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Punitive Damages – The American Tradition Of Private Law

Die in den Vereinigten Staaten von Amerika eingereichten Schadensersatzklagen (17 Mrd. US-\$) im Streit um die Bertelsmann Unterstützung von Napster dürfen nach einer einstweiligen Verfügung des Bundesverfassungsgerichts wegen der in Deutschland unüblichen Höhe des begehrten Schadensersatzes vorerst nicht zugestellt werden. Professor Carrington beschäftigt sich diesbezüglich in seinem Beitrag mit der Bedeutung der sog. punitive damages für das us-amerikanische Recht. Besonders setzt er sich mit der Wirkung derartig hoher Schadensersatzansprüche für die Regulierung und Durchsetzung von Kartellverboten, Verbraucher- und Umweltschutz auseinander.

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1 THE ROLE OF PRIVATE ATTORNEYS GENERAL

The first thing for European lawyers to understand about American law is that the distinction between public and private law is in America seldom noticed. American judicial institutions, unlike those in most other countries, were not designed merely to resolve civil disputes, but were fashioned for the additional purpose of facilitating private enforcement of what in other nations would generally be regarded as public law. This purpose reflects widespread mistrust of the political institutions and government officials upon whom American citizens would have to depend if private law enforcement were not available, as generally it is. That shared mistrust has ancient roots and is reflected in state and federal constitutional provisions assuring the weakness and ineptitude of American political institutions other than courts,¹ and in the habit of Americans, observed in 1835 by the French observer de Tocqueville,² to litigate issues they care most about. As a consequence of these conditions, substantial reliance for the regulation of business is placed on private plaintiffs. Much regulation is done *ex post* the regulated business conduct in the form of civil money judgments rather than *ex ante* in the form of official approval or disapproval. It is provided by lawyers serving as private attorneys general. Its aim is to keep business executives alert to the risks their business decisions may impose on others.

² Although it has roots in earlier times,³ this tradition of reliance on private regulation of business dates in America from the era of industrialization in the 19th century. An important 19th century example is the federal antitrust law providing for treble damages.⁴ The authors of that legislation recognized that the United States Department of

¹ On the deficiencies of American legislatures, see ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (New Haven 2001). It was just the best they could do in the 18th century. CAROL BARKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION (New York 2002).

² 1 DEMOCRACY IN AMERICA: THE REPUBLIC OF THE UNITED STATES OF AMERICA AND ITS POLITICAL INSTITUTIONS REVIEWED AND EXAMINED 306. This work was published in Paris in two volumes in 1835. It was promptly translated by Henry Reeves and republished in a single volume by A. S. Barnes & Co. in New York.

³ Exemplary and treble damages have English origins going back to the 13th century, and probably Roman origins of an earlier time. 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 3 (2d ed Charlottesville 1989); BARRY NICHOLAS, INTRODUCTION TO ROMAN LAW 210 (Oxford 1975). And see, e.g., *Huckle v. Money*, 95 Eng. Rep. 768 (K. B. 1763).

⁴ Act of July 2, 1890, 26 Stat. 209. A judicial response of the same era was set in motion by an 1889 flood that destroyed the city of Johnstown, Pennsylvania and was caused by the failure of a dam erected for recreational uses by very wealthy notables who took no responsibility for the consequences. The outcry resulted in new judge-made law imposing strict liability on the owners of bursting dams. The rapid evolution of the case law is described by Jed Handelsman Sugarman, *The Floodgates of Strict Liability: Bursting Reservoirs and the*

Justice, then a mere fledgling, was at best an erratic mechanism for the enforcement of laws protecting small business from big business. The big commercial trusts that were the targets of that regulatory scheme were politically powerful institutions able to intimidate and subvert public enforcement often enough to make defiance profitable and enforcement demoralizingly uneven. Congress made the assessment that if it wanted the antitrust law enforced, it would have to rely primarily on private lawyers advising and representing the smaller businessmen whom the law was intended to protect. To provide them with an adequate incentive to take on their bigger adversaries, a bounty or prize was to be paid in the form of treble damages, an institution not unknown to English and Roman traditions. This bounty assures that a good case will yield sufficient proceeds to compensate the plaintiff's lawyer as well as the plaintiff. And it adds a deterrent effect. Any firm contemplating a violation of the antitrust laws must reckon not merely on the prospect of fighting off the federal government, but also of fighting off private plaintiffs and private lawyers who will be very difficult to influence or intimidate, except of course by paying what they demand.

- 3 In the United States today, private law enforcement is the primary method of enforcing the securities laws, the consumer protection laws, the civil rights laws, antitrust laws, and the environmental laws. While there are state and federal governmental agencies also having responsibilities in those fields, it is private plaintiffs represented by private lawyers who do most of the enforcement of those forms of business regulation.⁵ Damages actions are also the primary means of enforcing standards of professional conduct for doctors, lawyers, accountants, and members of other professions.
- 4 Dependence of Americans on claims for compensation for harms to protect them from corporate wrongdoing in some measure relates with the rights of American businessmen to constitutional protection from excessive regulation by bureaucracy. For example, the Supreme Court of the United States in 2002 held that businesses selling prescription drugs have a constitutional right to speak the extends to at least some forms of misleading advertising about their products without prior approval by the Food and Drug Administration.⁶ The decision invalidates in part the United States Food-and-Drug Laws first enacted in 1908 to inhibit false claims for medicines.⁷ What the Court did not do, however, is insulate businesses from liability for fraud in actions brought by private citizens represented by contingent fee lawyers and aggregated in class actions. Without private enforcement, Americans would be exposed to fraud in the sale of food and medicine by firms exercising their constitutional right to free speech while engaging in consumer fraud.

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5 THE CORNUCOPIA OF RIGHTS AFFORDED PRIVATE ENFORCERS

Associated with this idea of private law enforcement are numerous features of American law and civil procedure that are congenial to plaintiffs. These include the following rights frequently invoked by private attorneys general bringing claims against business defendants:

- 6 (1) to bring suit in the plaintiff's home jurisdiction against a distant business that has caused foreseeable harm at that place, a feature known in American law as "*long-arm jurisdiction*":

Adoption of Fletcher v. Rylands in the Gilded Age, 110 YALE L. J. 333 (2000). The story of the flood is told by DAVID G. MCCULLOUGH, THE JOHNSTOWN FLOOD (New York 1968).

⁵ CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS AND THE COMMON LAW 141-43 (New York 2001).

⁶ Thompson v. Western States Medical Center, 122 S. Ct. 1497 (2002).

⁷ The specific provision at issue in Thompson was the promotion of "compounded drugs" made by local pharmacists and not approved by the FDA as required by 21 U. S. C. §353a enacted as §503 of the Food & Drug Administration Modernization Act of 1997, 111 STAT. 2328.

- 7 (2) to proceed without risk of liability to the defendant for its litigation costs if a claim fails, a right generally known as *The American Rule*;⁸
- 8 (3) with respect to claims successfully enforcing civil rights and environmental laws to compel the defendant to compensate plaintiff's counsel, a device known as a "*one-way fee shift*";⁹
- 9 (4) to hire a lawyer who agrees to receive compensation only if he or she is successful on condition that he or she will take a substantial share of the recovery, thus liberating the individual plaintiff from any substantial financial risk in bringing suit;¹⁰ a device known as the *contingent fee*;
- 10 (5) to compel the defendant and others as well to disclose information in their possession that might be useful as evidence to prove the plaintiff's case, a device known to Americans as the right to *discovery*, a right enabling private counsel to investigate possible wrongdoing by business;
- 11 (6) to secure from the United States and from most state governments most information in their possession that might facilitate proof of the plaintiff's claim, a feature of American law known as *Freedom of Information*;
- 12 (7) in most civil matters, to a *trial by jury* if that is preferred to trial before a judge;
- 13 (8) to compensation not only for medical expenses and lost earnings but also for *mental anguish* caused by a defendant's wrongdoing;
- 14 (9) to an award of *punitive damages* if a defendant can be shown to be reckless or malicious; and
- 15 (10) if the claim is small, to aggregate it with other like claims in a *class action* so that it will be financially worthy of pursuit by private lawyers.
- 16 The effect of this cornucopia of procedural rights is to make American courts by far the most congenial in the world to plaintiffs. The system seeks to attract plaintiffs to court-houses not merely to seek compensation for an injury or disappointment they may have experienced, but to deter antisocial conduct by those who might escape accountability if we relied upon our clumsy governments to provide the deterrence and punishment needed to constrain corporate greed, a state of mind perhaps especially rampant in the United States.
- 17 Three of the distinctive features of American civil procedure have roots in American constitutional law as well as English tradition. One of these is the right to jury trial in civil cases. That right is embedded in the Seventh Amendment to the federal Constitution,¹¹ and in each of the fifty state constitutions governing proceedings in state courts,¹² where over 90% of our civil litigation is conducted.¹³ Those constitutional provisions originated in the hostility of 18th century American colonists to the imperial

⁸ On its origins, see John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47-1 *LAW & CONTEMP. PROB.* 9, 17 (1984).

