed. Reg. at 44,502-03.

157. See FDA Notice of Proposed Rulemaking, 60 Fed. Reg. at 41,337-38.

arettes to underage consumers.<sup>158</sup> The prospect of such misconduct, perhaps more than anything else, speaks to the blameworthiness of the industry in the eyes of many. From a strategic standpoint, moreover, the focus upon the marketing of cigarettes to children represents a further effort to undercut the supposition that smoking is simply a matter of individual choice.

I do not purport here to resolve the longstanding debate within the social science and public health communities over the causal connection, if any, between tobacco advertising and the incidence of tobacco consumption, whether by underage consumers or by the public generally.<sup>159</sup> Indeed, such resolution is unnecessary for present purposes. The more significant observation consists of the degree to which principles of criminal law cast new light upon the treatment of the tobacco industry, *even if* its duplicitous conduct ultimately did not cause consumers to smoke.

Those who seek to deceive consumers, as distinct from those who simply fail to disclose information about product risk, bear more than a passing resemblance to the criminal defendant who tries unsuccessfully to commit a crime. Indeed, the addition of claims predicated upon fraudulent misrepresentation and similar notions serves to inject into the tobacco litigation the equivalent of a criminal *mens rea*. In contrast to the implant litigation, the allegation here is that the defendants acted purposely, with the conscious objective of addicting consumers, perhaps including persons whom one might regard as especially vulnerable. This is not to say that the tobacco litigation heretofore has carried with it all the trappings of criminal law; indeed, that is precisely the problem when one considers the significant obstacles of risk-decisional causation that the litigation encounters.

## 2. *Independent Sources of Risk Information*

Allegations of fraud, at bottom, are informational in nature. They need not turn upon the content of product warnings, for

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158. See Milo Geyelin, *Reynolds Sought Specifically to Lure Young Smokers Years Ago, Data Suggest*, WALL ST. J., Jan. 15, 1998, at A4 (quoting an internal R.J. Reynolds document from 1975 that refers to the need for the Camel brand to "increase its share of penetration among the 14-to-24 age group").

159. For a mere smattering of the rancor on this question, compare FDA Preamble, 61 Fed. Reg. at 44,489-93 (analyzing empirical literature for the purpose of demonstrating that advertising restrictions actually will advance the government's interest in reducing smoking) with Jean J. Boddewyn, *Cigarette Advertising Bans and Smoking: The Flawed Policy Connection*, 13 INTL. J. ADVERTISING 311 (1994) (presenting an analysis of the same empirical literature by an academic who has served as a consultant to the tobacco industry).

*Cipollone* forbids such an attack upon the tobacco industry.<sup>160</sup> Instead, as in tort law generally, fraud entails the manipulation of information to induce behavior that results in harm to the victim.<sup>161</sup> As such, claims of fraud, like the more common claim of a failure to warn, implicate the risk decision of the consumer.

*a. Nicotine in History.* As noted earlier, mass tort disputes frequently require one to cull out the effects of the defendant's misconduct from those of background forces, be they alternate causes of disease in cases of scientific causation or alternate sources of information about product risk in cases of risk-decisional causation.<sup>162</sup> In many mass tort contexts, this exercise is not problematic. The classic subjects of mass tort litigation frequently have consisted of newly developed products — breast implants,<sup>163</sup> the morning sickness drug Bendectin,<sup>164</sup> and the Dalkon Shield contraceptive device,<sup>165</sup> to name only a few — over which the manufacturer retains considerable control. As is true for innovative new products generally, the manufacturer may well have property rights that tend to inhibit analysis of the product by others.<sup>166</sup> In these situations, it would be implausible to claim that consumers could have learned about the product from other sources.

160. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

161. Such misconduct need not involve product warnings. For example, the *Restatement (Second) of Torts* provides that

[o]ne engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation . . . .

RESTATEMENT (SECOND) OF TORTS § 402B (1965) (emphasis added); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 9 cmts. a-b (Proposed Final Draft 1997) (clarifying that § 402B applies to product sellers); RESTATEMENT (SECOND) OF TORTS §§ 310, 550-51 (1965) (stating that there should be similar liability for conscious misrepresentation involving the risk of physical harm as well as fraudulent concealment and nondisclosure).

162. See *supra* note 25 and accompanying text. The Restatement requires that the reliance of the plaintiff upon the defendant's misrepresentation must be "justifi[ed]." See RESTATEMENT (SECOND) OF TORTS § 402B (1965). Reliance is not justified if the plaintiff "knows" that the defendant's misrepresentation "is false or its falsity is obvious to him" based upon other sources. RESTATEMENT (SECOND) OF TORTS § 541 (1965); see also RESTATEMENT (SECOND) OF TORTS § 402B cmt. j (noting that § 541 applies to limit liability under § 402B).

163. See *supra* section II.A.

164. See *supra* note 84.

165. See SOBOL, *supra* note 91.

166. See Mary L. Lyndon, *Secrecy and Innovation in Tort Law and Regulation*, 23 N.M.L. REV. 1, 2-3, 39-50 (1993) (discussing trade secrecy in the context of chemical pollution regulation). In fact, considerable controversy recently arose from revelations of efforts by one pharmaceutical manufacturer to exercise a right of prepublication approval over a scientific study that cast doubt upon the effectiveness, though not the safety, of a popular thyroid drug. See Lawrence K. Altman, *Experts See Bias in Drug Data*, N.Y. TIMES, Apr. 29, 1997, at C1.



By contrast, the tobacco wars have taken place amidst a wealth of independent information, not merely about the health risks associated with smoking, but also, specifically, about the difficulty of smoking cessation. The newfound focus upon nicotine addiction is certainly a master stroke of litigation savvy, insofar as it draws attention away from the longstanding awareness that smoking can kill. But it still runs headlong into the equally longstanding awareness that smoking is hard to quit.

Much controversy has swirled in recent years over the use of the medical term "addiction" in connection with nicotine.<sup>167</sup> This debate over nomenclature, though potentially worthwhile for the sake of medical precision, merely obscures the crucial point for purposes of tort law. "Irrespective of the label applied to the cost of altering cigarette smoking behavior, or whether one believes that cigarettes belong in the same category as crack cocaine and heroin, it is clear that cessation of smoking does involve real and substantial costs."<sup>168</sup> Even more to the point, the fundamental recognition that it is difficult to stop smoking once one starts — for some, exceedingly so — has been around for a very long time.

In his Pulitzer Prize-winning history of the tobacco industry in America, Richard Kluger — a forceful advocate for extensive FDA regulation of tobacco — observes:

While new evidence had emerged . . . showing that Philip Morris and [Brown & Williamson], among others, had done research on the addictive nature of nicotine and had neither disclosed it to the public nor warned against the addicting potency, many similar findings by investigators outside the industry had long since been made and published. Public-health advocates, moreover, had for years advised that nicotine was as addicting as heroin and cocaine, yet the Surgeon General had not declared smoking to be addicting until 1988. The point was that whether one categorized smoking as a practice, a habit, an indulgence, a vice, a dependency, or an addiction, it was commonly known — and had been for decades — to be hard to stop once begun.<sup>169</sup>

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167. See generally SURGEON GENERAL, U.S. DEPT. OF HEALTH & HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION* 14-15 (1988) (using the nomenclature of "addiction" to describe the impact of nicotine on smokers). For the many possible shadings of this term and their significance for tort doctrine, see Alan Schwartz, *Views of Addiction and the Duty to Warn*, 75 VA. L. REV. 509 (1989).

168. W. KIP VISCUSI, *SMOKING: MAKING THE RISKY DECISION* 17-18 (1992) (adding that alterations in various sorts of behavior often entail what economists would deem substantial transaction costs).

169. KLUGER, *supra* note 7, at 760; see also GOODMAN, *supra* note 122, at 122 ("During the first two decades of the twentieth century medical researchers produced an enormous literature on the toxicology of tobacco. . . . [T]here were many studies purporting to deal with

Historian Thomas Laqueur even more emphatically observes that, “[w]ith the exception of lung cancer, almost every adverse effect of tobacco use had been noted well before the advent of mass-marketed cigarettes.”<sup>170</sup> Even the awareness of a link to lung cancer dates from the 1950s.<sup>171</sup> The further notion “[t]hat tobacco contains a drug, or is a drug, is without doubt the most ludicrous ‘discovery’ of our day.”<sup>172</sup> As Laqueur notes:

Bartolome de Las Casas, the friar who accompanied Columbus and wrote in defense of the Indians, is quoted . . . to the effect that when he reproved some sailors for smoking “cigars” they replied that “they were not able to stop taking them.” Christians have become “much attached to this plant,” came the complaint from Brazil already in 1517; and by the middle of the century there was the scandal of a bishop who was relieved of his see because without smoking “he could not live.” . . . [King] James I, in his famous *Counterblaste* on tobacco, observed that a smoker can no more forbear tobacco without “falling into an incurable weakness” than “an old drunkard can abide to be long sober.” “Continual custom” have rendered them “*habitu[m], alteram naturum.*” In short, addicted. “Many light their pipes . . . even before getting out of bed so that not an hour should pass without smoking,” a Leipzig physician complains fifty years later. And so on, and so on, and so on.<sup>173</sup>

These voices, moreover, are not alone amongst historians.<sup>174</sup>

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tobacco consumption as a form of addiction, called variously tobaccomania and tobaccoism.”).

170. Thomas A. Laqueur, *Smoking and Nothingness*, NEW REPUBLIC, Sept. 18 & 25, 1995, at 39, 43.

171. See *id.* at 42.

172. *Id.*

173. *Id.* at 42-43.

174. In parsing through documents from sixteenth- and seventeenth-century England, medical historian David Harley points to criticism of tobacco on the ground that the smoking of this “divine drug” was so rampant among the upper classes that “purses are emptied and many gentlemen’s patrimonies have expired in fumes and flown out shamefully from the nose of their master.” David Harley, *The Beginnings of the Tobacco Controversy: Puritanism, James I, and the Royal Physicians*, 67 BULL. HIST. MED. 28, 32, 34 (1993) (respectively, quoting THOMAS NASHE, NASHES LENTEN STUFFE 24-25 (1599) and translating from the original Latin JOSEPH HALL, MUNDUS ALTER ET IDEM, SIUE TERRA AUSTRALIS ANTE HAC SEMPER INCOGNITA 170-71 (1605)). For ease of reference, I have modified the spelling of the quoted phrase from Nashe to accord with current English spelling; the quoted phrase appears in the original as “diuine drugge.”

“By the end of the [nineteenth] century,” medical historian R.B. Walker adds, “heavy smoking was beginning to be seen as a disease, an addiction based on physiological dependence.” R.B. Walker, *Medical Aspects of Tobacco Smoking and the Anti-Tobacco Movement in Britain in the Nineteenth Century*, 24 MED. HIST. 391, 398 (1980). In fact, Walker points to English fiction as painting “the most extreme picture of the physical, intellectual, and moral degeneration wrought by cigarette addiction.” *Id.* at 396 (citing CYRIL ARTHUR EDWARD RANGER GULL, THE CIGARETTE SMOKER, BEING THE TERRIBLE CASE OF UTHUR KENNEDY (1902)). Walker even goes on to recount a meeting at Cambridge University in the same period, at which Anti-Tobacco Society secretary Thomas Reynolds — in an attack upon students with a brashness that only a law professor could admire — baldly “declared that nine-

Since at least the nineteenth century, popular nicknames for cigarettes have underscored not only their risks to health — “coffin nails” — but also the notion that it is difficult to stop smoking — “dope sticks” and “little white slavers.”<sup>175</sup> Even within the realm of medical research, studies from the 1930s explicitly treat nicotine as a source of “addiction” akin to that associated with drugs.<sup>176</sup> By 1961, the authors of a comprehensive review of the medical literature could state with regard to nicotine that “[t]he terms habituation and addiction” are “used more or less indiscriminately by many writers.”<sup>177</sup>

All of this has been getting through to ordinary people. In its successful defense to a recent individual lawsuit, R.J. Reynolds led jurors through “decades of magazine articles, popular-song lyrics and books” on the hazards of smoking, dredging up public-opinion surveys from the 1960s and before that document the awareness on the part of both adults and teenagers that smoking causes cancer.<sup>178</sup> In fact, research by psychologists on the extent to which teenagers and children perceive the carcinogenicity of tobacco also indicates widespread awareness of the further notion that “it is very hard to stop smoking”<sup>179</sup> — an awareness that notably predates by centuries the contemporary focus upon the pharmacology of nicotine.

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tenths of all the undergraduates who failed were ‘plucked’ because of their addiction to tobacco.” *Id.* at 398 (recounting the Cambridge Tobacco Riot).