⁹ See generally Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 *DUKE L. J.* 651.

¹⁰ See generally HERBERT M. KRITZER, *RHETORIC AND REALITY ... USES AND ABUSES ... CONTINGENCIES AND CERTAINTIES: THE AMERICAN CONTINGENT FEE IN OPERATION* (Madison 1996).

¹¹ CONSTITUTION OF THE UNITED STATES, Amendment VII.

¹² Indeed, each of the eleven states that had promulgated state constitutions before the federal constitution was ratified had embraced the constitutional right to jury trial in civil cases before there was a Seventh Amendment. A compilation is *THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA* (E Dycinck ed., New York- 1820). There has is in no state ever been a serious discussion of its elimination.

¹³ About 14 million matters were handled by state courts in 1998. *NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1998: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 17-23* (Williamsburg 1999).

British judiciary.¹⁴ Because of that hostility, the civil jury was embraced by those who were revolting against the Empire with much greater fervor than it was ever embraced by Englishmen¹⁵ or their more docile colonists in Canada or Australia.¹⁶

- 18 Those fifty-one constitutional rights to trial by jury in civil cases continue to reflect popular mistrust of judges, and the legal profession of which they are a part, a group exercising much political power in the United States. The right to jury trial in the courts of the federal government was a precondition to ratification of the Constitution. Had the Seventh Amendment not been agreed to, there would likely have been no United States of America because many of the former colonists viewed the prospect of a new federal judiciary with utmost suspicion.
- 19 The right to jury trial continues to serve in the 21st century to democratize our court-houses. By empowering citizens who hold no office and no professional status, it strengthens their confidence in the judicial system. Millions of Americans have served as jurors, and most who have would attest to the integrity of the process in which they participated and to that of the judge who presided over their trial, keeping the lawyers under control and providing the jurors with advice and instructions on the law. It is said that the jury is the only institution of government having no ambition of its own, and on that account is most worthy of trust. Indeed, a civil jury is virtually immune to bribery because its members are numerous and disassociated in their lives and careers. It is equally immune to intimidation, for its members will upon the rendering of their verdict return to their normal daily lives where they are not at risk of harm imposed by the losing party. Juries are therefore always free of direct personal interest in their verdicts, and can afford to enforce law (as explained to them by the judge) with less fear than may sometimes be exhibited in the conduct of professional judges. Moreover, a jury trial is a public event calling public attention to the alleged misdeed of the defendant and affords the parties who seek it the satisfaction of telling the world about their side of a dispute, and alerting them to the alleged avarice of the defendant. It is largely because of the civil jury trial that astute observers have remarked that American law, unlike that of most other countries, comes more from the bottom up and less from the top down.¹⁷
- 20 Among those who have celebrated the civil jury in strenuous terms was Francis Lieber who migrated from Prussia to America in 1827 to become the preeminent American legal theorist of the 19th century. Lieber was the principal American informant of Alexis de Tocqueville, and the author of numerous works on American law written in his time, including a work of comparative law entitled *Civil Liberty and Self-Government* and published in 1852. True to his Prussian origins, Lieber denoted all forms of government that he disapproved as Gallican. He identified the right to jury trial in civil cases as a foundation stone of government in the United States.¹⁸

¹⁴ Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 730 (1973); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407 (1999).

¹⁵ William Blackstone affirmed that the civil jury "ever has been, and I trust ever will be, looked upon as the glory of the English law." 3 COMMENTARIES ON THE LAW OF ENGLAND *379 (London 1768). The "glory" was largely extinguished by 1914. Michael Lobban, *The Strange Life of the English Civil Jury 1837-1914* in "THE DEAREST BIRTHRIGHT OF THE PEOPLE OF ENGLAND" (John W. Cairns & Grant McLeod, eds. Oxford 2002); Joshua. Getzler, *The Fate of the Civil Jury in Late Victorian England*, id. at 217

¹⁶ Neil Vidmar, *Canadian Criminal Jury: Searching for Middle Ground*, 62-2 LAW & CONTEMP. PROB. 141 (1999); MARK FINDLAY & PETER DUFF, *THE JURY UNDER ATTACK* (London 1988) (re Australia).

¹⁷ P. S. ATIYAH & ROBERT SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS* 38 (New York 1987).

¹⁸ CIVIL LIBERTY AND SELF-GOVERNMENT 234-237 (T. Woolsey ed., Philadelphia 2d ed 1874). Lieber was consulted by the King of Prussia in 1845, and remained in Berlin, his native city, for a year as a royal advisor. LIFE AND LETTERS OF FRANCIS LIEBER 185-187 (Thomas Sergeant Perry ed., Boston 1882). It is not clear what effect his advice may have had on the formation of the first German constitution. See Bernd J. Hartmann, *How American Ideas Traveled: Cooperative Constitutional Law at Germany's National Assembly in 1848-1849*, 17 TUL. EUR. & CIV. L. F. 23 (2002).

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- 21 The second constitutional dimension of privatized law enforcement is that constitutional lack of authority of the federal government over the legal profession and its conduct. To the extent that the American legal profession is regulated, it is with rare exception not by any legislature, but by the highest courts of each of the fifty states.¹⁹ Those institutions make virtually all the law governing lawyers.²⁰ And the judges who sit on those courts are very much themselves a part of the legal profession in which they practiced until they acquired the stature as a lawyer required to become an American judge.
- 22 There are a million lawyers in the United States. While they are far from a cross-section of American society, there are many lawyers coming from every class, race, and subculture. While they have diverse interests and diverse political views, they are united in the position that the legal profession and the courts should enjoy independence from control by politicians and bureaucrats. So it is fair to say that the American legal profession is almost entirely self-regulated. Thus it is that lawyers enjoy almost complete freedom of contract with respect to fee arrangements and are themselves regulated primarily by their clients and others who may sue them for alleged misconduct.
- 23 The third constitutional dimension of privatization is the identity of the American judiciary. Because American courts were from the beginning commissioned to review the constitutionality of legislation, they have always been political institutions to be distinguished from the courts of either the common law or civil law traditions that strive more vigorously and with more success to maintain the apolitical professional discipline of faithful adherence to legal texts made by others. While merit is of course also considered, very few persons have ever attained judicial office in America who did not have significant political contacts. Appellate judges, especially, are recognized on all sides as makers of public policy as well as technicians, and they are selected in part for their political views.²¹ This recognition is reinforced by the practice originated in the United States in the early years of the 19th century of publishing opinions of the court that explain and justify appellate decisions, often by reference to first principles of democratic politics.²²
- 24 With respect to trial judges, about eighty percent of them can continue in office only by standing for re-election.²³ The fact that our judges are politicians is an additional reason why the right to jury trial in civil cases is a treasured right of citizens who may be in political opposition to the judge. But it also qualifies the judges to make law and policy to an extent not regarded as permissible in most other nations.
- 25 Within these constitutional parameters, the cornucopia of procedural and other rights have been fashioned over two centuries to enable American courts to perform an im-

¹⁹ CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 20-47 (St. Paul 1986). A recent controversy has arisen over the power of state courts to punish lawyers serving the federal government for violations of standards of professional conduct established by state law. The Congress of the United States has recently enacted legislation to assure that state law applies. For discussion, see Bruce A. Green & Fred C. Zacharias, Regulating Federal Prosecutors' Ethics, 55 VAND. L. REV. 381 (2002).

²⁰ That body of law is synthesized in AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS.

²¹ See HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS (New Jersey 1998).

²² The first appearance of the opinion of the court came in the first decision rendered after the appointment of Marshall. The story is told in G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815 at 207-245 (New York, 1981). There was a precedent for such a device in the opinions of the Privy Council giving advice to the Crown, but the Council was not primarily a judicial institution, at least until the Privy Council Appeals Act of 1832. REPORT OF THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE APPELLATE JURISDICTION 27 (London 1872). See also John P. Dawson, The Privy Council and Private Law, 48 MICH. L. REV. 627 (1950).

²³ The best statement of the case for electing judges is still FREDERICK GRIMKE, THE NATURE AND TENDENCY OF FREE INSTITUTIONS 444-475 (John William Ward ed., Cambridge 1968). Grimke was a member of the Ohio Supreme Court; his book was first published in 1841,

portant political role as managers of a vast array of social issues. To that end, rules of procedure are designed to draw socially significant disputes into court. So it is that Lord Denning of the English House of Lords was moved to say that "[a]s a moth is drawn to the light, so is a litigant drawn to the United States."²⁴

26 Even foreign governments now choose to bring their claims in American courts when they can. A striking example was the case brought by the Republic of India against the Union Carbide Corporation for the 200,000 deaths and personal injuries resulting from the explosion of a fertilizer plant in Bhopal in 1984.²⁵ The plant was owned and operated by a company in which the Republic of India shared ownership with Union Carbide, an American firm that had designed and built the plant. Everyone employed in the plant and everyone harmed by the explosion was Indian. Many American lawyers went to Bhopal to sign up clients authorizing them to bring suit in American courts against the American defendant having the deep pocket able to pay the claims. At first, the Republic of India was offended by the suggestion that it could not deal with the matter without the help of private law enforcers coming from the United States. However, it soon reckoned that it might in an American court, although perhaps not in its own court, secure information suggesting that the tragedy was the result of bad design of the plant by Union Carbide. The reason for this hope was the discovery procedure available in an American court that would enable lawyers representing India to inspect the otherwise private files of Union Carbide in New York City and to compel its employees and officers to give evidence under penalty of perjury. Those rules are a secondary consequence of the right to jury trial dictating that proceedings shall be conducted orally and without substantial interruptions, and that the adversary lawyers must therefore have access to possible evidence before trial. Thus, if the case were to proceed in New York as the Republic of India desired, it and Union Carbide would each have to open their files to scrutiny by the other. And American or Indian lawyers might go to Bhopal to interrogate and cross-examine victims in depositions that might be recorded on videotape and played at trial in New York. In exchange, Union Carbide would be entitled to have each claimant subjected to a medical examination by doctors nominated by it, and to see any existing information, such as income tax returns, that might shed light on claims for economic losses.

27 If by such discovery, the Republic of India could find evidence of wrongdoing by Union Carbide, it might be sufficient to persuade an American judge, or a jury if either party preferred, that the company should be held responsible for all the harm. And, if that liability could be established, damages might be assessed in the traditional American manner. If so, compensation would extend to all medical and economic costs to the workers and their families, and compensation for emotional losses as well. On the other hand, if the Republic of India could prove no case against Union Carbide, it would nevertheless not be obliged to pay Union Carbide's legal expenses as it would if it lost the case in India. For these reasons, the settlement value of the case would be much greater if it were scheduled to be decided in the United States. Union Carbide fought desperately and successfully to get the case out of a court that was situated a few blocks from its world headquarters, and into the courts operated by its adversary, the Republic of India.²⁶ The irony is obvious.²⁷ The case was settled for \$400 million, a minor fraction of its value in the United States.

28 For another more recent example, the DuPont company, for over a century the dominant business enterprise in the small state of Delaware and for many years the primary employer of its citizens and the primary investment of its wealthiest families, strenu-

²⁴ Smith Kline & French Lab. Ltd v. Bloch, [1983] 2 All ER 72, 74 (C. A.).

²⁵ An account of the Bhopal tragedy is DAN KURZMAN, A KILLING WIND: INSIDE UNION CARBIDE AND THE BHOPAL CATASTROPHE (New York 1987).

²⁶ In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F. 2d 195 (2d Cir. 1987).

²⁷ UPENDRA BAXI, INTRODUCTION: TOWARDS THE REVICTIMIZATION OF THE BHOPAL VICTIMS, IN INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE 1, 1 (U. Baxi, ed., Bombay 1986). For an account of the availability of tort remedies in India fifteen years later, see J. N. PANDEY & VIJAY KUMAR PANDEY, LAW OF TORTS 3 (Allahabad 2002).

ously but unsuccessfully resisted the jurisdiction of the Delaware state court in products liability cases brought by citizens of England, Scotland, Wales, and New Zealand.²⁸ The citizens of all those places preferred litigation in a Delaware state court to any forum at the place where they reside, purchased the DuPont product alleged to have caused them harm, and where they experienced that alleged harm. The reason for their preference was the availability of procedural rights in Delaware that are not afforded them in their courts at home. These included most notably the right to proceed without financial risk to themselves, and with access to discovery.

- 29 I have enumerated the incentives to plaintiffs and emphasized their constitutional roots because it is not possible to discuss thoughtfully any one of them unless one understands that each is connected to all the others by the common purpose of facilitating private law enforcement by politically independent lawyers. Together, they pose an insurmountable obstacle to the harmonization of American civil procedure with that of nations who use their courts merely to resolve civil disputes efficiently. They also pose a major impediment to current efforts to secure a satisfactory international convention on the enforcement of judgments because of the reluctance of foreign courts to enforce American civil judgments that bear the marks of public law enforcement.

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30 **REGULATING FOREIGN COMPETITORS IN AMERICAN MARKETS**

Anyone contemplating the doing of business in the United States ought reckon, and ought be made to reckon, on the inevitable need to take the bitter pill of this scheme of private law enforcement along with the sweet profits that many firms are able to secure in American markets. While there may be some possibilities of avoiding the application of American law by contractual arrangements such as forum selection clauses and arbitration agreements,²⁹ the United States cannot long allow foreign firms doing business in America to escape the lash of its laws regulating commerce and thus enjoy a competitive advantage in its markets.

- 31 This imperative requires that the ten features of private law enforcement be available to plaintiffs making claims against foreign businesses competing in American markets to substantially the same degree that they are available in claims made against local firms. If European firms were allowed to contest claims in America in ways familiar to them in Europe, their American competitors in American markets would be at a competitive disadvantage and would insist on equal rights. To make the American system of business regulation into one more like that familiar to Europeans would require the undoing of the whole network of rights, assumptions and premises underlying private law enforcement characteristic in the American legal system. If private law enforcement were effectively disabled, America would have to reorganize its governments in parliamentary form, enlarge its bureaucracies, socialize the cost of health care, and raise taxes, or else experience intolerable consequences of unrestrained corporate greed. Such a transformation of our legal institutions would require in turn deep change in the structure of the national economy underlying the legal and political apparatus, and then in the social structure that underlying those economic relationships. Such changes in the United States cannot be achieved by any democratic process. Thus, most of the enumerated features of American law that prospective defendants find objectionable are indelible, at least until some time of social upheaval.
- 32 For example, consider the practice frequently protested in Europe of the application of American discovery practice to evidence located outside the United States. Europeans apparently thought that they had gained control by their governments of what they

²⁸ Ison v. E. I. DuPont de Nemours & Co., 729 A. 2d. 832 (Del. 1999). See also Picketts v. International Playtex, Inc., 576 A. 2d 518 (Conn. 1990).