175. See Cassandra Tate, *In the 1800s, Antismoking Was a Burning Issue*, SMITHSONIAN, July 1989, at 107, 108.

176. For an overview of such research, see P.S. LARSON ET AL., TOBACCO: EXPERIMENTAL AND CLINICAL STUDIES: A COMPREHENSIVE ACCOUNT OF THE WORLD LITERATURE 526-27 (1961).

177. *Id.* at 526.

178. See Milo Geyelin, *How RJR Won Its Latest Tobacco Case*, WALL ST. J., May 7, 1997, at B1 (quoting juror Meg Goodrich’s assessment that this survey evidence “weighed heavily” in the jury’s deliberations). A first-hand account written by the forewoman of the jury reflects the same assessment:

We all agreed that Reynolds had disregarded a moral responsibility to its customers. The company knew cigarettes can cause lung cancer; it chose not to disclose this and even raised doubts about it. But Reynolds’s actions did not negate the fact that the risks were widely known.

Laura T. Barrow, *Why My Jury Let R.J. Reynolds Off*, WASH. POST, May 25, 1997, at C1.

179. Frank W. Schneider & Loretta A. Vanmastrigt, *Adolescent-Preadolescent Differences in Beliefs and Attitudes About Cigarette Smoking*, 87 J. PSYCHOL. 71, 74 (1974). This study of Canadian children and teenagers revealed that virtually all (99%) believed that smoking can cause cancer and that the vast majority (74%) further believed that “it is very hard to stop smoking.” See *id.*

Research in the United States is in accord. A 1979 survey of American teenagers prepared under the auspices of the Department of Health, Education, and Welfare documents that, “even among smokers, nine out of ten agree that the health information about smoking is true and that smoking can harm the health of teenagers.” DOROTHY E. GREEN, U.S. DEPT. OF HEALTH, EDUC. & WELFARE, *TEENAGE SMOKING: IMMEDIATE AND LONG-TERM PATTERNS* 23 (1979). The same study further indicates that over 72% of teenagers did not

In light of this lengthy history, economist W. Kip Viscusi has suggested that, if anything, consumers may be overestimating the risks associated with smoking. Specifically, smokers' perceptions of the risk of lung cancer alone appear to exceed scientific estimates of the actual mortality risk from all smoking-related causes of death.<sup>180</sup> In Viscusi's estimation, "if people had accurate perceptions of the lung cancer risks linked to smoking, then societal smoking rates would *rise* by 8 percentage points."<sup>181</sup> Indeed, observers of American culture have argued more broadly that it is precisely the consciousness of danger — the knowledge that cigarettes are deadly — that makes smoking all the more alluring and all the more potent a symbol of rebellion against the forces of mortality.<sup>182</sup>

*b. Causation and the Marginal Consumer.* The presence of independent sources of information about product risk has serious implications for the viability of fraud claims. Consumers are unlikely to regard as credible a denial of nicotine addiction in the face of literally centuries of popular knowledge to the contrary. Put simply, fraud does not work when its would-be victims are not apt to believe the defendant's obfuscations. On this score, the tobacco industry's most notorious denial of the addictiveness of nicotine — the 1994 testimony, oft-replayed in the media, of senior tobacco executives before a congressional committee<sup>183</sup> — has been the subject more of incredulous ridicule than serious consideration, except in connection with suspicions of perjury.<sup>184</sup> The executives might as well have said that the earth is flat.

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express agreement — indeed, nearly half “Strongly Disagree[d]” — with the statement that “[t]eenagers who smoke regularly can quit for good any time they like.” See *id.* at 104, 110; see also Kathryn Urberg & Rochelle L. Robbins, *Adolescents' Perceptions of the Costs and Benefits Associated with Cigarette Smoking: Sex Differences and Peer Influence*, 10 J. YOUTH & ADOLESCENCE 353, 356 (1981) (noting that among the costs “frequently cited” by American teenagers as associated with smoking is the prospect that they will “get hooked”).

180. See VISCUSI, *supra* note 168, at 65-70. This effect overwhelms the more widely known proposition that smokers' perceptions of the risks associated with smoking are lower than those of nonsmokers. The more significant point made by Viscusi is that the risk perceived by both groups may well be higher than the actual level of risk. See *id.* at 68-69.

181. *Id.* at 8 (emphasis added); see also *id.* at 99-100 (summarizing the calculation).

182. See generally KLEIN, *supra* note 123, at 184.

183. See *Regulation of Tobacco Products (Pt. 1): Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 103d Cong. 628 (1994). Industry executives recently changed their tune in congressional testimony. See *supra* note 138.

184. For an example of such ridicule, see Art Buchwald, *The Lung Goodbye*, WASH. POST, Apr. 21, 1994, at C1. On the prospects for perjury charges, see Freedman, *CEO Lied*, *supra* note 2, at A1; Milo Geyelin, *Even If Tobacco Chiefs Did Lie, Perjury Conviction Is Uncertain*, WALL ST. J., Mar. 21, 1996, at B1.

If ever there were a case of outrageous fortune, this is it. No matter how blameworthy one might consider Big Tobacco, it ultimately may well have failed to convince people that smoking is safe and nonaddictive, because nothing less than the entire history of tobacco in Western civilization was saying, loudly and clearly, that it was lying.<sup>185</sup> One aptly might describe this as the Joe Isuzu scenario.<sup>186</sup> Indeed, one might liken the industry to the criminal defendant who tries but fails to complete a crime, because circumstances beyond his control have rendered the completion of the crime impossible.<sup>187</sup>

In the tobacco context, there are two additional wrinkles to the problem of risk-decisional causation. First, until very recently, the industry carefully couched its statements about the addictiveness of nicotine as a description of the prevailing view of the public-health community rather than as an admission that the industry itself takes the same view.<sup>188</sup> That the industry nonetheless has succeeded in fending off most of the recent individual lawsuits that have focused upon the manifold revelations of its outrageous conduct,<sup>189</sup> if anything, attests to the depth of public awareness as to the difficulty of smoking cessation — wholly apart from the willingness of industry officials so to concur on the public record.

The second wrinkle is that the causation question becomes more complicated when one considers the situation not from the stand-

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185. These are, in effect, the words of the forewoman of the jury that returned a verdict in favor of R.J. Reynolds in one of the few actual trials to feature the recently revealed industry documents. See *supra* note 178.

186. During the 1980s, Isuzu gained attention for its automobiles through a series of humorous television commercials that depicted a slick salesman named Joe Isuzu making extravagant claims about Isuzu automobiles. As Joe Isuzu spouted his sales pitch, the words "He's lying" would flash prominently on the screen. See Gerald Parshall, *Too Much Truth Is Uncouth*, U.S. NEWS & WORLD REP., Oct. 27, 1986, at 7.

187. See *supra* note 35 (noting that impossibility generally is not a defense to an attempt crime).

188. See *supra* note 138.

189. The industry has prevailed in two of the three individual trials to feature the recently discovered industry documents. See Milo Geyelin, *Reynolds Wins Ex-Smoker's Cancer Suit*, WALL ST. J., Nov. 3, 1997, at B12 (reporting a verdict for the tobacco industry by a Florida jury, notwithstanding that the jury saw "industry documents . . . that suggest tobacco executives have long understood the addictiveness of nicotine and manipulated its content in cigarettes"); Milo Geyelin, *RJR's Tobacco Unit Wins a Big Victory: Jury Clears It of Blame in Smoker's Death*, WALL ST. J., May 6, 1997, at A3 (reporting a Florida jury's verdict for the tobacco industry, notwithstanding "a barrage of internal records"); Suein L. Hwang et al., *Jury's Tobacco Verdict Suggests Tough Times Ahead for the Industry*, WALL ST. J., Aug. 12, 1996, at A1 (reporting a \$750,000 damage award by a Florida jury and attributing the result to the "availability of internal documents" on addiction). A fourth trial in Indiana resulted in a defense verdict, but the jury in that case "never saw a pile of new internal industry documents about nicotine, addiction and cancer." Milo Geyelin, *Jury Sides with Tobacco Firms in Cigarette Suit Filed in Indiana*, WALL ST. J., Aug. 26, 1996, at B8.

point of individual tort suits, but from the aggregate perspective presented in the state Medicaid context. Here, questions of risk-decisional causation turn upon suppositions about the behavior, and even the existence, of persons whom one might describe as marginal consumers. Speaking outside of the tobacco context in connection with tort liability based upon a failure to warn, Mark Geistfeld observes that “the disclosure of unavoidable risks will predictably lead to a decline in the market demand for most products, but there is no good way to identify the consumers who would leave the market following disclosure.”<sup>190</sup> One might say the same with regard to the claims of fraud advanced against the tobacco industry. In the face of the pervasive awareness of risk that has characterized tobacco consumption in the West for centuries, there is no good way to determine how many consumers today would have behaved differently, absent the quite serious misconduct on the part of the tobacco industry. Viewing the situation from an aggregate perspective, one finds it hard to believe that risk-decisional causation is literally impossible in the sense that the industry’s misdeeds did not manage to tip the scales for at least one person. It is difficult to imagine that the industry had the truly outrageous good fortune to cause literally no one to smoke who would not have lit up anyway. But the industry might well have come close, and the more one considers both the lineage and the breadth of popular knowledge about smoking, the lower the number of marginal consumers appears to be.

The most striking feature of the tobacco wars is that we are unlikely ever to get an answer to the marginal consumer question and, even more remarkably, that the legal system may very well not need one. Rather, the recent calls for national legislation to end the tobacco wars would make resolution of the question largely beside the point. As detailed in Part III, national legislation is likely to amount to a rehabilitation plan for the tobacco industry — a hybrid of tort and criminal concepts that does not depend upon a causal relationship between the blameworthy conduct of the industry and the current incidence of smoking. Insofar as proposals for national legislation have met with formidable political controversy, that ferment centers not upon matters of causation, but instead upon just how hard to sock the industry for its misconduct. In this sense, the debate over tobacco legislation reveals as much for its points of common ground — that the industry should be punished for what

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190. Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. MICH. J.L. REFORM 309, 349 (1997).

one might characterize as an attempted mass tort — as for its differences over details of public policy.

Before one may assess the merits of these developments, however, it is essential to recognize that both the tobacco and the implant litigations are unlikely to stand as anomalies. Instead, the problem of the blameworthy-but-fortunate mass tort defendant is likely to persist in the future.<sup>191</sup>

### C. *Future Prospects*

Recent developments naturally raise the question of why mass tort litigation is brought against an arguably blameworthy defendant in the face of uncertainty over causation, whether of a scientific or risk-decisional kind. In particular, is the impetus for these sorts of lawsuits such that one reasonably may expect the unfolding of events like those recounted above to be a recurring phenomenon in future mass tort disputes? The answer to this second question is yes, based upon the economic underpinnings of mass tort litigation and, relatedly, upon the interaction between litigation and other methods by which to influence the public agenda.

In analyzing mass tort disputes, commentators have pointed to the phenomenon of entrepreneurial litigation.<sup>192</sup> In this context, lawsuits — especially the earliest of their kind — entail the expenditure over an extended time period of substantial sums by the plaintiffs' bar in order to develop the documentary evidence and scientific expertise needed to bring a successful claim in tort.<sup>193</sup> The plaintiffs' bar undertakes this effort upon the prospect of financial reward in the long run from contingency fees — specifically, fees obtained from the bringing of additional, successful claims of the same sort, such as will enable the plaintiffs' bar to draw upon the array of documents and expertise assembled in connection with its initial round of victories.<sup>194</sup> The phenomenon of entrepreneurial litigation has taken on unprecedented proportions in the tobacco litigation, extending to the pooling of financial resources by plaintiffs' law firms that previously had gained both prominence and

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191. Cf. *infra* note 266 and accompanying text.

192. The term "entrepreneurial litigation" originated in scholarship focused primarily upon corporate and securities class actions. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987). Commentators have extended the analysis to the mass tort context. See, e.g., Coffee, *supra* note 93, at 1347, 1373-76.

193. See Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 909-10 (1996).

194. See *id.* at 910.

capital through successful litigation over earlier forms of mass torts.<sup>195</sup> In fact, the general-interest press has noted, with some trepidation, the pervasive involvement by the same group of private lawyers in Medicaid reimbursement actions ostensibly brought by state governments<sup>196</sup> and, more recently, the riches that the tobacco wars might spell for such attorneys.<sup>197</sup>

From the standpoint of the plaintiffs' bar, one fairly may describe mass tort litigation as a kind of investment — one with the potential to do good, certainly, but an investment nonetheless. No one invests money in something that she does not believe will pay off. The expected payoff from litigation depends upon expectations about the behavior of juries. This is not to suggest that most, or even many, mass tort claims ultimately yield jury verdicts. In the tort system as a whole, of course, most claims do not reach a jury at all.<sup>198</sup> But expectations — perhaps only rough, unarticulated, and potentially inaccurate intuitions — about what a jury would do in a given kind of litigation will set the parameters for settlement negotiations and, even earlier, for the decision to sue. As the implant litigation demonstrates, moreover, verdicts in a few early individual lawsuits can exercise considerable influence upon the subsequent course of events.<sup>199</sup> That entrepreneurial litigation is brought against arguably blameworthy defendants even in the face of formidable causation questions thus must stem, at least in significant part, from expectations about juries.