²⁹ E.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985). Justice Stevens, dissenting in that case, noted that the Court's opinion "creates the impression that this case involves the fate of an institution designed to implement a formula for world peace."

perceived to be the excesses of American discovery when they secured ratification of the Hague Evidence Convention.³⁰ Disappointment was widely expressed in Europe when the Supreme Court of the United States held that the Convention did not prevent an American court from requiring a French aircraft manufacturer to open its files for examination by the decedents of those killed in a private plane crash in the United States.³¹ Had the Convention been interpreted as the Europeans hoped, this would have conferred a significant advantage on the French manufacturer giving it a preferred position in the American market for private aircraft. Its American competitors would likely have secured the repudiation of the treaty, for it is difficult to imagine American politicians approving a preference for a foreign manufacturer.

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33 **ASSISTING REGULATION OF COMPETITORS IN FOREIGN MARKETS**

Europeans are prone to perceive such uses of discovery to gain information available only in Europe as an infringement of European sovereignty. In contrast, Americans do not see the control of information as an element of sovereignty. This point bears emphasis because it confirms that the application of American law to foreign competitors in American markets is not an expression of an arrogant view that American methods of regulating business are entitled to disregard or disrespect the governments of other lands.

34 Thus, American federal law directs the American judiciary to compel anyone in the United States to disclose information to foreign courts upon request of foreign judges.³² Also, one need not be an American or a resident of the United States to employ the Freedom of Information Act to secure evidence that may be on file with an American government. These provisions reflect the commitment of American law to the ascertainment of facts that are the subject of legal disputes to the end that the law may be faithfully applied and evenly enforced in private as well as public litigation, and not merely in the United States. American law assumes that, to assure effective deterrence of business mischief, the truth ought be revealed even at the cost of substantial intrusions on what businessmen, American or foreign, would prefer to regard as their privacy. Parties resisting disclosures to American courts are often in America presumed to be guilty of the alleged wrongdoing that their adversaries seek to investigate.³³ And in like manner Americans not desiring to cooperate with foreign judicial investigations get very little help in shielding pertinent evidence that may result in adverse judgments in foreign courts.

35 The problem obverse to that of the foreign firm competing in American markets is that of American firms doing business abroad. As the DuPont example clearly reveals, American defendants are often just as eager as foreign firms to avoid the jurisdiction of American courts if it is possible to do so. To the extent that they are subject to suit in American courts for claims arising from transactions in foreign lands they are exposed to a system of regulation to which their competitors are not subject. The Bhopal case provides an illustration. To the extent that firms possibly responsible for that tragedy are exposed to suit in the United States, they are more likely to be deterred from engaging in conduct that risks harm to others. (Pesticide factories may be better designed or more safely operated). On the other hand, the American deterrence may be so strong that useful enterprise is discouraged by higher costs, and/or may result in higher prices. (There may then be fewer pesticide plants in India and pesticides may be more expensive.) If firms who are exposed to suit in the United States must compete with others that are not, they are placed at a disadvantage because they must bear the higher legal costs associated with American private law enforcement. (Pesticide plants in India may then be built only by Japanese or German firms that cannot be

³⁰ Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (The Hague 1970).

³¹ *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U. S. 522 (1987).

³² 28 U. S. C. §1782.

³³ F. R. Civ. P. 37.

sued in the United States.) On the other hand, if firms can avoid exposure to suit in American courts by moving corporate activities outside the United States, they may be motivated to relocate the whole pesticide industry to India or elsewhere, to the economic disadvantage of American workers.³⁴

- 36 These considerations suggest a need for restraint on the part of American courts being asked to take jurisdiction over claims arising from business transactions in foreign lands. If India places a higher value on the need for cheap fertilizer and is willing to take somewhat higher risks of accidents to achieve that result, that nation should be free to make that political decision and no American court should intercede. Thus, it seems wise that the American court refused to entertain the Bhopal cases, while the decision of the Delaware courts to entertain claims against the DuPont Company seems less wise. DuPont, it would seem, should be entitled to a level playing field that requires that it be subject to regulation of its products according to the laws of England, Scotland, Wales, and New Zealand, just as its competitors in that market are.
- 37 Nevertheless, while the Bhopal case should be decided in India and DuPont should be sued at the place where it sells its chemicals and is alleged to have caused harm, American courts will lend assistance to courts in India or Scotland or New Zealand that seek information in the possession of persons in the United States. It is not perceived by Americans that any question of sovereignty is raised by investigatory activities conducted on American soil even if they should expose matters that an American firm might prefer to regard as private. Nor, incidentally, do Americans perceive any threat to its sovereignty if foreign courts use the mail or any other effective means to notify Americans of proceedings brought against them in the courts of other lands.
- 38 These observations about sovereignty suggest a possible basis for an international convention. At least in matters involving consumers or workers or the environment, claims should be entertained in the courts of the nation where the alleged misconduct resulted in harm. Jurisdiction at that place is never "exorbitant;" and is generally consistent with principles expressed in the recent revision of the Brussels Convention.³⁵ Accordingly, the courts of all nations ought assist in the enforcement of one another's civil judgments effecting the regulation of business within the rendering court's jurisdiction even though characterized as punitive.³⁶ The United States should correspondingly enforce European judgments without exception for those involving governments as plaintiffs.³⁷ This would assure each government the power effectively to regulate its markets to protect consumers, workers, and the environment in its own way. That consequence is the one that should follow a decision to sell or make goods or employ workers in another country. If that is an impediment to the development of the global economy,³⁸ it would nevertheless be protective of democratic sovereignty³⁹ and a shar-

³⁴ For reflections, see C Leigh Anderson & Robert A. Kagan, *Transaction Costs: The Industrial Flight Hypothesis Revisited*, 20 INTL. REV. L. & ECON. 1 (2000).

³⁵ Articles 5(3) and 17.

³⁶ It is the general rule in the United States as well as in Europe not to enforce the penal judgments of other nations, but this rule does not prevent enforcement of civil judgments in favor of private parties. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §483 (1987). See *Huntington v. Attrill*, 146 U. S. 657, 673-64 (1892).

³⁷ Such a treaty would reverse the result in cases such as *Atty Gen. of Canada v. Reynolds Tobacco Holdings Inc.*, 268 F. 3d 103 (2d cir 2001), cert. den. 2002 US Lexis 8081, holding that Canada cannot use American courts to recover taxes owed by American firms smuggling cigarettes into Canada.

³⁸ Efforts to harmonize the recognition of foreign judgments have been centered at the Hague Conference on Private International Law, where lengthy negotiations have been conducted to draft a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments. Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L. J. 635 (2000). The stated purpose of the United States in pursuing such a Convention has been to accommodate international trade. Statement of Jeffrey D. Kovar, Subcommittee on the Judiciary, U. S. House of Representatives, June 29, 2000. For discussion, see Russell J. Weintraub, *How Substantial is Our Need For A Judgments Recognition Convention and What Should We Bargain Away to Get It?* 24 BROOKLYN J. INTL. L. 167 (1998); Kevin Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89 (1999).

ing of protections against business misconduct. Resistance to such an approach is likely to be seen in American eyes as unjustified protectionism.

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39 **PUNITIVE DAMAGES**

As troubling to Europeans as the American practice of discovery is the award of punitive damages to be paid by firms found guilty of malicious wrongdoing.⁴⁰ Most familiar is the celebrated case of the cup of hot coffee.⁴¹ The Wall Street Journal and the business press a few years ago decried a 2.7 million dollar jury award to a plaintiff claiming that she had been scalded when she spilled a cup of coffee purchased at McDonald's.⁴² Facts not revealed in the journalism and generally unknown were that (1) McDonald's vigorously enforced a company rule requiring that coffee served at all restaurants under the famed golden arch be served at a temperature in excess of ninety degrees centigrade, a temperature that its officers acknowledged to be capable of causing very serious burns, but which elevates the pleasant odor of the drink and makes patrons (at least those who do not scald themselves) prefer a McDonald's breakfast to that of its rivals; (2) McDonald's had a file containing 700 hundred complaints about serious injuries received from scalding coffee; (3) McDonald's had not warned its customers that its coffee was dangerously hot; (4) the 79-year old plaintiff, a retired waitress who had never before been a litigant, suffered serious burns causing acute and enduring pain requiring skin grafts and other expensive treatments that put her life at risk; (5) McDonald's refused even to pay the plaintiff's medical bill, much less other unavoidable costs of treatment, and (6) the trial judge, finding that \$2.7 million was excessive, ordered a new trial unless the plaintiff agreed to accept \$480,000, which she did. A third of that sum and more went to pay her lawyer and legal expenses. Given the substantial cost of skin grafts and the time-value of money enjoyed by McDonald's when it refused to pay her medical expenses, the plaintiff receiving \$320,000 may have received little more than her out-of-pocket expenses and modest compensation for her pain and suffering. The judgment and the threat of others like it apparently sufficed, however, to cause a modest reduction in the temperature at which coffee is sold by McDonald's.

40 It is reasonable to conclude that the right result was reached with respect to hot coffee, and that no apology for the extravagance of American law in that case is in order. It may be that European business executives are more humane than American executives when contemplating the social consequences of their decisions respecting such matters as the temperature at which coffee will be sold. Or it may be that in Europe it is reasonable to expect administrative departments of government to protect the people from the sort of reckless business judgment made by the management of McDonald's. It is also likely in Europe that the plaintiff's injuries in such a case would be given medical treatment at public expense. That is generally not so in the United States and it is not unimaginable that a badly scalded customer would be required to pay a hundred thousand dollars or much more for her medical care as a result of a severe scalding. Maybe she was privately insured at her own expense, but it is not likely, given the cost of health care in the United States. McDonald's did not care about that. At least its executive officers did not care until her lawyer took them to court to enforce their public duty to protect McDonald's patrons from needless risks and thus reminded them that when they deliberately created risks of scaldings, McDonald's is the

³⁹ Globalization is not for everyone. WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* (New York 1997).

⁴⁰ Punitive damages were provided in the Code promulgated by Hammurabi four millennia ago.1 LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* 3 (2d ed Charlottesville 1989); BARRY NICHOLAS, *INTRODUCTION TO ROMAN LAW* 210 (Oxford 1975). And see , e,g, *Huckle v. Money*, 95 Eng. Rep. 768 (K. B. 1763)

⁴¹ *Liebeck v. McDonald's Restaurants, Inc.*, 1995 WL 360309 (D.N.M. 1994) (on remand).

⁴² See Michael McCann, William Haltom, & Ann Bloom, *Java Jive: Genealogy of a Judicial Icon*, 56 U. MIAMI L. REV. 113 (2001).

insurer liable for resulting medical costs of its patrons. If they continued to sell coffee at ninety degrees centigrade, the next judge and jury might be even more punitive. They would be asked, how much must McDonald's be required to pay before they will forego the additional margin of commercial advantage resulting from the occasional needless scalding of its patrons? Sooner or later, an American jury was likely to give McDonald's the message that we disapprove its brutal indifference to the safety of its patrons. No other government agency would be likely to do so. To an American, it seems unlikely that such a message would or could be transmitted to a corporate management in any other way but by this draconian means.

- 41 Americans would, of course, want, indeed insist, on sending the same message to a European firm selling scalding hot coffee in the United States. So a European court refusing to enforce an American judgment imposing punitive damages liability on a European firm doing business in the United States is insisting on immunizing the European firm against enforcement of the only American law against reckless scalding of American consumers. The obvious effect is to give them an unjust competitive advantage in that market.
- 42 It may surprise European readers to know that a majority of American corporate officers, excepting most of the very top managers, approve of the use of punitive damages to deter business decisions of the kind made by McDonald's.⁴³ The reason is that even American businessmen are sometimes afflicted with humanitarian concerns. Without the risk of punitive damages, the calculus of such business decisions is left to a cold-hearted comparison of the cost in money damages of scalding patrons with the additional profits to the corporation to be gained from selling coffee that smells a little better than Burger King's.
- 43 Consider another quite different and current example. Curtis Campbell, an insured driver, was involved in a fatal accident on a Utah highway. Campbell and his wife were at the point of retirement; they owned a small home without debt and had modest savings. His liability insurer was State Farm, the largest liability insurer in the United States, with assets of \$39 billion. State Farm provided him with a lawyer, as it was required to do by the terms of their policy. That lawyer's duty as stated was to protect the Campbells. Yet he refused to settle the claim brought against Campbell for \$50,000, the coverage limit on the insurance policy. The Campbells asked him if they should get a lawyer of their own and were told that he and the company would protect them as indeed, State Farm was obligated to do under the terms of the policy. At trial, Campbell suffered a judgment in the amount of \$185,000. What now, they asked? The lawyer advised them to sell their home to pay the judgment before the plaintiffs foreclosed and forced its sale. He then withdrew as their counsel.
- 44 After eighteen months of anxious discussion with the decedent's estate over the prospect of losing their home and savings, the Campbells settled with the plaintiffs by assigning to them half their claim against State Farm. Together, the parties then sued State Farm for breach of trust, fraud, and intentional infliction of mental distress. Through discovery of State Farm's files, Campbell was able to prove that it was the national policy of State Farm for at least twenty years:
- 45 (1) to require lawyers paid by State Farm to represent its insureds to refuse settlement of all claims no matter how reasonable the offer except for claims made by prosperous white males or other similar persons who seemed unusually likely to fight effectively, the purpose being to intimidate future claimants and their lawyers so that they will look for defendants insured by other liability companies;
- 46 (2) to employ as lawyers ostensibly representing the insureds only those known as "attack dogs" who would stoutly maintain State Farm's non-settlement policy without re-

⁴³ The data is old. GALLUP ORGANIZATION, ATTITUDES TOWARD THE LIABILITY AND LITIGATION SYSTEM: A SURVEY OF THE GENERAL PUBLIC AND BUSINESS EXECUTIVES 54-55 (New York 1982).

gard for the interests and desires of the insured whom the lawyers pretended to serve;

47 (3) to compensate its claims adjustors contingent on their success in deflecting just claims and to punish its investigators for observing and recording evidence that persons insured by State Farm were at fault;

48 (4) to keep no records of adverse verdicts and to receive no information from local offices about possible punitive liabilities.

49 A Utah jury was enraged by the insurer's corporate policy disfavoring settlement because its practice maliciously denied compensation for meritorious claims and betrayed the rights and interests of the company's insureds. It unanimously awarded Mr. Campbell \$145 million in punitive damages. The trial court, although sharing the jury's indignation, reduced the award to \$25 million. On appeal, the Supreme Court of Utah affirmed the judgment and reinstated the full award of \$145 million, finding that the conduct of the insurer was so egregious that the award in the larger amount was a needed deterrent of chronic and unrepentant corporate malevolence.⁴⁴ Indeed, the court's opinion is a startling revelation of the moral squalor that can invade the boardrooms and executive offices of an American corporation.

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50 The Supreme Court of the United States set aside that award as excessive,⁴⁵ indicating that a punitive award should seldom exceed compensatory damages by more than a multiple of ten. But the insurer did not escape substantial civil punishment because its corporate policy was clearly a violation of its fiduciary duty to its insured and punitive civil liability is the only means effective available in American law to correct that form of abuse. Yes, there are agencies in every state that are responsible for the regulation of the insurance industry,⁴⁶ but these agencies are underfunded and often dominated by the industry they are appointed to regulate. Insurance executives are rarely deflected from a profitable decision by any utterance of mere public regulators. If Americans are to be protected from vicious insurance companies, it will have to be through the tort system. We have no other way because institutions as powerful as State Farm can subvert much bureaucratic protection of policyholders.