The behavior of juries is a notoriously murky subject much prone to exaggeration in many directions, whether to hail jurors' common sense or to decry their misconceptions.<sup>200</sup> An assessment of the overall capabilities of the civil jury is far beyond the scope of

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195. See Glenn Collins, *A Tobacco Case's Legal Buccaneers*, N.Y. TIMES, Mar. 6, 1995, at C1 (reporting at the outset of the most recent wave of tobacco litigation that "[c]lose to 60 prominent law firms known for so-called toxic torts are contributing \$100,000 each to a consortium, filling an annual war chest of nearly \$6 million"); cf. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 218 (2d Cir. 1987) (discussing an early example of resource pooling by plaintiffs' counsel in the Agent Orange litigation).

196. See Barry Meier, *In Tobacco Talks; Lawyers Hold Key*, N.Y. TIMES, May 22, 1997, at A1.

197. See Paul A. Gigot, *\$50 Million Men: Tobacco Lawyers Become Sultans*, WALL ST. J., June 27, 1997, at A14; Barry Meier, *Record Legal Fees Emerge as Issue in Tobacco Deal*, N.Y. TIMES, June 23, 1997, at A11; Richard B. Schmitt, *Big Winners in the Settlement Could Be the Lawyers*, WALL ST. J., June 23, 1997, at B1; Matthew Scully, *A Modest Proposal on Tobacco Lawyers' Fees*, WALL ST. J., July 9, 1997, at A14.

198. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — And Why Not?*, 140 U. PA. L. REV. 1147, 1183-89 (1992).

199. See *supra* section II.A.1.

200. For an even-handed exposition of many emerging issues with regard to civil juries, see *Developments in the Law — The Civil Jury*, 110 HARV. L. REV. 1408 (1997).



this article. In order to ascertain the potential for future mass tort disputes to raise problems of outrageous fortune, however, there are a number of more focused observations that one can make. Specifically, cognitive psychological research, Supreme Court case law, and empirical accounts of tort litigation all lend credence to the expectation that litigation against an arguably blameworthy defendant can be economically viable, even in the face of formidable doubt over matters of causation. This body of learning has developed only recently and, as such, remains subject to additional, confirmatory research in the coming years. The upshot so far, however, is the perception that jurors sometimes might “commingle” various legal elements. In particular, in tort cases, jurors might overlook weak evidence of causation when confronted with strong evidence of misconduct on the part of the defendant.<sup>201</sup> In fact, as I explain after providing a summary of the emerging literature in the area, one need not believe that all jurors reason in this way in all cases in order to understand the economic attraction of mass tort litigation in situations of outrageous fortune.

What does the literature tell us? Experimental research by cognitive psychologists indicates that mock juries tend to return more verdicts for plaintiffs when they consider close questions of scientific causation together with evidence of the defendant’s fault, as compared to consideration of the causation issue alone.<sup>202</sup> These results fit comfortably within a broader conception of jury decision-making that has emerged in the cognitive psychological literature, positing that jurors sometimes reason holistically rather than by fitting discrete pieces of evidence to discrete legal elements.<sup>203</sup> A prominent version of this hypothesis holds that jurors may seek to fit evidence into a coherent “story.” In so doing, jurors may tend to side with the litigant whose position best accords with this story model as a whole rather than as considered element by element.<sup>204</sup>

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201. See Dresser et al., *supra* note 50, at 741; Sanders, *supra* note 84, at 53. Some commentators go even further, describing this phenomenon as a form of jury “nullification.” See Rochelle Cooper Dreyfuss, *Galileo’s Tribute: Using Medical Evidence in Court*, 95 MICH. L. REV. 2055, 2074 (1997) (reviewing ANGELL, *supra* note 50, and SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA (1995)); Wagner, *supra* note 27, at 827.

202. See Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269, 278 (1990).

203. See MIRJAN DAMASKA, EVIDENCE LAW ADRIFT 35-36 (1997) (relating psychological research on juries in this country to continental theories about modes of reasoning by jurors).

204. For an overview of the “story” model, see Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 190 (Reid Hastie ed., 1993) (citing underlying studies in cognitive psychology). For a more detailed exposition of the same theory, see Nancy Pennington & Reid

This past Term, in *Old Chief v. United States*,<sup>205</sup> the Supreme Court expressly recognized that evidence offered by a prosecutor to prove a particular element of a crime may have the secondary effect of making more credible the prosecution's case with regard to other, disputed elements. As the Court observed:

Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the [further] inferences, whatever they may be, necessary to reach an honest verdict. . . . [T]he prosecution may fairly seek to place its evidence before the jurors . . . to convince the jurors that a guilty verdict would be *morally* reasonable as much as to point to the discrete elements of a defendant's legal fault.<sup>206</sup>

Though the Court did not explicitly link these insights to the emerging research in cognitive psychology, "commingling" by jurors in the criminal context closely resembles the analytical processes believed to be applied by jurors in at least some tort cases as well.

Neil Feigenson has shown that the rhetoric used by plaintiffs' counsel in actual tort litigation appeals to precisely this sort of reasoning on the part of jurors<sup>207</sup> — a strong indication that the aca-

Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519 (1991).

205. 117 S. Ct. 644 (1997).

206. 117 S. Ct. at 653-54 (emphasis added). The defendant in *Old Chief* was charged with unlawful possession of a firearm by a convicted felon. See 117 S. Ct. at 647. The defense offered to stipulate not only to the existence of a prior felony conviction but also to the name and nature of that offense, in an effort to prevent the prosecution from so apprising the jury. See 117 S. Ct. at 648. The trial court concluded that the prosecution need not accept the stipulation, and the defendant was convicted. See 117 S. Ct. at 648.

On appeal, the Supreme Court underscored that, as a general matter, "the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." 117 S. Ct. at 654. A stipulation might interrupt the "story" that the prosecution otherwise is attempting to tell through the ordinary means of physical evidence and witness testimony; as such, a stipulation might leave the jury to "wonder what they are being kept from knowing." 117 S. Ct. at 654. As the Court recognized, "a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent." 117 S. Ct. at 653. This is, if anything, an endorsement of what commentators describe as "commingling."

*Old Chief* itself required deviation from this general principle, but only because of its unusual facts. The Court pointed to the risk that the jury might convict the defendant simply out of a belief that he was a person of bad character, were the jury to learn not only that he had a prior felony conviction but also the inflammatory details of that crime, see 117 S. Ct. at 655: an "assault resulting in serious bodily injury" to the victim and a five-year prison sentence for the defendant, see 117 S. Ct. at 658 (O'Connor, J., dissenting). Punishment of the defendant for the crime at issue simply because of his prior bad act, the Court held, would entail precisely the sort of propensity reasoning that Rule 404(b) of the Federal Rules of Evidence forbids. See 117 S. Ct. at 651, 655; see also *FED. R. EVID.* 404(b) (providing that "[e]vidence of other crimes . . . is not admissible to prove the character of a person in order to show action in conformity therewith" on the occasion in question).

207. See Neil R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 *HASTINGS L.J.* 61, 140-47 (1995).

demic literature documents a phenomenon that resonates with real-world practitioners. In the mass tort context specifically, Joseph Sanders and Michael Green separately attribute the handful of early victories for plaintiffs in the Bendectin litigation to the phenomenon of commingling by jurors.<sup>208</sup> The same phenomenon also helps to explain the whopping ratio of punitive to compensatory damages awarded to plaintiffs in the early, pathbreaking lawsuits over breast implants.<sup>209</sup>

Notions of commingling by jurors suggest that mass tort litigation brought in spite of doubt on causation may be *especially* likely to involve substantial evidence of blameworthiness. The latter is what makes such a case economically viable, notwithstanding the former.<sup>210</sup> Indeed, the commingling hypothesis helps to explain why blameworthy-but-fortunate defendants should be the recurring subject of mass tort litigation in particular, perhaps more so than ordinary kinds of tort actions. By definition,<sup>211</sup> mass torts entail the exposure of large numbers of people to essentially the same mass-produced item or substance. Blameworthy behavior in this context typically will consist of the willingness on the part of some corporate entity to run the risk of mass exposure for the sake of the riches to be had from product sales. The potential endangerment of thousands or millions of individuals in the pursuit of profits is bound to seem a good deal more worthy of blame than the endangerment of just one or a few.

208. Invoking the cognitive psychological literature, Sanders observes that

[c]ommingling generally helped Bendectin plaintiffs by implicitly encouraging the factfinder to balance a weak case on causation against a stronger case on breach and damages. It also helped the plaintiffs tell a better story. . . . The story told how Merrell [Dow] negligently tested its new drug, leading to the release of a dangerous product.

Sanders, *supra* note 84, at 54; see also GREEN, *supra* note 19, at 127, 263. For the reasons why Bendectin did not produce a deluge of lawsuits on the scale of the breast implant litigation, see *supra* note 84.

209. See *supra* notes 62-63 and accompanying text. See generally Wagner, *supra* note 27, at 828-29 ("It would seem more than coincidental that in those cases in which juries have awarded damages in spite of weak causation evidence, the defendant manufacturers' negligence in testing [its product] often rose to the level of gross negligence or recklessness sufficient to support the simultaneous award of punitive damages." (footnote omitted)).

210. See Dresser et al., *supra* note 50, at 733 ("[S]ocially irresponsible behavior may even be a necessary pre-condition to mass products liability litigation for latent hazards: a manufacturer's failure to reasonably ensure the long-term safety of its product increases both the chance that the product will later be deemed hazardous and the outrage felt by victims and jurors."). Viewing the mass tort plaintiffs' bar as entrepreneurs in the truest sense, one might say that they have identified a scenario in which at least some civil juries may tend to overvalue certain kinds of claims in much the same manner as a savvy stock analyst might seek to identify particular companies that financial markets have overvalued.

211. For a working definition of mass torts, see *supra* note 1.

Not all jurors necessarily reason in this way all the time. But in order to escape unscathed — in particular, to avoid the financial disaster that a few substantial punitive damage verdicts might bring — the defendant in such litigation must win the vast majority of cases. When evidence begins to mount about a manufacturer's blameworthy behavior, all it may take to bring such a firm to its knees is for a handful of juries to reject a defense built upon the lack of causation. At that point, the only question likely to remain open will center simply upon the calculation of damages. On that score, evidence of the defendant's misdeeds will weigh heavily.

From the standpoint of the entrepreneurial plaintiffs' attorney, it is enough that the phenomenon of commingling might occur in some juries, not that it necessarily will do so in every instance. Indeed, the foregoing analysis also explains why blameworthy-but-fortunate defendants would be eager to resolve whole categories of mass tort litigation once smoking-gun evidence of their misdeeds has come to light. Defendants — and, for that matter, their shareholders — understandably may not wish to take the chance that some day some jury will reject a defense centered upon a lack of causation and proceed to sock it to defendants in a punitive damage award. This concern helps to explain, among other things, why the securities market so heavily discounts shares of tobacco stock:<sup>212</sup> investors are betting, quite understandably, that the industry cannot win every case.

Considerations of blameworthiness do not cut only against defendants, of course. Some individual plaintiffs may be emotionally unappealing to jurors. As noted earlier,<sup>213</sup> the small number of individual tobacco suits that have proceeded to verdict in recent years have produced mixed results, notwithstanding the emphasis by plaintiffs' counsel upon newly discovered documents that detail the conduct of the industry. These results, however, may be more of a testament to the depth and pervasiveness of popular awareness about the risks of smoking — and, relatedly, to the notion that smokers themselves are to blame for their maladies — than to any explanatory inadequacy in the commingling hypothesis.

Apart from the perceived tendencies of jurors, the bringing of lawsuits in itself has the capacity to uncover additional information that may alter the understanding of the litigation. The bringing of

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212. See generally Suein L. Hwang & Milo Geyelin, *B.A.T May Kick Tobacco Habit at Last*, WALL ST. J., Oct. 15, 1997, at B8 ("Stock analysts have long argued that all tobacco stocks are undervalued.").