51 Several notable punitive awards have been made against automobile manufacturers, including at least two against foreign manufacturers. Relative calculations of risks and benefits to consumers are, of course, unavoidable for those making products that are inherently dangerous. But the risk of punitive liability may make those calculations more sensitive to the moral dimensions of risk-taking where the harms at risk are to be borne by others. Punitive damages serve to foster the attention of executives to the human consequences of what they are doing to protect and improve the corporate bottom line.

52 In one case, General Motors' executives decided to locate the fuel tank of many of its trucks outside the basic frame of the vehicle. It was obvious that a few people would be killed in explosions caused by collisions crushing the gas tanks thus located, but it was calculated that the damages to be paid to compensate the heirs of the deceased victims was a lesser sum than the cost saving to General Motors of that dangerous but economic design. It did save about twelve dollars in the cost of making each truck, and they might hope to sell hundreds of thousands of trucks a year. Fidelity of management to the bottom line therefore required the executives to sacrifice a few lives unless the risk of substantial punitive civil liability is to be taken into account. So it is that punitive damages serve to legitimate the concerns of executives who want to be respectful of the bottom line but who prefer to advocate truck designs manifesting an appro-

⁴⁴ Campbell v. State Farm Mut. Auto Ins. Co., 2001 UTAH 89, 2001 UTAH LEXIS 170.

⁴⁵ State Farm Mut. Auto Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003)

⁴⁶ For a quick view, see JOHN F. DOBBYN, INSURANCE LAW IN A NUTSHELL (3d ed., St. Paul 1996)

priate humane respect for life and safety.

- 53 It is a problem that this role requires the court as well as the manufacturer to place a monetary value on human life and limbs. In the General Motors case, the jury unanimously awarded the plaintiff \$200 million to punish the company for taking inexpensively avoidable risks. Both the trial judge and the appellate court agreed that General Motors had been too brutal in undervaluing the lives it put at risk, and that the punishment assessed was reasonable in light of the evidence. The unanimous agreement of the jurors with that of the trial judge and the appellate court is usual with respect to the question whether the conduct of a defendant is so morally degraded that a deterrent punitive award is justified.
- 54 Agreement is much more difficult in setting monetary values on the evils that they detect. This may be especially true for juries lacking experience in damage assessment. Hence, we sometimes see spectacular verdicts that excite the interest of business journalists. A California jury not long ago awarded a plaintiff \$4.8 billion against Ford Motor Company in a case involving deaths occurring in one of its ill-designed vans that tend to roll over. The misconduct of Ford was aggravated not only by its continued manufacture and sale of a dangerous product, but by its successful effort to suppress public knowledge of the defect by privately settling cases that would have called public attention to the design defect on condition that plaintiffs and their lawyers make no disclosures to other prospective plaintiffs or to journalists who might inform the public of the dangerous defects. Apparently, a juror reckoned the amount of Ford's advertising budget for the year, and the jury of which he was a member irrationally concluded that this would be a reasonable measure of the appropriate punishment for selling an inexcusably dangerous product without publicizing its defect. That verdict was set aside by the judge as excessive, as are most of the highly publicized verdicts.
- 55 As that case and the State Farm case illustrate, there are constitutional restraints on punitive awards that serve thus to correct the most extraordinary awards that are celebrated by journalists. In *Honda v. Oberg*,⁴⁷ an Oregon state court awarded an injured plaintiff \$1 million for injuries suffered in an accident that occurred when he was driving a three-wheel vehicle up a sand dune. It was contended by the plaintiff that the vehicle was inherently too dangerous to drive, and in fact three-wheel vehicles are for that reason now seldom marketed. The jury concluded that Honda had recklessly endangered the lives of Oregonians by selling such contraptions. They imposed an additional \$5 million punitive award to discourage their sale, and the Supreme Court of Oregon affirmed. But the Supreme Court of the United States reversed, holding that the Oregon procedure embedded in the Oregon constitution, too closely restrained the judges from reviewing the calculation of the punitive award. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires the judiciary to sign on its approval of a punitive award as reasonable in amount and no larger than needed to serve the deterrent purpose of such awards.
- 56 In *BMW v. Gore*,⁴⁸ the plaintiff, a medical doctor in Alabama, complained that BMW had sold him for \$40,000 an automobile that appeared to be new, but had been repainted to conceal rust acquired while the car was in transit across the Atlantic. This was said to cause the car to lose 10% of its value and to be a violation of Alabama law. The plaintiff was on this account wrongfully harmed and he claimed damages in the amount of \$4,000. The jury agreed, and to deter such frauds in the future, it also awarded the plaintiff \$4 million in punitive damages. The Supreme Court of Alabama reduced the award to \$2 million, a sum deemed adequate to deter BMW from selling repainted automobiles as new. The Supreme Court of the United States reversed that judgment, holding that even \$2 million was excessive. It noted that what BMW had done would not be regarded as fraudulent in many states, that it had in its history sold only 14 repainted automobiles in Alabama, and that the amount was irrationally disproportionate

⁴⁷ *Honda Motor Co. v. Oberg*, 517 U. S. 1219 (1996).

⁴⁸ *BMW of North America, Inc. v. Gore*, 517 U. S. 559 (1995).

to the harm and to the frequency with which it had been imposed on Alabamians.

- 57 Finally, I note the still pending case involving the award of \$5 billion against Exxon to deter corporate recklessness such as that leading to the enormous oil spill off the coast of Alaska. The trial judge heard the evidence and concluded that the verdict was correct. The federal appeals court, however, concluded that the award was excessive in amount and directed the trial judge to reconsider. He did so, and entered judgment for \$4 billion.⁴⁹ That decision is still undergoing review.
- 58 These cases suggest a trend toward heavier involvement of professional (but not apolitical) judges in making the calculation of the measure of a punitive award. The Supreme Court has very recently held that appellate courts must review punitive awards *de novo* to assure their reasonableness. This seems to be a prudent development for the reason that appellate courts are better able to compare awards and assure that they are reasonably even-handed.
- 59 It is a demerit in the punitive damages system that awards can be so radically disparate, although given its deterrent purpose, it may not be desirable to fix too precisely the adverse consequences of business misconduct. While it may be hoped that the mechanisms in place can enable appellate courts to make punitive awards somewhat less erratic and more even-handed in their measurement, absolute predictability would at least partially defeat the purpose of the punishment to deter business from making brutal calculations that assign only economic value to the welfare of consumers, workers, and the environment.
- 60 It seems therefore that foreign firms selling dangerous goods or oversold investments in America, or who hire American workers and violate their rights, or who emit noxious fumes in American air will have to endure the hardships of exposure to punishment imposed in suits brought by private citizens and private lawyers, and no government agency will be able to immunize them from that risk. If evidence is found indicating that corporate greed has so overcome common decency to give profound offense to an American court, a foreign business, like an American one, may be required to pay such sum as the court deems sufficient to prevent a recurrence, at least to the extent that it has assets within reach of any American forum.

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61 **AGGREGATION OF CLAIMS: SMALL CLAIM CLASS ACTIONS**

An alternative means of regulating corporate greed is the aggregation of large numbers of very similar claims against a single large defendant alleged to be responsible for many harms. The celebrated device for aggregation is the class action to recover damages. That procedure is now also in use in several other countries.⁵⁰ The American invention is a variant of the ancient practice in the English Court of Chancery; it was added to the Federal Rules of Civil Procedure in 1966⁵¹ and copied, sometimes with variations, into the procedures of most states. Its purpose is to allow many plaintiffs to aggregate their claims so that enough is at stake to attract a lawyer serving as a private attorney general to advance them.

- 62 The advocates for this use of the class action made the point that many businesses achieve profits by externalizing some of their costs in small portions to many person with whom they deal.⁵² Instead of causing the deaths of a few randomly selected customers, the executives may enhance profits by cheating all of their customers out of

⁴⁹ In re Exxon Valdez, 270 F. 3d 1215 (9th cir. 2001).

⁵⁰ See Lindblom, Individual Litigation and Mass Justice: A Swedish Perspective on Group Actions in Civil Procedure, 45 AM. J. COMP. L. 805 (1997).