213. See *supra* note 189.

suits against defendants that have engaged in suspicious behavior, notwithstanding uncertainty about causation, may reflect the familiar adage: "Where there's smoke, there's fire." The understandable notion on the part of the plaintiffs' bar may be that defendants that have behaved in an arguably blameworthy manner might have done so in order to hide some darker secret — one that aggressive exploration might uncover. In this sense, ongoing litigation provides a vehicle by which plaintiffs' lawyers may search for additional evidence of causation from the defendants' own files. In the meantime, mass tort litigation itself can have the effect of spurring scientific research on the causation question.<sup>214</sup>

Finally, it remains important to keep in mind that litigation is not the only force in play here. Lawsuits interact with other channels by which one may bring to public attention corporate conduct thought to be the source of a mass tort. In this regard, the claims advanced by the mass tort plaintiffs' bar gained credibility from media reports at early stages of the breast implant and tobacco controversies. This is not to say that media attention consisted simply of alarming reports, as were aired with regard to implants.<sup>215</sup> If anything, the widely reported efforts of the tobacco industry to seek legal recourse against adverse television reports on grounds of libel — or to discourage the airing of such programming in the first place, through the implicit threat of legal action — served merely to reinforce public suspicions of the industry generally.<sup>216</sup> In addition

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214. See JASANOFF, *supra* note 201, at 50-51 (noting that scientific research may be "undertaken only when a lawsuit points to the existence of a previously unsuspected causal connection").

215. See *supra* note 64 and accompanying text (discussing an alarmist television report on breast implants that aired in 1990). See generally Hensler & Peterson, *supra* note 50, at 1020-23 (discussing the impact of media coverage on mass tort litigation as a whole).

216. In response to a 1994 report on ABC's news program *Day One* concerning efforts to manipulate the level of nicotine in cigarettes — one of the first media reports on the subject — Philip Morris filed and aggressively litigated a \$10 billion claim for libel. See Steve Weinberg, *Smoking Guns: ABC, Philip Morris and the Infamous Apology*, COLUM. JOURNALISM REV., Nov.-Dec. 1995, at 29, 34. See generally Benjamin Weiser, *Big Tobacco vs. Big Media*, WASH. POST NATL. WKLY. EDITION, Jan. 15-21, 1996, at 6-9. The network ultimately settled the case by paying Philip Morris's legal expenses of \$15 million and by providing an apology on the air, see Weiser, *supra*, at 6, notwithstanding what observers consider to be strong grounds for defense of the report as true. See Benjamin Wittes, *Philip Morris v. ABC: The Defense the Network Never Mounted*, LEGAL TIMES, Jan. 15, 1996, at 1, 41-42.

In the aftermath of the ABC apology, CBS refused to run a *60 Minutes* interview with former Brown & Williamson head of research Jeffrey Wigand that would have focused upon, among other explosive topics, allegations of perjury by tobacco executives with regard to the addictiveness of nicotine. See Lawrence K. Grossman, *CBS, 60 Minutes, and the Unseen Interview*, COLUM. JOURNALISM REV., Jan.-Feb. 1996, at 39, 40-44. The network's action set off a torrent of criticism. CBS's promise to indemnify Wigand in the event of a libel action may have amounted to tortious interference with a confidentiality agreement he had entered into with his former employer. See Alix M. Freedman et al., *CBS Legal Guarantees to "60 Minutes" Source Muddy Tobacco Story*, WALL ST. J., Nov. 16, 1995, at A1. Even more

to media attention, moreover, tort suits may coincide with federal regulatory initiatives of the sort that appear to have contributed to the torrent of claims in the implant litigation<sup>217</sup> and reinforced notions of nicotine addiction from smoking.<sup>218</sup>

It is easy to place a sinister overlay upon the role of juries, the media, and government regulators — for example, to depict mass tort litigation simply as the product of runaway juries, investigative reporters with an appetite for narratives of corporate greed, and self-righteous regulators in the pursuit of political acclaim. Such an assessment, however, would treat as underlying causes what are simply external symptoms. Although the prospect that a jury might commingle causation and fault certainly is at odds with the organization of conventional tort doctrine into discrete legal elements, it would be a mistake to point the finger of doubt at jurors to the exclusion of doctrine.

My contention is decidedly not that jurors are too stupid, but, instead, that they sometimes may be too wise. The growing body of evidence in support of the commingling hypothesis suggests that some jurors may be inclined to turn mass tort litigation into a vehicle for the moral condemnation of corporate behavior thought to be irresponsible or malevolent.<sup>219</sup> The intuition of jurors that moral condemnation may be appropriate should not be a cause for hapless dismay. Instead, it should form the impetus for an assessment of the appropriate constraints — both institutional and doctrinal — upon such sentiments. The ordinary people who become commin-

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loudly, however, commentators decried the implicit threat of Big Tobacco to bludgeon media critics into silence. See Walter Goodman, *Enough Smoking Guns for All on "60 Minutes,"* N.Y. TIMES, Nov. 14, 1995, at B2; *Self-Censorship at CBS*, N.Y. TIMES, Nov. 12, 1995, § 4, at 14 (editorial). CBS ultimately aired the interview several months later, after the same information had come to light through other means. See Bill Carter, *"60 Minutes" Interview with Tobacco Insider Set for Tonight*, N.Y. TIMES, Feb. 4, 1996, § 1, at 14.

This is not to say that the industry's efforts to seek legal recourse in these regards were necessarily wrongful. The law of libel and tortious interference does not protect only the virtuous. But the industry's response to these media investigations merely enhanced the image of tobacco defendants as sinister actors.

217. See *supra* note 71 and accompanying text.

218. See *supra* notes 143-45 and accompanying text.

219. This assessment echoes one recently voiced elsewhere. As Rochelle Dreyfuss observes,

the science problems that courts encounter will never be resolved fully without addressing the underlying rules of law of which they are a part. . . . [S]ome of the "mistakes" juries made . . . tell us more about the community's view of how best to resolve a difficult social dilemma than about the jury's assessment of the science.

Dreyfuss, *supra* note 201, at 2074; see also Dresser et al., *supra* note 50, at 741 ("Rather than acting incompetently by ignoring or even shunning science in entering plaintiff verdicts, jurors may be 'commingling' or nullifying the causation rule to produce a legal outcome that compensates for the lack of legal incentives to test products earlier in the development process." (footnotes omitted)).

gling jurors are on to something important, but they are putting into effect their moral intuitions through channels wildly unsuited to their implicit goal.

### III. SHOULD THE CRIMINAL ANALOGY BE GENERALIZED?

Insofar as mass tort litigation in cases of outrageous fortune has come to encompass notions analogous to those at the core of criminal law — albeit, in large part, via expectations on the part of both plaintiffs' lawyers and defendants about the moral intuitions of jurors — the question is whether this development should be generalized. In particular, the progress of both the implant and the tobacco litigations should lead us to explore the merits and hazards of a more explicit integration of tort and criminal concepts. The major benefit of an approach to cases of outrageous fortune rooted in criminal notions lies in the flexibility that it lends to the formulation of legal remedies. In particular, responses drawn from criminal law emphasize the prospective reduction of risk through means other than the payment of compensation. Put simply, responses that draw upon criminal notions have the capacity to focus the moral opprobrium of the community upon defendants *without* giving money to plaintiffs. This is especially appropriate when the causal connection between the conduct of defendants and the harm suffered by plaintiffs is tenuous at best. The efforts to effect some form of national legislation to end the tobacco wars illustrate such an approach; indeed, one may draw from that example lessons for the ongoing controversy over breast implants.

Negotiation amongst mass tort lawyers, however, is an unwieldy means by which to make the kinds of tradeoffs often needed in cases of outrageous fortune. One might well wish to place a priority upon the reduction of risk to future generations of consumers through punishment of the defendant rather than to give a monetary jackpot to present-day tort claimants. The making of such tradeoffs should be the stuff of open discussion through political channels rather than simply the product of back-room dealmaking. Indeed, consideration of national tobacco legislation raises the prospect that mass tort litigation might form an impetus for democratic deliberation — specifically, a means to *channel* the intuition of ordinary people to impose moral condemnation upon outrageous corporate misconduct into a forum more suitable for consideration of such an approach. The influx of criminal analogies *sub silentio* through other means, by contrast, raises a genuine prospect that the

litigation system as a whole might be deployed in a private witch-hunt against the manufacturers of risky products.

In light of these concerns, the law, if anything, should look further to the criminal system — specifically, to the institutional and doctrinal limitations that criminal law imposes upon its analogous process of moral condemnation. Familiar features of the criminal law — the central role of politically accountable institutions, limitations based upon concepts of *mens rea*, and considerations of deterrence — offer significant constraints that speak to the concerns canvassed above. The challenge for academic commentators and those interested in legal reform is to move beyond the unacknowledged and haphazard borrowing of criminal notions that has characterized recent events. What is needed for the future is a systematic consideration of the manner in which the law of mass torts *ought* to draw upon criminal law. The assessment that follows is a first step in this enterprise.

#### A. *The Advantages of Remedial Flexibility*

As conventionally conceived, criminal sanctions differ in form from tort remedies. As John Coffee aptly phrases the distinction, criminal law “prohibits,” whereas tort law “prices.”<sup>220</sup> Indeed, the stigma associated with imprisonment, as distinguished from the payment of damages, is a significant justification for the greater procedural protections available to criminal defendants.<sup>221</sup> A criminal sentence discharges the defendant’s figurative “debt to society” rather than a debt to a particular individual in the form of a civil judgment.<sup>222</sup> The victims of crime get the psychological satisfaction of knowing that the law will punish the person who harmed them, or who attempted to do so, whereas the victims of torts get cash. Even the feature of the current tort system that most clearly embodies goals of retribution akin to those of criminal law — the availability of punitive damages — comes in the form of a transfer payment from defendants to plaintiffs. Conversely, the feature of the criminal system that most resembles the damage remedy of tort — the imposition of criminal fines — involves the taking of money

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220. See Coffee, *Reflections*, *supra* note 11, at 194; see also Mann, *supra* note 11, at 1808.

221. See, e.g., *In re Winship*, 397 U.S. 358, 363 (1970) (noting that a criminal defendant has at stake “interests of immense importance” because of, among other things, “the certainty that he would be stigmatized by [a] conviction”).

222. Blackstone, for example, distinguished between crimes as public wrongs and civil injuries, such as torts, as private wrongs. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*5.



from the defendant. In the criminal system, fines generally do not go into the coffers of crime victims.

This difference in remedial techniques helps to explain the differing significance of causation in the two systems. If a tort defendant has not caused harm to the plaintiff, the conventional conception of tort law offers no justification for the compelled transfer of money to that individual, no matter how much good one might produce in the future by so doing.<sup>223</sup> Causation matters, in other words, when legal remedies take the form of a monetary transfer. By contrast, the punishment of crimes — including those in which the would-be victim remains unharmed or may have been contributorily negligent — serves all of the conventional objectives of the criminal law as a vehicle for retribution, deterrence, incapacitation, and rehabilitation.<sup>224</sup>

For mass tort disputes centered upon outrageous fortune, the solutions wrought by negotiation have blurred the foregoing distinctions between tort remedies and criminal sanctions. As noted earlier, responses in the form of reorganizations in bankruptcy impose a costly burden upon the debtor corporation that may stigmatize its future business affairs.<sup>225</sup> A national legislative solution for the tobacco wars would take this trend several steps further. Although even the original \$368.5 billion proposal negotiated by the industry and state attorneys general would not have resolved lawsuits currently pending in the tort system,<sup>226</sup> that proposal does contain several controversial provisions that concern the industry's liability in tort for past acts: for example, by barring class actions henceforth;<sup>227</sup> by prospectively forbidding punitive damage awards, apart from the payments that Congress might require by federal law;<sup>228</sup> and by limiting the sums that the industry would have to pay annually in satisfaction of any outstanding tort judgments.<sup>229</sup> It re-

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223. Some commentators have offered substantial criticisms of this conventional view. See *supra* note 16 and accompanying text.

224. See *supra* note 33 and accompanying text (discussing the lack of a contributory negligence defense to a criminal prosecution and the punishment of attempt crimes). For a survey of the four conventional rationales for criminal punishment, see SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 102-31 (6th ed. 1995).

225. See *supra* section II.A.2.

226. Apart from any national legislation, the industry settled a class action brought on behalf of flight attendants exposed to secondary smoke. See Mireya Navarro, *Cigarette Makers Reach Settlement in Nonsmoker Suit*, N.Y. TIMES, Oct. 11, 1997, at A1.