⁵¹ F. R. Civ. P. 23(b)(3).

⁵² The idea was first advanced in Harry Kalven & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684 (1941).

sums too small to warrant filing suit.

- 63 The class action can be an alternative to punitive damages as a means to deter corporate misconduct. Instead of allowing a single plaintiff to recover a punitive damages windfall to punish and deter egregious business misconduct, the class action, at least in theory, deters corporate misconduct by allowing each member of the class to receive appropriate compensation for any misdeeds, without need to prove that the defendant's conduct was so offensive as to require punishment, thereby stripping the malefactor of all its ill-gotten gain.
- 64 Some class actions of this sort may be coattails to government regulation. Thus, a government agency may sue or prosecute a business alleging and proving corporate misconduct. A resulting judgment against the corporate defendant can then be used by private counsel to preclude the defendant from resisting liability to the class of persons harmed by the misconduct. The effect is to magnify, sometimes very substantially, the deterrent effect of government regulation.⁵³
- 65 The idea of aggregating small claims was an attractive idea, but it has not worked as well as hoped. Practices under the rule have drawn a lot of criticism. The rule has recently been revised, but no revisions under consideration will solve all the problems.
- 66 Consider a simple example of the use of the rule as it was intended to be used. A suit brought against the maker of a food processor designed for home use. The claim was made that the manufacturer had exaggerated the capacities of its product and was thus in breach of contract. No buyer of the product lost money or was otherwise harmed, but many were mildly disappointed that the machines they had bought could not do all they were led to expect, and all were entitled to a little compensation for that disappointment. One buyer brought a class action on behalf of all, seeking a \$25 cash refund to each member of the class. As almost always happens with such class actions, it was settled. The manufacturer agreed to pay a substantial fee to the lawyer for the class, and to give each member of the class a coupon worth \$25 toward the purchase of a new machine *at the list price*.
- 67 Settlements of such class actions must, under the rule, be approved by the trial judge and this one was, as almost all are. This settlement, however, was set aside on appeal. The appellate court noted that few members of the class would want to buy a new machine, even at a reduced price, and that the coupon was in any case illusory because few if any purchasers of the machines ever paid the full list price. Hence, the settlement was essentially a bribe to the class action lawyer to sell out his clients, who, after all, had so little at stake that they did not care enough to complain.
- 68 While that settlement was set aside, such coupon settlements are now a common event in the United States. I have myself received several coupons presented as compensation for harms done to me over the years by one business or another, but the coupons were of no value whatever to me. Their distributions to my fellow class members was, however, thought by some judge sufficient to justify a fee paid to the lawyer who purported to represent us. Some class actions of this kind are brought to compensate for truly trivial injuries, so trivial that few if any class members considered themselves to have been injured at all. Each is initiated by a lawyer who identifies a minor wrong by a corporate defendant and then finds a person in the wronged class who is willing to lend their name to the case as lead plaintiff. More than a few Americans are outraged by such settlements that compensate the lawyer for the class, but not its members, despite fanfare depicting the outcome as a triumph for class members. Perhaps such coupon settlements serve the corrective function, but they are often unsightly in what they reveal about the relationship between class action attorney and his

⁵³ See Howard M. Erickson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U. C. DAVIS L. REV. 1 (2000).

clients.⁵⁴

- 69 It seems apparent that some class actions are pursued with the cooperation of a corporate defendant who seeks "global peace" in the form of an adverse judgment to which it consents as a settlement. The judgment will then, it is hoped, be binding on all members of the class. Such a resolution is very attractive to corporate defendants who foresee large numbers of successful claims being asserted against them.⁵⁵
- 70 An example is *Kamilewicz v. Bank of Boston*.⁵⁶ A class action against a New England bank was filed in an Alabama state court to recover interest not paid to home mortgagors on sums held by the bank in escrow accounts to assure payment of real estate taxes. Very few of the escrow accounts contained much money for very long, so the liability of the bank to each mortgagor was quite small, yet the interest not paid on the total of all the bank's mortgage escrow accounts was not insignificant. None of the homes involved were located in Alabama or within a thousand kilometers of that state. The members of the class were notified that the suit had been brought in their behalf and offered the option of leaving the class if they chose to pursue their claims individually. Given the tiny stakes, it would have made no sense to do so and no one pursued that option. A settlement was then quickly reached (if in fact it had not been reached before the class action was filed) between the bank and the lawyer for the class. It was agreed that the bank would pay some overdue interest to mortgagors and that the class action lawyer would receive a large fee to be paid in proportionate shares by all the class members. The settlement was promptly approved by the Alabama trial judge. No member of the class purportedly represented cared enough to appeal until the bank executed the judgment. In keeping with its promise, it added a few dollars of interest to each homeowner's escrow account as compensation for the interest not paid when due, and then subtracted a few dollars to pay the mortgagors' lawyer. The transaction was a net loss to some homeowners who paid their lawyers more than they received in interest. It was good for their lawyer, and it was good for the bank that had in effect bought a *res judicata* defense against any other claims that might have been brought against it for the unpaid interest. It is not difficult to imagine the rage of some homeowners who lost money by winning a case they had never elected to pursue. And, indeed, the Supreme Court of Vermont has held that the class judgment is not enforceable against residents of that state.⁵⁷
- 71 A related problem is forum shopping by class action lawyers. It may seem indeed odd that the First National Bank of Boston was sued in an Alabama state court when none of the members of the class were residents of that state. Many Americans have been represented in similar class actions brought in courts in distant states. They are notified, of course, but few seek advice of counsel about a claim that is too small to pursue and that they may not have considered before receiving the notice. Because they are plaintiffs, the usual requirements for jurisdiction over the persons of individual members are not imposed.⁵⁸ This enables the class action lawyer to aggregate the claims of class members in the forum of his or her choice. It thus also invites the possibility of corrupt connections between individual class action lawyers and individual judges who will be called upon to approve a settlement of the case. For these reasons, it now seems likely that there will be federal legislation inhibiting state court class actions in which the class purports to include citizens of other states who have not explicitly elected to be included among the class.
- 72 This form of class action is not suited to personal injury litigation or other tort claims that are likely to be require proof of individual injuries too diverse for uniform resolu-

⁵⁴ See DEBORAH HENSLER ET AL, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (Santa Monica 2000).

⁵⁵ Francis E. McGovern, The Defensive Use of Federal Class Actions in Mass Torts, 19 ARIZ. L. REV. 595 (1997).

⁵⁶ *Kamilewicz v. Bank of Boston Corp.*, 100 F. 3d 1348 (7th cir. 1996).

⁵⁷ *Vermont v. Homeside Lending Inc.* (Vermont 2/21/03)

⁵⁸ *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797 (1985).

tion. Most efforts to use the class action in grave product liability cases have been defeated because the common issues in which the class members shared an interest were less substantial than the issues particular to each class member that would have to be litigated individually.

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73 **VOLUNTARY AGGREGATION BY PLAINTIFFS**

The class action is not the only means of aggregating civil cases for settlement. Lawyers who represent personal injury plaintiffs across the continent are very well organized through the internet, and are adept at aggregating large numbers of similar cases in the hands of a few lawyers who are positioned to negotiate a settlement of all. It appears to be the case that more generous settlement terms are available when this is done because it saves legal expenses for the corporate defendant and presents a more intimidating threat to management. Such simple aggregation may enable the management to employ the accounting maneuver of segregating the settlement fund so that it is not charged against current income. The device does not, however, offer global peace to the corporate defendant. And it leaves the problem of dividing the proceeds of the settlement in the hands of the plaintiffs' lawyers. Surely they can make the division at a minimum of cost, but whether in a manner that reflects the relative merits of diverse claims is a question. A system with a rigorous conflict-of-interest rule might preclude such deals.