227. See *Proposed Resolution, supra* note 7, at 39.

228. See *id.* This limitation would not apply to lawsuits based upon future misconduct. See *id.* at 41-42.

229. See *id.* at 40-41 (providing that judgments in excess of the annual cap would roll over to be paid in the following year).

mains unclear what mix of measures, if any, ultimately will be part of any national legislation, but the Clinton administration has indicated that "reasonable provisions modifying the civil liability of the tobacco industry would not be a dealbreaker."<sup>230</sup>

Unlike reorganization plans in bankruptcy, however, the most innovative aspects of national legislation in the tobacco area consist of features designed not to resolve questions of compensation for tort claimants, but instead to support dramatic new efforts to reduce smoking in the future. In its negotiations with the state attorneys general, the industry already has demonstrated its willingness to embrace dramatic new regulatory measures that would go well beyond even those promulgated by the FDA. These measures include: explicit statutory recognition of FDA authority to mandate the "gradual reduction . . . of nicotine yields" and, potentially, to eliminate nicotine entirely in the long run;<sup>231</sup> financial penalties in the absence of specific percentage reductions in underage smoking;<sup>232</sup> warnings about health risks and addictiveness that would occupy twenty-five percent of the front panel of cigarette packs;<sup>233</sup> sweeping restrictions on marketing that would outlaw all outdoor

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230. Jeffrey Taylor, *Clinton to Back Tobacco Firms on Suit Relief*, WALL ST. J., Feb. 5, 1998, at A4 (quoting the testimony of David W. Ogden, counselor to the Attorney General, before the House Committee on the Judiciary).

231. See *Proposed Resolution*, *supra* note 7, at 16-18. It now appears likely that any national legislation will not encompass certain restrictions upon FDA authority that were part of the original proposal — for example, a requirement that the FDA use highly cumbersome formal rulemaking procedures in the event that it wishes to ban nicotine and a further demand that the FDA demonstrate that such action would "not result in the creation of a significant demand" for contraband cigarettes. See *id.* at 17. Critics of the original deal made considerable headway by pointing out that FDA authority to take such action already exists, without the controversial limitations. See John M. Broder, *White House Says Tobacco Proposal Would Hurt F.D.A.*, N.Y. TIMES, July 9, 1997, at A1. Such power follows from the proposition, recently accepted by a federal district court, that the FDA has the legal authority to regulate nicotine in tobacco products under the current food and drug laws. See *Coyne Beahm, Inc. v. FDA*, 958 F. Supp. 1060, 1079-83 (M.D.N.C. 1997), *appeal pending*, No. 97-1581 (4th Cir.). Whether there ever will be sufficient political will to ban nicotine, of course, is another question.

232. See *Proposed Resolution*, *supra* note 7, at 24. Under the proposal, surcharges would be triggered in the event that underage smoking does not decline by at least 30% in 5 years, 50% in 7 years, and 60% in 10 years. See *id.* (providing for surcharges totalling up to \$2 billion per year).

Controversy remains not only over the specified percentages, but also over the qualification that the industry may obtain abatement of up to 75% of the surcharge by showing that it has "taken all reasonably available measures to reduce youth tobacco use and ha[s] not taken any action to undermine the achievement of the required reductions." *Id.* Again, the controversy is over the severity of the penalty upon the industry rather than its existence. See Broder, *supra* note 231; cf. Jeffrey Taylor, *Shalala Offers Plan on Curbing Smoking*, WALL ST. J., Sept. 26, 1997, at A3 (reporting a suggestion by Secretary of Health and Human Services Donna Shalala that penalties be levied "on a company-by-company basis, so that those that make brands popular among underage smokers pay more than others").

233. See *Proposed Resolution*, *supra* note 7, at 10.

advertisements as well as the use of human images or cartoon characters;<sup>234</sup> expenditure of funds collected from the industry to support antismoking advertisements to be developed by the public health community;<sup>235</sup> and the dissolution of industry disinformation organizations, coupled with the creation of a public depository for the documents therefrom.<sup>236</sup>

Apart from the foregoing measures, considerable attention has focused, in recent months, upon the prospect that dramatic increases in cigarette prices — as much as \$1.50 per pack, as President Clinton has suggested, or even more — may help to reduce cigarette consumption.<sup>237</sup> The precise mechanism through which to achieve price increases of this magnitude remains open to debate. As part of national legislation in the tobacco area, Congress simply might increase federal taxes upon tobacco products. Alternatively, Congress might increase the amount of money the tobacco industry itself would have to pay under the national legislation — above the \$368.5 billion originally proposed — with the expectation that the industry will pass along the cost to consumers. Whatever the mechanism, the impact of price hikes may be especially pronounced for underage consumers, whose disposable income tends to be relatively fixed.<sup>238</sup> Economists Frank Chaloupka and Michael Grossman, for example, have estimated that a seventy-five-cent-per-pack

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234. See *id.* at 9. This aspect of the proposal, if ultimately included in national legislation, would overcome the current lack of statutory authority for the more narrow set of advertising restrictions in existing FDA regulations. See *Coyne Beahm*, 958 F. Supp. at 1083-86. In an attempt to reduce the prospects for a constitutional challenge on grounds of commercial speech, the proposal would not have applied advertising restrictions to tobacco firms other than the major companies that control virtually all of the domestic market for cigarettes and that negotiated the proposal with the state attorneys general. See *Proposed Resolution*, *supra* note 7, at 28-29; cf. Edmund L. Andrews, *European Officials Agree to Ban on Most Tobacco Ads by 2006*, N.Y. TIMES, Dec. 5, 1997, at C1 (reporting an agreement of European health ministers on sweeping restrictions on tobacco advertising in their respective countries).

I leave for others the merits of the First Amendment issue. Compare, e.g., Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 620 (1996) (expressing skepticism over the constitutionality of advertising restrictions) with, e.g., Vincent Blasi & Henry Paul Monaghan, *The First Amendment and Cigarette Advertising*, 256 JAMA 502 (1986) (asserting the constitutionality of advertising restrictions) and Sylvia A. Law, *Adoption, Autonomy, and Advertising*, 77 IOWA L. REV. 909 (1992) (same).

235. See *Proposed Resolution*, *supra* note 7, at 37-38.

236. See *id.* at 22, 64-65.

237. See Jeffrey Taylor, *Clinton Presses Tougher Deal on Tobacco*, WALL ST. J., Sept. 18, 1997, at A3; see also Jeffrey Taylor, *More Senators Seem to Back Increasing Cigarette Prices Beyond Level in Accord*, WALL ST. J., Sept. 17, 1997, at A6 (noting congressional support for large price increases); cf. LeBel, *supra* note 133, at 640 (calling for a massive increase in cigarette taxes as a means, among other things, to reduce consumption).

238. For internal industry documents expressing such a concern with respect to past price increases, see GLANTZ ET AL., *supra* note 133, at 249.

increase in cigarettes prices would be associated with a twenty-five percent reduction in underage smoking.<sup>239</sup>

Full-fledged debate in Congress over the precise details of any national legislation remains to be had. For present purposes, however, the most noteworthy feature of the emerging debate consists of its focus upon what critics regard as the excessive leniency of the regulatory measures originally negotiated by state attorneys general — their failure to go even further to punish the industry — rather than upon their existence. The debate, in short, is over how far to go in the direction of criminal-law-like remedies. The premise so to proceed in the first place has now become the starting point for discussion. Only a short time ago, measures along the lines outlined here would have been dismissed as fantasy, even if accompanied by many more gaping loopholes.

The regulatory aspects of the proposed national legislation amount to nothing less than an effort to rehabilitate Big Tobacco. Indeed, the first paragraph of the original proposal states explicitly that regulatory measures of the sort outlined therein would “mandate a total reformation and restructuring” of the tobacco industry — one that would have the effect of “changing the corporate culture.”<sup>240</sup> Here is the rhetoric of criminal law writ large. Indeed, the prospect of national legislation that would establish a rehabilitation program for defendants without mandating cash transfers to current smokers speaks specifically to the problem of risk-decisional causation raised in Part II: legislation along these lines would make sense of both the formidable evidence of the industry’s blameworthiness and the equally formidable amount of information in society about the harmful and addictive nature of smoking. It would bring moral condemnation upon the industry without, at the same time, transferring money to those who, in all likelihood, well understood the harmful nature of smoking but considered the pleasures of nicotine to be worth it. For this, national legislation would be an elegant solution to the problem of outrageous fortune.

There is more than just the culture of Big Tobacco at stake, of course. Given the longstanding awareness of the nature of smoking, there are eminently sensible grounds upon which to be skeptical about the impact that more explicit warnings and restrictions upon advertising, in themselves, might have upon the incidence of

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239. See Frank J. Chaloupka & Michael Grossman, *Price, Tobacco Control Policies and Youth Smoking* 23 (National Bureau of Econ. Research Working Paper No. 5740, 1996).

240. *Proposed Resolution*, *supra* note 7, at 1.

smoking.<sup>241</sup> Along similar lines, some critics have questioned the effect of cigarette price hikes upon demand.<sup>242</sup> The parsing of any legislative proposal on a point-by-point basis, however, may miss the forest for the trees. Its significance for future generations may well lie not in any of its particulars but, rather, in its expressive impact as a whole.

One of the growing movements in criminal law scholarship centers upon the role of criminal sanctions as a vehicle to express social norms. Under this view, featured most prominently in the recent writing of Dan Kahan, criminal regimes are significant as much for what they *say* to people about the prevailing social culture as for what they *do*.<sup>243</sup> As Kahan explains,

[s]ocial meaning plays a critical role in criminal law. Economists speak of criminal law as a mechanism for pricing misconduct, but ordinary citizens think of it as a convention for morally condemning it. Against the background of that expectation, the positions that the law takes become suffused with meaning. *What* it punishes . . . can tell us what kind of life the community views as virtuous; *how* it punishes (imprisonment, corporal punishment, fines) can tell us what forms of affliction it views as appropriate to mark wrongdoers' disgrace; *how severely* it punishes . . . can tell us whose interests it values and how much.<sup>244</sup>

Kahan argues that the articulation and enforcement of criminal sanctions has the capacity to change the social meaning of behavior — to deter crime not simply out of some cold-blooded calculus centered upon the expected costs of punishment, but from a sense of shame and rebuke from society at large.<sup>245</sup>

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241. See Klein, *supra* note 10 (arguing that macabre warnings simply may make cigarettes seem like even more of a forbidden fruit for underage consumers); see also Stanton A. Glantz, *Editorial: Preventing Tobacco Use — The Youth Access Trap*, 86 AM. J. PUB. HEALTH 156, 157 (1996) (expressing a similar criticism by an antitobacco activist of the more limited advertising restrictions set forth by the FDA).

242. For an overview of this debate, see Jeffrey Taylor, *Critics Question Tobacco Pact's Effect on Teen Smoking*, WALL ST. J., Aug. 19, 1997, at A20. Other observers have pointed to the related concern that consumers as a whole may blunt the effect of price hikes by purchasing cigarettes at the growing number of discount smoke shops that focus virtually exclusively upon high-volume sales of tobacco products. See Barnaby J. Feder, *Tough Climate May Benefit Smoke Shops*, N.Y. TIMES, Aug. 5, 1997, at C1.

243. See Kahan, *supra* note 33, at 362-65; see also Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594-605 (1996) (discussing the "expressive dimension" of criminal punishment).

244. Kahan, *supra* note 33, at 362 (footnotes omitted).

245. See *id.* at 363 (noting that "criminal law can produce social meaning through the regulation of social norms" (emphasis omitted)). For empirical support, see Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997).

To the extent that any conceivable national legislation has genuine prospects for success, those prospects lie primarily in its potential to alter not merely the culture of industry but also the social meaning of smoking itself. Legislation, in particular, can serve to recharacterize the underage smoker not as a rugged individualist but simply as one in a herd of thousands duped by a clever campaign of corporate disinformation. Understood in this light, the notion of nicotine addiction as some sort of new-found revelation is a well-constructed myth; but it may be a myth that serves an expressive purpose, apart from historical accuracy.

An understanding of the proposed tobacco legislation drawn from criminal law has implications for the appropriate resolution of the breast implant controversy. As noted earlier, there certainly remains some debate over whether implant makers did anything worthy of moral condemnation.<sup>246</sup> Insofar as one might think they did, a sensible approach would be to punish the conduct of defendants without giving a windfall to plaintiffs who, apparently by sheer coincidence, happened to receive implants and later to develop connective tissue disease. Chapter 11 bankruptcy is a useful procedural vehicle for disentangling various creditors' claims established under some body of substantive law; only by accident does the bankruptcy process itself act as a means by which to punish the debtor.<sup>247</sup>

Whatever one might think of implant makers, it does seem clear that their degree of culpability is lower — indeed, significantly lower — than that of Big Tobacco. Implant defendants, for all their arguable foibles, did not affirmatively set out to harm consumers in the manner alleged of the tobacco industry. I turn to that line of distinction later, in connection with the limitations that one should draw from criminal concepts of *mens rea*.<sup>248</sup> For the moment, the point is that bankruptcy too may serve, unwittingly and without political input, as a vehicle for punishment of defendants that ultimately need not give money to plaintiffs. As compared to legislation on the scale being discussed for tobacco, bankruptcy is a far lesser vehicle for altering the social meaning of product consumption, but that difference may not be especially significant. Silicone gel breast implants, unlike cigarettes, have been withdrawn from the market.<sup>249</sup>

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246. See *supra* note 61 and accompanying text.

247. See *supra* notes 115-18 and accompanying text.

248. See *infra* section III.B.2.

249. See *supra* notes 66-67 and accompanying text.

## B. *The Importance of Institutional and Doctrinal Constraints*

Although the foregoing remedial advantages are by no means inconsiderable, it would be a serious mistake simply to pluck from criminal law the notion of moral condemnation without regard to causation and to transfer that idea, unadorned, to the mass tort context. Both tort and criminal law are coordinated systems in which each component of substantive doctrine exists within a collection of suppositions not only about the content of other, related doctrines but also about the appropriate roles of various legal institutions.<sup>250</sup> Attention to these aspects of criminal law — specifically the role of political institutions, gradations of *mens rea*, and goals of deterrence — helps to frame the appropriate parameters upon the process of moral condemnation for corporate misdeeds.

### 1. *The Role of Political Institutions*

Mass tort disputes have not previously garnered significant consideration by political institutions. Indeed, one generally might regard as desirable the relative lack of involvement by political bodies, insofar as litigation can serve as an independent means by which to bring to light questions of product safety.<sup>251</sup> The *identification* of safety issues by way of entrepreneurial litigation, however, does not necessitate their *resolution* completely outside of channels for public discussion and political accountability. In these respects, the proposal to resolve the tobacco litigation is notable for the crucial role contemplated for Congress.

*a. Plaintiffs and Accountability.* A recurring problem in the fashioning of any kind of collective solution to mass tort disputes lies in balancing the interests of current plaintiffs with those of future generations. In previous mass tort scenarios, litigation typically has driven the product in question and, in some instances, entire manufacturing firms from the market.<sup>252</sup> For cases in which the causal link between defendants and plaintiffs is reasonably clear, the challenge has been to provide appropriate redress to those who currently suffer from disease and, at the same time, to

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250. This remains the enduring insight of the Legal Process school. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* at cxxxvii (William N. Eskridge & Philip P. Frickey eds., 1994).

251. See *supra* note 44 and accompanying text.

252. The most prominent example remains the asbestos litigation. For a detailed account, see generally PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985).

fashion a sustainable compensation framework for those who may manifest disease only years or decades later.

The situation is even more complex in cases of outrageous fortune. The national legislation currently contemplated for the tobacco area focuses not upon compensation per se but, predominantly, upon measures to reduce the consumption of a product expected to remain on the market in the future. Here, the tradeoff is not merely temporal — measures of concern to present-day persons versus measures for the protection of others in the future — but also of kind — compensation for past harms versus regulation to discourage product use prospectively. Indeed, as explained above,<sup>253</sup> cases of outrageous fortune often cry out for solutions that will punish the conduct of defendants but that, due to lack of causation, will not result in a windfall for present-day plaintiffs.

These are not the sorts of matters that one can compare on a balance sheet; rather, they inherently entail the application of rough value judgments. Private negotiation alone — whether in the context of reorganization proceedings in bankruptcy or in connection with aggregate lawsuits, such as the state Medicaid reimbursement actions — is ill-suited for this task. Private negotiations to effect solutions along these lines frequently, for understandable practical reasons, tend to focus upon those mass tort plaintiffs' attorneys who already have substantial numbers of current clients: they are the ones who need to sign on to any deal in order to assure defendants that the deal really does mark a solution to the litigation. One does not have peace unless all of the entities who might attack you have signed the peace treaty.

Plaintiffs' lawyers with a large stable of clients in the particular area at issue, however, are not positioned to trade off dollars for current claimants in order to punish the conduct of defendants through other, potentially more suitable, means. Negotiations of this sort place plaintiffs' lawyers not in the position of zealous and loyal advocates for present-day clients,<sup>254</sup> but rather in a posture akin to that of a regulatory agency charged with the advancement of the public interest as a whole. Indeed, attention recently has fo-

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253. *See supra* section III.A.

254. Longstanding principles of legal ethics impose upon attorneys duties of zealous representation and loyalty. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1995) ("A lawyer should act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. ("Loyalty is an essential element in the lawyer's relationship to a client.").



cused upon the possibility that prominent plaintiffs' attorneys involved in the tobacco negotiations in their separate capacity as counsel for various state governments may have labored under a conflict of interest by calling for legislation that would put no dollars in the hands of their present clients in exchange for industry assent to measures designed to reduce smoking prospectively.<sup>255</sup>

To address this problem, courts in aggregate proceedings sometimes have subdivided the representation of the various interests aligned against defendants. Courts in the class action and bankruptcy contexts, for instance, sporadically have insisted upon the creation of subclasses for future claimants or have appointed a guardian ad litem to review any deal as a whole.<sup>256</sup> The effectiveness of these measures is itself a subject of debate in the academic literature.<sup>257</sup>

For present purposes, however, the more significant observation goes not to the potential effectiveness of efforts to subdivide legal representation but, rather, to the existence of such efforts in the first place. These attempts to bring the negotiation process into line with conventional understandings of legal representation stand as an effort — again, unacknowledged — to push mass tort litigation toward the institutional arrangements familiar in other substantive areas of law: in particular, areas like criminal law that contemplate a significant role for politically accountable bodies. It is as if courts are seeking, *sub silentio*, to create the kind of vehicle for wide-ranging consideration of contending interests that is more readily akin to the mechanisms for *political* representation.

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255. See Milo Geyelin, *Tobacco Plaintiff Sues Her Ex-Attorney*, WALL ST. J., Aug. 19, 1997, at B7 (reporting on a lawsuit raising such allegations); Bob Van Voris, *Tobacco Negotiations Created Sharp Client Conflicts*, NATL. L.J., Aug. 4, 1997, at A8 (same). Although this particular lawsuit resulted in a settlement on undisclosed terms, see Milo Geyelin, *Lawyers on Florida's Antitobacco Team Try to Hold Up Pact in Bid for More Fees*, WALL ST. J., Sept. 10, 1997, at B3, the larger question of ethical propriety remains open.

256. See, e.g., Flanagan v. Ahearn (*In re Asbestos Litig.*), 90 F.3d 963, 972 (5th Cir. 1996), vacated on other grounds, 117 S. Ct. 2503 (1997) (using guardian ad litem to review a class action settlement involving asbestos products manufactured by Fibreboard); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 743-45 (2d Cir. 1992) (striking down a plan to restructure the Manville bankruptcy trust due to a lack of sufficient subclasses).

257. Compare Coffee, *supra* note 93, at 1445-46 (endorsing the use of subclasses in the class action context) with Smith, *supra* note 87, at 383-91 (suggesting that even this may be inadequate to safeguard the interests of future claimants in bankruptcy). Especially in cases of outrageous fortune, there may be practical limitations upon efforts to subdivide legal representation: if solutions in this situation ideally should give little or nothing to one or more of the contending groups, it is difficult to imagine an attorney willing to take on the representation of a subclass composed only of such persons. Alternatively, if the attorney simply acts in the role of a guardian ad litem, one wonders whether there will be sufficient incentive to press vigorously for financial returns.

The major concern is not that plaintiffs' attorneys are incapable of making tradeoffs, especially if suitable subclasses can be created; instead, it is that they — even when they negotiate subject to judicial approval from, say, a bankruptcy court — are not politically accountable. There may well be many plausible approaches with regard to tobacco, for example — conceivably, including the outright rejection of any national legislation — and it is not only appropriate but desirable for political institutions to hash them out. Given the need for value judgments that are *both* temporal and qualitative in character, legislative consideration is vastly preferable on grounds of public deliberation and accountability to lawyer- or court-centered solutions.

In casting the resolution of mass tort disputes into the political realm, one must not underestimate the role of interest groups, as distinct from the negotiators themselves. In fact, the national debate occasioned by the tobacco litigation is an especially vivid illustration of the role that such groups may play. The strongest advocates for both FDA authority and measures to reduce underage smoking have been leaders within the public health community who were *not* present at the negotiating table when the original proposal was formulated.<sup>258</sup>

*b. Defendants and the Problem of Line-Drawing.* For prospective defendants, there is a different concern: the danger that litigation at the behest of entrepreneurial plaintiffs' lawyers will amount to little more than a witch-hunt that might be richly deserved by its initial target, but that could give rise to a whirlwind of subsequent repercussions for other manufacturers. Some observers have raised serious fears along these lines with respect to the tobacco litigation, questioning whether the techniques used against that industry are

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258. See Broder, *supra* note 231 (discussing criticism of the proposal by an independent group of public-health leaders). This observation arguably runs contrary to the claim of public-choice theory that the legislative process generally tends to favor the interests of narrow, concentrated groups and, in so doing, may disserve interests that are more broadly dispersed in society. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991) (providing an overview of the public-choice account of legislation). A full-scale examination of the tobacco litigation from a public-choice perspective is an intriguing enterprise that nonetheless lies beyond the scope of this article. For present purposes, it is enough to say that, when one considers the present mass tort litigation system and the channels of private negotiation used therein, deliberation in the public realm holds *comparatively* greater prospects for political accountability. For a broader defense of interest groups as important sources of information for government decisionmakers, see Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 *YALE L. & POLY. REV.* 553, 583-86 (1997).

the harbingers of even more troubling attacks upon other manufacturers long understood to make harmful products.<sup>259</sup>

Under this view, it is not so much that antitobacco lawyers uncovered wrongs committed by Big Tobacco and then sought to bring that industry to justice but, rather, the reverse: one may understand the development of new theories of liability based upon nicotine addiction and Medicaid reimbursement primarily as strategic devices to enable antitobacco forces, at long last, to tap into “the plumpest, juiciest, golden-egg layer of all time.”<sup>260</sup> In the criminal system, there is reason for concern when prosecutors seek to pin crimes on people rather than match people to crimes.<sup>261</sup> In the mass tort context, the trouble is how — specifically, how as an institutional matter — to go about finding a sensible stopping point for such theories.

Consideration of the tobacco proposal by Congress is especially valuable as a vehicle by which to facilitate public debate on whether moral condemnation should be visited upon mass tort defendants generally.<sup>262</sup> Insofar as national legislation would break down the conventional tort-crime distinction, the decision to do so clearly is a subject for public deliberation. Criminal law teaches us that it is the distinctive role of legislatures, not courts or private negotiators, to serve as the vessel for the moral condemnation of conduct.<sup>263</sup>

With all the acrimony directed at the tobacco industry — much of it long overdue — it is easy to lose sight of the premise that the involvement of political bodies in the criminal system can act as a major safeguard against the kind of private vendetta that some have labeled the tobacco litigation. A significant attraction of a legisla-

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259. See Robert H. Bork, *Addicted to Health*, NATL. REV., July 28, 1997, at 28-30; *White Smoke, and Black*, ECONOMIST, June 28, 1997, at 16.

260. Weiser, *supra* note 132, at 19 (quoting tobacco stock analyst Gary D. Black concerning the motivations of tobacco plaintiffs' lawyers).

261. See *Morrison v. Olson*, 487 U.S. 654, 728-29 (1988) (Scalia, J., dissenting) (criticizing on these grounds the independent counsel statute for the criminal prosecution of senior Executive Branch officials).

262. Apart from legislative consideration of the tobacco proposal at the back end, there also has been a modicum of political accountability at the front end — albeit, not directed to the incorporation of criminal law principles. Lawsuits by state attorneys general are, on their face, similar to the standard mode for the enforcement of substantive criminal law — namely, publicly initiated prosecutions under the auspices of the very same state officials. That said, however, political constraints are significantly attenuated insofar as state officials do not pursue litigation against the tobacco industry through expenditure of their own limited budgetary resources, but instead retain entrepreneurial private attorneys on an off-budget, contingency-fee basis.

263. See *supra* note 42 and accompanying text.

tive solution for the tobacco wars consists precisely of the ad hoc character of legislation itself.

A legislative solution indeed would break the political logjam upon regulation of the tobacco industry<sup>264</sup> — a source of public health risk much greater in magnitude than others addressed by governmental regulation.<sup>265</sup> Even more notable, however, is that a legislative deal would do so without creating a body of precedent that might be deployed, by analogy, in similar attacks upon other longstanding sources of risk to consumers — employed without the benefit of additional political deliberation upon the merits of such extensions. Stores are full of products that, like tobacco, come from controlled industrial processes that might be said to “spike” the levels of various ingredients, some of which may make it more difficult physically or psychologically for consumers to discontinue use. One can strike a legislative deal with respect to tobacco icons that appeal to children, in other words, without building a corpus of judicial decisions that could fuel attacks upon the Budweiser frogs, the Coca-Cola polar bears, and Ronald McDonald. Some may think that moral condemnation of the purveyors of products laden with alcohol, sugar, caffeine, fat, or salt would be a good idea;<sup>266</sup> some may not. The major point, however, does not concern individual policy preferences, but instead the appropriateness of fora that are expressly political as the vehicles through which to decide such questions collectively and in a manner sensitive to the distinctive risk-benefit tradeoffs involved in each context.