74 Aggregation may also occur in federal courts through use of a statutory provision authorizing a transfer of similar cases to a single federal court where pretrial proceedings, notably discovery, can be conducted on a consolidated basis.⁵⁹ In clear defiance of the text of the statute, many lower federal courts were deciding such aggregations of cases on the merits, and many were settled *en masse* in anticipation of such a consolidated trial. The Supreme Court was called upon to halt this practice and did.⁶⁰ However, cases that have been consolidated in this way for pretrial proceedings are still often ripe for a consolidated settlement because the diverse plaintiffs will have voluntarily organized to conduct a united discovery.

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75 **CITIZEN SUITS**

Finally, there is yet another form of aggregation of interests that is the citizen suit authorized by federal environmental laws such as the Clear Air Act⁶¹ and the Clean Water Act.⁶² A purpose of such laws is to enable citizens and non-governmental organizations to apply the lash of the law to protect the environment.

76 In fact, very few "citizen suits" are brought by individual citizens. They are generally brought by organizations such as the Environmental Defense Fund or the Natural Resources Defense Council that have managed to raise private money for the purpose of defending the environment. Some of their money comes from settlements of citizen suits brought by them against alleged offenders. The most common sort of case is one brought against a corporate polluter by an environmental group after the United States Environmental Protection Agency (the EPA) has decided that the case was not worth pursuing. For example, a business firm may have failed to keep the kind of records required by the EPA. An environmental organization can bring suit to impose on the firm a civil penalty prescribed by the statute, and then settle the case for a payment somewhat less than the penalty would be. Those funds are then used to support other pri-

⁵⁹ 28 U. S. C. §1407.

⁶⁰ *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 856 (1998).

⁶¹ 42 U. S. C. §7604.

⁶² 33 U. S. C. §1365. For a summary of the different provisions, see MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS, APPENDIX A (Salem NH 1991).

vate enforcement activities conducted by non-profit private organizations.

- 77 Citizen suits are also brought against the EPA and other governmental agencies. Perhaps the most common form is a suit against the agency to compel it to meet a statutory deadline that it has failed to meet. But more significant have been the numerous cases brought to challenge EPA policy; often the substance of the issues at stake has been the propriety of cost-benefit analysis, the environmentalists generally taking the position that the statute required the elimination of pollution no matter what the cost. The Supreme Court has held, however, that deference to the agency's sense of the aims and values expressed in the statute is appropriate even when challenged in a citizen's suit.⁶³
- 78 Many citizens' suits are inconsequential. But the effectiveness of the device might be measured by the lengths to which parties have sometimes gone to suppress them. A spectacular example has recently been provided in the state of Louisiana. The state agreed to provide millions of dollars in tax relief and other subsidies to a Japanese petrochemical company to locate a new plant in the town of Convent.⁶⁴ Convent already had the worst air in the United States, because of the presence of other polluters; the town is known to those who reside there as Cancer Alley. The population is poor and mostly black. They acquired legal counsel from an office maintained at Tulane University for the dual purpose of providing training for law students and services for needy clients, and they filed a citizens' suit to enjoin further poisoning of their air.
- 79 Their suit was greeted with rage by business interests in the state. It is pertinent that the economy of the state of Louisiana was languishing relative to that of surrounding states. It may also be pertinent that Louisiana is the one state that was settled initially by French immigrants; its code was influenced by the Napoleonic Code and the accompanying "Gallican habits" (as Francis Lieber would have denoted them), including that of a strong Governor. The Governor launched a vigorous public attack on Tulane University, a state university, for providing the citizens with counsel in a case that could mean a loss of new industry for the state. The Supreme Court of Louisiana, sensitive to the judges' dependence on campaign contributions from the concerned business groups, changed its rules governing the practice of law in state courts to exclude the student clinic from representing the plaintiffs. Law firms in the state, under pressure from their clients, announced that they would not employ graduates of the Tulane Law School if its clinic did not drop the case.
- 80 In the end, in part because the lawyer for the plaintiffs stayed on the case, the federal Environmental Protection Agency exercised its jurisdiction to disapprove the Louisiana air standard. The petrochemical plant has not been constructed. Moreover, the Supreme Court of the United States held in 2001 that the federal Legal Service Corporation providing legal services to the poor may not restrict its lawyers in the political objectives they seek on behalf of their clients.⁶⁵ The Court concluded that the poor client has a right protected by the First Amendment of the Constitution of the United States to express his or her grievances to a court, and that the legislature providing funds for legal services must accept the duty of the lawyers to pursue the objectives of their clients. It is a fair inference from this recent decision of the Supreme Court that the rule of the Louisiana Supreme Court providing some legal services to the citizens of Convent, but denying them lawyers when they wish to challenge the air quality associated with the petrochemical factory, is unconstitutional.
- 81 Perhaps reasonable minds may differ on the utility of citizen suits such as that brought by the citizens of Convent. Such suits are not an economically efficient mode of law enforcement. The EPA could do the job more efficiently without the help of citizens, if only we could trust the federal government to take care of the people of Convent with-

⁶³ *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865 (1984).

⁶⁴ The story is told by Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J. L. & POLICY 33 (2000).

⁶⁵ *Legal Services Corporation v. Velazquez*, 531 U. S. 533 (2001).

out the prodding of citizen suits. On the other hand, citizen suits do provide a forum and an activity for the many people and organizations who are deeply concerned about the environment. They reflect the moral judgments of a culture that assigns a very high value to procedure and to the opportunity to be heard. Moreover, people who are litigating are generally found indoors and are not out in the streets arousing fellow citizens to disorder. That is a useful function for any legal system to perform.

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82 **CONCLUSION**

In defending American practices to the extent that I have, I do not recommend that European nations adopt them. If business decisions affecting consumers, workers, and the environment can be adequately restrained by other means that are satisfactory to the people who need the law's protection, there is little to be said for costly American devices. If, however, multinational business firms manifest in Europe the traits exhibited in the cases I have mentioned, and if they can successfully resist regulation imposed *ex ante*, as American firms often do, then perhaps Europeans may need to consider some of the American experience to see if there are features you might borrow.

83 Many American business executives dislike the American legal system for the same reasons that European business executives do.⁶⁶ However, when asked if they would prefer the establishment of a bureaucracy sufficiently empowered to protect consumers, workers, and the environment, few would make that choice. Even fewer would opt for a political system that also took pressure off the liability system discussed here by providing for publicly provided health care. At the end of the day, American business, while it will continue to whine about such injustices as that said to have been done to McDonald's, and will propose various forms of deregulation, will not favor any scheme that requires it to pay higher taxes or endure the unwelcome attention of government regulators. For these reasons, Europeans considering investments in the American economy should generally proceed in the expectation that private law enforcement will continue to be an indispensable means by which the United States protects consumers, workers, and the environment, and that such enforcement will be brought to bear on them to the extent that they participate in that marketplace.

Zitierempfehlung: Paul D. Carrington, HFR 2004, S. 24 ff.

⁶⁶ For a particularly acid comment on the features of American law that are the subject of this paper, see Richard W. Dusenberg, *Views on the American Legal System*, IN *UNITED STATES/JAPAN COMMERCIAL LAW AND TRADE* 431 (V. Kusuda-Smick ed., Ardsley-on-Hudson 1989). Dusenberg quotes an American CEO: "If we can take the lawyers in America –and I speak for all CEOs – and move them to Japan, the U. S. could be competitive in 24 hours. Twenty four hours later, Japan's productivity would go down, its trade balance would go down, and its legal bills would go up." This comment was made at a time when the Japanese economy was at its apex; it has not been repeated in more recent times. The Manhattan Institute is funded by multinational enterprise to pursue the aim of protecting business from American law by perpetuating the myth that America would prosper even more if only Americans would put greater faith in business management.. See, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (New York 1991). Some responses are STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995); ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 101-145 (Durham 2001); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 *DENV. U. L. REV.* 77 (1993); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 *MD. L. REV.* 1093, 1109-1112 (1996); 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 (1992). Not all who disdain the system are business managers or their delegates at the Manhattan Institute. See, e.g., PATRICK ATIYAH, *THE DAMAGES LOTTERY* (Oxford 1997).