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264. Leaders of the antitobacco movement draw upon this insight when they describe mass tort litigation as a way to overcome “the failure of conventional legislative and administrative regulation” in the area due to what they consider the inordinate political influence of the industry. See Kelder & Daynard, *supra* note 134, at 66. For a highly critical assessment of industry influence in earlier periods, see Stephen Moore et al., *Epidemiology of Failed Tobacco Control Legislation*, 272 JAMA 1171 (1994). The proposed tobacco legislation notably casts the subject before Congress under circumstances in which antitobacco forces appear especially influential. Cf. *supra* note 258 and accompanying text.

265. See *supra* note 151 and accompanying text.

266. This is not as far-fetched as it initially might seem. See, e.g., MARIETTA WHITTLESEY, *KILLER SALT* 78 (1977) (arguing that “food manufacturers first carefully foster a taste for salt in the public and then stay in business by meeting and fostering that salt dependency”); Sally Goll Beatty, *How the Beer Industry Uses TV Ads to Mollify Critics, Buff Its Image*, WALL ST. J., Aug. 14, 1997, at A1 (detailing the beer industry’s use of advertising to deflect criticism of the effects of its product); Bruce Ingersoll & Sally Goll Beatty, *FTC Broadens Probe of Brewers’ TV Ads*, WALL ST. J., Apr. 8, 1997, at B10 (reporting an FTC investigation into the possibility that beer manufacturers may have targeted underage consumers with television advertisements); cf. William J. Bennett, *Face the Facts About Alcohol and Crime*, N.Y. TIMES, July 29, 1997, at A13 (forecasting that “[i]f the liquor industry does not start acting in a more socially responsible way, it may soon find itself held in the same kind of esteem in which the tobacco companies are now held”).

The tobacco-litigation and the variations that one might imagine for the future — indeed, the implant controversy too — all pose the same tension between two broader trends in modern America: respect for individual choice and respect for what Richard Klein has aptly labeled “healthism.”<sup>267</sup> The first trend resonates not only in the demand of the products liability revolution for information as a vehicle for individual risk decisions, but also in the roughly contemporaneous recognition of a constitutional right of privacy.<sup>268</sup> In both contexts, the objective of the law has been to facilitate and, often, to insulate from coercion the making of significant individual choices, even choices that many might regard as socially destructive or contrary to the best interests of the individual in question.

The second trend is more subtle, but equally important. As Klein pointedly observes, cigarettes have soothed human nerves for centuries — an achievement that is not trivial amid the stress of modern life — yet “their value these days is exclusively determined with reference to their noxious effects.”<sup>269</sup> In Klein’s view, “[h]ealthism has become part of the dominant ideology of America,” an ideology that “has sought to make longevity the principal measure of a good life.”<sup>270</sup> It is this neo-Puritanical tendency to define for others what makes life worth living, not any allegiance to Big Tobacco, that makes recent developments so disturbing and so threatening to some. In fact, the Medicaid reimbursement suits brought by state attorneys general fuel this sentiment by suggesting — quite possibly incorrectly — that smokers’ implicit rejection of healthism is costing the rest of society big money.<sup>271</sup> That those who advance these sentiments should draw upon concepts from

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267. KLEIN, *supra* note 123, at 191.

268. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception). See generally *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990) (assuming that competent persons have a constitutional right to refuse life-extending treatment). I leave for others the quite considerable debate over privacy rights under the Constitution. For two classic explorations of the issue, compare John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1973) (criticizing the right to privacy in the abortion context as “not inferable from the language of the Constitution, the framers’ thinking . . . any general value from the provisions they included, or the nation’s governmental structure”) with Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989) (defending the constitutional right to privacy based upon the capacity of prohibitory laws “to direct and to occupy individuals’ lives”).

269. KLEIN, *supra* note 123, at 184-85.

270. *Id.* at 185, 191.

271. It is by no means clear that smokers impose a net loss upon the public fisc when one accounts — admittedly, with a cold heart — for the taxes levied on cigarettes and the premature deaths attributable to smoking. For surveys of the economic literature on this subject, see Kluger, *Peace Plan*, *supra* note 7, at 29; Laura Mansnerus, *Making a Case for Death*, N.Y. TIMES, May 5, 1996, at E1.

criminal law is especially troubling, given what one commentator vividly describes as the tendency of criminal prosecutions in general to give wing to “the self-congratulatory emotion of blame” toward the defendant and “a self-conscious attitude of moral superiority” on the part of the prosecutor.<sup>272</sup>

The job of mediating between these two trends within the constraints of the Constitution<sup>273</sup> is not merely the province of political institutions; it is the ordinary business of criminal law. The very existence of criminal law stands as powerful evidence that there are some choices that civilized societies are prepared to deny completely, both to individuals and to those who otherwise might turn a handsome profit from the satisfaction of public demand. Criminal law does so even in the face of arguments that the dangers posed by the underlying activity stem not from the exercise of choice itself, but instead from the effects of its denial by the law. That is often the quandary that criminal sanctions pose, as both the history of efforts to prohibit alcohol<sup>274</sup> and the longstanding debate over the criminalization of narcotics exemplify.<sup>275</sup>

Outright criminalization, of course, is not the only option available. Were one to imagine a continuum ranging from, say, the strict criminal prohibition of heroin down to the free availability and overt promotion to children of fast-food hamburgers, there would be legitimate debate over precisely where one ought to place cigarette smoking. The measures now being debated, in practical effect, would seek to rehabilitate the tobacco industry, but would leave adult consumers free to choose its deadly wares. The role of political bodies in criminal law has long been to make — or not to make

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272. See Donald Dripps, *The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199, 204 (1996); see also Steiker, *supra* note 11, at 806 (citing the quoted language from Dripps and adding that the “ability to harness the force of blaming represents a particularly threatening aspect of state power” when wielded in the ordinary criminal system).

273. No one seriously claims, for example, that there exists a fundamental right either to sell or to smoke cigarettes.

274. For illustrative accounts of Prohibition, see, e.g., NORMAN H. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION* (1976); JAMES H. TIMBERLAKE, *PROHIBITION AND THE PROGRESSIVE MOVEMENT 1900-1920* (1963); LAW, ALCOHOL, AND ORDER: PERSPECTIVES ON NATIONAL PROHIBITION (David E. Kyvig ed., 1985).

275. For an overview of the debate on this subject, see Ronald Bayer, *Introduction: The Great Drug Policy Debate — What Means This Thing Called Decriminalization?*, in *CONFRONTING DRUG POLICY: ILLICIT DRUGS IN A FREE SOCIETY* 1-23 (Ronald Bayer & Gerald M. Oppenheimer eds., 1993). For an illustrative sampling of recent academic criticism of drug interdiction efforts, see, e.g., EVA BERTRAM ET AL., *DRUG WAR POLITICS: THE PRICE OF DENIAL* (1996); STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RE-THINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* (1992).

— compromises of this sort upon public deliberation, and that institutional lesson should accompany any importation of criminal notions into mass tort litigation.

*c. The Future of Politics.* As a practical matter, it appears unlikely that anything on the horizon will garner the attention of political bodies in quite the manner of the tobacco wars. It would be a mistake, however, to dismiss the role of political institutions to facilitate public discourse on mass torts as the product of some anomalous alignment of the planets. Rather, *any* solution to mass tort disputes that entails *both* measures that concern liability for past misdeeds and commitments with regard to future regulation must necessarily entail political action in some form. It is only the political process at the federal level — not entrepreneurial litigators, state attorneys general, or public health advocates — that ultimately can make commitments about the content of regulatory statutes.

Even when current statutes are sufficiently broad and open-textured as to be capable of encompassing the kind of regulatory regime envisioned by negotiators without amendment by Congress, the decision so to read the relevant statutes itself is a matter given over to political bodies — specifically, the President. That is the central lesson of the Supreme Court's landmark decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,<sup>276</sup> which obligates the courts to defer to reasonable interpretations rendered by the Executive Branch to fill gaps and to resolve ambiguities in regulatory statutes.<sup>277</sup> As the Court emphasized in support of this principle, the judiciary is not politically accountable, whereas the Executive Branch is.<sup>278</sup> As a practical matter, of course, interested parties nonetheless might insist upon statutory amendment, rather than leave themselves open to the possible ebb-and-flow of Executive Branch interpretation of a statute.

Apart from the need for legislative or executive action to effect future deals similar to that under debate for tobacco products, one should not underestimate the impact that the overall political climate may have upon the prospects for deal making in the first place. Litigation by the mass tort plaintiffs' bar and the states might not have brought Big Tobacco so quickly to the negotiating table but for the contemporaneous regulatory initiative undertaken by

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276. 467 U.S. 837 (1984).

277. See 467 U.S. at 843-44.

278. See 467 U.S. at 865.

the FDA. In fact, secondary sources have suggested that then-White House advisor Dick Morris played a crucial role in persuading a hesitant President Clinton to pursue the FDA initiative, precisely because of its perceived ability to enhance his political standing for purposes of reelection.<sup>279</sup> That a different administration might have made a different calculus — and, in so doing, may have changed the course or, at least, the timing of events — is the stuff of which presidential elections are made.

This, however, is only a partial prescription. Collective resolution of claims against blameworthy mass tort defendants in the face of disputes over risk-decisional causation may well necessitate political action as a matter of sheer practicality, insofar as the product in question is to remain on the market in some form. But what about cases of scientific causation? As the controversy over silicone gel breast implants indicates, cases of this sort are less likely to result in the relevant product remaining on the market. Apart from how the scientific community ultimately might answer the causation question, the publicity generated by mass tort litigation — especially revelations of defendants' awareness of a possible safety risk — may produce the same result. In such a situation, there is no need to debate the posture of future regulatory efforts.

As I have described in greater detail elsewhere in connection with the implant controversy,<sup>280</sup> there are other ways to enhance deliberation through political channels with regard to disputes over scientific causation. Specifically, I have called for the recognition, by statute, of channels by which private petitioners may obtain consideration by the relevant federal regulatory agency of safety issues identified by way of mass tort litigation.<sup>281</sup> Statutorily mandated consideration at the agency level, in turn, would trigger the application of existing prudential limitations of administrative law upon litigation on the same subject in the tort system. The effect would be to call "time out" to prevent the sheer momentum brought on by an avalanche of lawsuits from dictating the outcome.<sup>282</sup> This does not mean that the law always must stand idly by, awaiting some

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279. See Alix M. Freedman & Suein L. Hwang, *How Seven Individuals with Diverse Motives Halted Tobacco's Wars*, WALL ST. J., July 11, 1997, at A1.

280. See Nagareda, *supra* note 50, at 351-67.

281. See *id.* at 353 (conditioning the right so to petition upon the filing of mass tort actions in sufficient numbers such as to trigger consolidation of federal lawsuits by the MDL Panel).

282. See *id.* at 359-63 (discussing the application of the existing administrative law doctrine of primary jurisdiction as a means by which to effect a "time out" in the tort system pending agency review).



definitive pronouncement on causation from the scientific community. The benefits of some products may be sufficiently ephemeral that the mere existence of uncertainty about their long-term effects, coupled with irresponsible conduct on the part of manufacturers, may warrant the effective punishment of defendants by way of reorganization in bankruptcy.<sup>283</sup> The key is that the choice of whether and when to let matters take that course should stem from public input and deliberation focused upon a politically accountable agency.<sup>284</sup>

## 2. *Mens Rea, Deterrence, and the Significance of Context*

Apart from institutional considerations of the sort sketched above, moral condemnation for misconduct in the absence of causation remains intertwined with doctrinal qualifications. Even criminal law is not prepared to punish attempts, for example, without the presence of a highly culpable *mens rea* on the part of the defendant — a purposeful effort to complete a crime, rather than a merely reckless or negligent one.<sup>285</sup>

This doctrinal distinction sheds light upon a potential difference between mass tort cases centered upon addiction as an impediment to risk decisions and those, like the implant controversy, that turn upon scientific causation. The notion that any collective entity, such as a corporate manufacturer, might have an ascertainable mental state partakes of legal fiction to a degree. One need not attempt to parse the corporate mindset in depth, however, in order to draw useful lessons from the distinction between purposeful conduct and lesser states of culpability.

In the tobacco litigation, the plaintiffs' theory is that it was economically rational for defendants to engage in fraud with respect to the addictiveness of nicotine — indeed, that such action was essential to the survival of Big Tobacco as an industry, insofar as adult consumers ultimately must be replaced.<sup>286</sup> A manufacturer of this

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283. See *id.* at 342 (contrasting the appropriate treatment of cosmetic devices such as breast implants with that of lifesaving, but potentially quite risky, products such as heart valves).

284. The agency might conclude its review of the matter and let bankruptcy ensue, or, alternatively, the agency itself might seek to oversee negotiations amongst the concerned parties in order to reach a proposed resolution of the matter that the agency then might issue in the form of a rule. See *id.* at 355 (discussing the potential for agencies to draw upon existing authority for negotiated rulemaking in lieu of class action settlements); Nagareda, *supra* note 193, at 976-81 (same).

285. See *supra* notes 38-40 and accompanying text.

286. See *supra* note 152 (discussing criticism of industry marketing to children on the theory of customer replacement).

sort makes money from the repeated use of its product and, hence, has an incentive to promote usage through everything from the composition of the product itself to the strategies deployed for its promotion. Allegations of fraud in these regards fit comfortably with the punishment of purposeful efforts to complete a crime.

Cases of scientific causation are different. They certainly may entail allegations that the defendant failed to warn consumers or, potentially, that it made some sort of misrepresentation concerning product safety. But the defendant's *mens rea*, if one can call it that, is different, and the difference stems not from chance or circumstance, but instead from the essential nature of the situation. No one suggests, nor could they plausibly say, that Dow Corning set out with the objective of developing a silicone gel breast implant that would cause connective tissue disease in women. The possibility of connective tissue disease, if any exists, stems at the very most from recklessness — a willingness to proceed forward with sales of the product in disregard of “substantial and unjustifiable” health risks.<sup>287</sup> Simply put, the most serious charge that one possibly could level against Dow Corning is that it rolled the dice; the charge against Big Tobacco is that it engaged in a campaign of fraud while not only knowing, but affirmatively desiring, that addiction to a harmful product would result in many consumers.

This is not to say that economic considerations are absent entirely from cases of scientific causation. Having sunk substantial sums of money in the development of a new product, a manufacturer might well hesitate to withdraw it, even upon quite strong indications of risk. Within the parlance of criminal law, one might be able to push such a case from the category of recklessness to the more culpable mental state of knowledge — namely, conduct undertaken with an awareness of a “high probability” of harm.<sup>288</sup> One surely would regard such behavior as irresponsible, but that still would not get one all the way to purposefulness.

In addition, there is at least one other scenario that might give rise to a dispute over scientific causation and that has a counterpart in the mental states used by criminal law. If there is only a remote prospect for the generation of independent risk information, manu-

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287. See MODEL PENAL CODE § 2.02(2)(c) (1985) (defining “recklessly” as “conscious[ ] disregard[ ]” of “a substantial and unjustifiable risk”); *supra* notes 59-60 and accompanying text (summarizing revelations of implant manufacturers’ conduct); *supra* note 84 (summarizing conduct on the part of Bendectin manufacturer Merrell Dow).

288. See MODEL PENAL CODE § 2.02(7).

facturers might choose a course of ignorance about their products. As Wendy Wagner explains:

A manufacturer that conducts no research can generally avoid liability because plaintiffs and government research programs are unlikely to conduct scientific research on their own. Voluntary safety research, on the other hand, might reveal a long-term risk associated with a product, a revelation that could provide vital evidence for aggressive plaintiffs' attorneys and ultimately increase, rather than reduce, the manufacturer's exposure to lawsuits and potentially catastrophic liability.<sup>289</sup>

Failure to conduct safety tests in the first place, as distinct from conscious disregard of their results, tracks closely the concept of criminal negligence<sup>290</sup> — a mental state that differs merely by degree from its more familiar namesake in tort law. Criminal negligence is what one would label gross negligence in tort.<sup>291</sup>

Standing alone, then, the principle that attempt crimes call for purposefulness rather than some less culpable mental state sheds doubt upon the extension of moral condemnation to cases of scientific causation. That, however, does not mean that such extensions are always ill-advised. The heightened mens rea requirement for attempts is a vehicle by which to narrow the reach of criminal sanctions; it seeks to separate those who really are trying to commit some serious misdeed from those whose conduct amounts, at most, to a reckless near-miss.

Mens rea, however, is not the only consideration implicated in the criminalization of conduct that falls short of a completed crime. A familiar justification for the punishment of attempt crimes in any form stems from goals of deterrence.<sup>292</sup> Absent the perfect detection of completed crimes, the next best way to induce adherence to the strictures of criminal law consists of efforts to "expand[ ] the set of circumstances in which sanctions are imposed" to encompass attempts.<sup>293</sup> "Those who would shoot at another person will realize that they may be penalized if they miss as well as if they succeed."<sup>294</sup>

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289. Wagner, *supra* note 27, at 775 (footnotes omitted). For a similar point, see Berger, *supra* note 1, at 2139.

290. See MODEL PENAL CODE § 2.02(2)(d) (defining "negligently" to refer to situations in which the defendant "should be aware," but actually remains unaware, "of a substantial and unjustifiable risk" posed by his conduct).

291. See MODEL PENAL CODE § 2.02(2)(d) (calling for a "gross deviation from the standard of care that a reasonable person would observe").

292. See Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435, 457 (1990).

293. See *id.* at 436.

294. *Id.*

An analogous concern arises in the mass tort context. Here the fear is not so much that completed mass torts will go undetected; their often horrible consequences are not easy to overlook. The fear instead is that, by letting off completely blameworthy manufacturers that manage to avoid causing harm to others by sheer happenstance, the law would inadequately deter risk taking by other manufacturers in the future. Such a shortfall in deterrence simply might add to existing disincentives to generate information about product risk. The insight, in other words, is that the law ought to take action against at least some near misses in order to prevent the recurrence of misconduct that might produce a direct hit the next time around. This concern for deterrence is especially pronounced with regard to the kinds of innovative new products that tend to give rise to disputes over scientific causation, given the proprietary control that manufacturers tend to have over product information.<sup>295</sup>

For mass tort cases centered upon scientific causation, context is crucial in three respects for the evaluation of deterrence arguments. First and most important, pleas for deterrence entail implicit trade-offs between risks and benefits that are not amenable to resolution on a categorical basis. In at least some areas, the risk-benefit trade-off may be such that the gains from deterrence come only at the cost of product innovation. Though one easily can overplay this concern, there are indications that, even now, the prospect of mass tort litigation can be especially inhibiting in particular discrete areas, such as the market for new methods of contraception.<sup>296</sup> In addition, there are areas for product innovation — artificial devices to replace critical organs, such as the heart<sup>297</sup> — wherein the risk to which a new product might respond already may be so great as to make desirable innovations that hold any prospect of success.

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295. See *supra* note 166 and accompanying text.

296. See COMMITTEE ON CONTRACEPTIVE DEV., NATL. RESEARCH COUNCIL, DEVELOPING NEW CONTRACEPTIVES: OBSTACLES AND OPPORTUNITIES 141 (Luigi Mastroianni, Jr. et al. eds., 1990) (National Research Council report concluding that “recent products liability litigation and the impact of that litigation on the cost and availability of liability insurance have contributed significantly to the climate of disincentives for the development of contraceptive products”); cf. Alan O. Sykes, *Reformulating Tort Reform*, 56 U. CHI. L. REV. 1153, 1158 (1989) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988)) (criticizing the indiscriminate advancement of concerns about the impact of tort liability upon product innovation). In recent years, the one notable innovation in contraception — Norplant — itself has been the target of mass tort litigation. See Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. TIMES, May 28, 1995, § 3, at 1.

297. Cf. *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1263-64 (S.D. Ohio 1992) (recounting the history of litigation over the Bjork-Shiley heart valve).

Second, as commentators increasingly have emphasized in the regulatory context, the abatement of risk in one area sometimes comes only with unintended effects that actually may increase other sorts of risk.<sup>298</sup> The impact of litigation over silicone gel breast implants upon the availability of silicone-containing shunts needed to divert excess water from the brains of children with hydrocephalus illustrates this broader phenomenon.<sup>299</sup>

Third, the need to provide additional deterrence through the use of moral condemnation in the mass tort area will depend upon an assessment of the relevant administrative framework, if any, for product testing — especially the existence and enforcement of penalties for failure to bring suspicions of product risk to the attention of regulatory agencies.<sup>300</sup> In this regard, record-setting criminal fines recently imposed by the FDA against major pharmaceutical firms and executives who misled government regulators offer a modicum of promise.<sup>301</sup>

Given the foregoing considerations, moral condemnation on the criminal model should turn upon an evaluation of the need for deterrence in the particular situation *relative to* the degree of culpability exhibited by manufacturers — whether their actions are totally blameless, merely negligent, reckless or, potentially, knowing. Undoubtedly without thinking explicitly in such terms, entrepreneurial mass tort litigators already may do a rough job of focusing upon those instances in which blameworthiness is relatively high, to the extent that such attorneys select cases according to the prospect that some jurors might commingle evidence of blameworthiness and causation.<sup>302</sup> Mass tort litigation, however, is a relatively poor

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298. For examples of this phenomenon, see John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in *RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT* 1, 10-19 (John D. Graham & Jonathan Baert Wiener eds., 1995).

299. See Linda Ransom, *Lawyers May Kill My Daughter*, *WALL ST. J.*, Mar. 20, 1996, at A14.

300. For an assessment that many such frameworks are quite dismal, see Wagner, *supra* note 27, at 784-90.

301. In "one of the largest [corporate fines] ever imposed on a brand-name manufacturer," the FDA obtained a guilty plea and an agreement to pay \$10 million in fines from Warner-Lambert Company "for hiding from the [FDA] faulty manufacturing processes used for several drugs." Philip J. Hilts, *Drug Maker Pleads Guilty to Deceit in Product Testing*, *N.Y. TIMES*, Nov. 29, 1995, at A1. More recently, "Copley Pharmaceutical, Inc. agreed to plead guilty to federal criminal charges and pay a \$10.65 million fine for falsifying drug-manufacturing reports to the [FDA] . . . the largest [fine] ever for a generic-drug maker." William M. Bulkeley, *Copley Pharmaceutical to Plead Guilty to Federal Criminal Charges*, *WALL ST. J.*, May 29, 1997, at B2.

302. See *supra* section II.C. In this respect, the economic incentives of plaintiffs' counsel serve to screen out instances in which product risk could not have been identified due to the methodological limitations of science. See Wagner, *supra* note 27, at 777-80.

vehicle for consideration — in any manner, much less a politically accountable vehicle for consideration — of the kinds of broader policy implications outlined here. Litigation focuses upon the plaintiff, the defendant, and the particular product in question, not upon related products or the efficacy of related regulatory regimes.

In short, considerations of mens rea and deterrence together suggest that the law should not extend moral condemnation on the criminal model to all cases in which an arguably culpable manufacturer has given rise to a dispute over scientific causation. The law certainly should not do so in the manner of attempt statutes in the ordinary criminal system — by creating, in one fell swoop, a corresponding tort of attempt for every completed tort.<sup>303</sup> In some areas, the need for deterrence may well take precedence over limitations upon the application of moral condemnation derived from the usual criminal law requirements of mens rea; in others, it may not. The crucial observation is that such an evaluation is heavily dependent upon qualitative judgments made in context and, as such, speaks further to the desirability of consideration by political institutions.

### CONCLUSION

Recent efforts to resolve mass tort disputes centered upon blameworthy-but-fortunate defendants have eroded the conventional tort-crime distinction. In this setting, mass tort litigation has become a troubling and unwieldy vehicle for the application of moral condemnation, wholly apart from the causation of harm. This transformation has taken place not through some policy determination by common law courts or legislatures, but rather primarily through negotiation to resolve particular disputes on an ad hoc basis. The unwitting incorporation of criminal notions holds promise for the development of innovative prospective remedies for misconduct by manufacturers that would not necessitate an undeserved windfall for tort claimants. The current debate over national legislation in the tobacco area exemplifies such an approach. At the same time, however, the influx of criminal notions of moral condemnation also carries quite considerable risks, both for the appropriate resolution of cases centered upon outrageous fortune and for prospective defendants.

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303. The Model Penal Code exemplifies this approach to the codification of criminal sanctions for attempts. See MODEL PENAL CODE § 5.01(1) (1985).

To address these concerns, the law should look for guidance to the institutional and doctrinal constraints found in ordinary features of criminal law, especially in the central role of political accountability, but also in concepts of mens rea and deterrence. In this manner, the law of mass torts may move away from the haphazard incorporation of criminal concepts to suit particular disputes and toward a truly integrated and politically legitimate system to address blameworthy corporate behavior.