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# *Parens Patriae* Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts

Michael L. Rustad<sup>1</sup> & Thomas H. Koenig<sup>2</sup>

## ABSTRACT\*

The BP oil spill has led to some of the most complex legal dilemmas in Anglo-American history. This Article explores four mechanisms that claimants are using to seek compensation for damages caused by this unprecedented environmental disaster: (1) One-on-One Torts; (2) Class Actions; (3) the Gulf Coast Claims Facility; and (4) Environmental *Parens Patriae* Actions. We argue that the government-initiated *parens patriae* actions are necessary to supplement, but not to supplant, the other three mechanisms in order to vindicate the larger societal injury. The *parens patriae* litigation may enable the Gulf States to recoup larger societal losses to their habitat, ecosystems, tax revenues, and tourism. This mechanism can potentially resolve the problem of aggregating valid claims by plaintiffs who cannot be certified as classes or who do not qualify under the Gulf Coast Claims Tribunal Guidelines. We classify environmental *parens patriae* as public crimtorts because government attorneys deploy private

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tort law to redress societal injuries. By contrast, in private crim torts, trial lawyers receive punitive damages as a bounty for uncovering and prosecuting dangerous conditions and practices. Both public and private crim torts require intermediate procedural protections to ensure that corporate defendants are treated fairly. Courts or legislatures will need to determine which intermediate protections best balance defendants' rights versus society's interests.

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## I.

## INTRODUCTION: THE BP OIL CATASTROPHE

On April 20, 2010, an explosion and fire on the Mobile Offshore Drilling Unit Deepwater Horizon (“Deepwater Horizon”) oil rig killed eleven workers.<sup>3</sup> Deepwater Horizon’s drilling platform sank into the Gulf of Mexico two days later, “bending and breaking a riser pipe carrying oil to the ocean surface from approximately 5,000 feet below the sea floor.”<sup>4</sup> The resulting release of five million barrels of oil<sup>5</sup> created the largest marine environmental catastrophe in U.S. history.<sup>6</sup> For an eighty-seven-day period, the broken pipe released approximately 35,000 to 60,000 barrels of crude oil daily into the waters of the Gulf of

3. At the time of the explosion, the Deepwater Horizon was located approximately forty-one miles off the coast of Louisiana in Mississippi Canyon Block 252 and was contracted to BP America Production Co. See Transocean Ltd., Quarterly Report (Form 10-Q) 42 (Nov. 3, 2010), available at <http://www.deepwater.com/fw/main/SEC-Filings-57.html> [hereinafter Transocean SEC Filing].

4. See Complaint at 1, State of Alabama *ex rel.* Troy King v. BP PLC, No. 2:2010cv00690 (M.D. Ala. Aug. 12, 2010) [hereinafter Complaint of Alabama]. The Deepwater Horizon was a “\$560,000,000.00 ultra-deepwater, dynamically-positioned semi-submersible oil drilling rig built by Hyundai Heavy Industries Co., Ltd. of South Korea and delivered to Transocean in February of 2001.” Complaint at 17, Dr. Seymour Stricker v. BP PLC, No. 3:10cv229 (N.D. Fla. June 28, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 792 (describing Deepwater Horizon drilling platform) [hereinafter Complaint of Dr. Stricker].

5. Complaint at 3, State of Louisiana v. Triton Asset Leasing, No. 2:10-cv-03059 (E.D. La. Sept. 14, 2010), <http://www.ag.louisiana.gov/Shared/ViewDoc.aspx?Type=3&Doc=259> [hereinafter Complaint of Louisiana].

6. The spill’s effects are widespread, with oil reported to have come ashore in Louisiana, Mississippi, Alabama, Florida, and, most recently, Texas. Its full impact on the lives and livelihoods of tens of thousands of Americans, especially those living in or near the Gulf of Mexico, is yet undetermined. See *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, MDL No. 2179 (J.P.M.L 2010), available at [http://www.jpml.uscourts.gov/\\_Mats/WinMATS%20Pleadings/2179/MDL%202179%20Pleading%2032.pdf](http://www.jpml.uscourts.gov/_Mats/WinMATS%20Pleadings/2179/MDL%202179%20Pleading%2032.pdf).

Mexico<sup>7</sup> before it was capped off and finally declared “effectively dead” on September 19, 2010.<sup>8</sup> The ensuing 200-mile wide and 300-mile long oil slick polluted “the precious wetlands, bays, and estuaries of Louisiana’s Coastal Zone with heavy oil and sludge, and has reportedly contaminated beaches in Mississippi, Alabama, and Florida.”<sup>9</sup> The oil spill “closed a third of the Gulf’s critical fishing grounds,” creating an economic disaster because “[f]or the Gulf States, \$10.5 billion of gross domestic product is tied to the fishing industry.”<sup>10</sup> The cascading effects of this widespread environmental devastation<sup>11</sup> have created unprecedented legal dilemmas that require rethinking of the traditional division between private and public law. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling in its January 11, 2011 Report to the President, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, called for new legal reforms to hold oil companies more accountable for environmental damage.<sup>12</sup> Laws and regulations, the Commission unanimously concluded, “lag behind the real risks associated

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7. *Id.*

8. Colson, Hicks & Eidson, *Federal Court Appoints BP Oil Plaintiffs’ Steering Committee*, BUSINESS WIRE, Oct. 13, 2010, <http://www.businesswire.com/news/home/20101012007058/en/Federal-Court-Appoints-BP-Oil-Plaintiffs%E2%80%99-Steering>.

9. The Complaint of Lavigue v. BP PLC describes the dangers from the oil contamination:

The oil contamination is dangerous . . . . Exposure to soil, vapors and water containing petroleum contamination can cause multiple health complications and illnesses such as respiratory conditions and illnesses, gastrointestinal conditions and illnesses, dermatological conditions and illnesses, neurological conditions and illnesses, immunological conditions and illnesses, and a host of other health complications and illnesses.

Complaint at 14-15, Lavigue v. BP PLC, No.1:10cv222 (S.D. Ala. June 22, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 1238.

10. Patrik Jonsson, *Gulf Oil Spill: Can Region Keep Its Seafood on America’s Dinner Tables?* CHRISTIAN SCI. MONITOR, Sept. 24, 2010, available at 2010 WLNR 19049238.

11. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 6 (2011), available at <http://www.gpoaccess.gov/deepwater/deepwater.pdf> [hereinafter NAT’L COMM’N REPORT] (describing the catastrophic blowout).

12. NAT’L COMM’N REPORT, *supra* note 11, at 283 (calling for reforms that will make oil companies more financially accountable for the after-effects of oil spills). The National Commission on the BP Deepwater Horizon Oil Spill also cited an “MMS investigation [that] concluded that poor management of a repair operation was to blame: not only was there an “absence of detailed and coordinated planning for the project,” there was a dearth of much-needed “oversight over contractor activities.” *Id.* at 70.

with deepwater drilling into large, high-pressure reservoirs of oil and gas located far offshore and thousands of feet below the ocean's surface."<sup>13</sup> The United States Justice Department filed suit against BP Products North America in a federal district court in Texas in March 2009 for violating the Clean Air Act.<sup>14</sup> The Justice Department sought an injunction and monetary penalties, charging BP Products with failing to report hazards required under Risk Management Program regulations in its Texas City refinery.<sup>15</sup> British Petroleum's (BP) history of failure to safeguard the Gulf region's environment drew harsh criticism,<sup>16</sup> as did the company's failure to protect the safety of its workers over the past fifteen years.<sup>17</sup>

This Article recommends that the Gulf States use their *parens patriae* powers to file environmental tort lawsuits to recover for societal damages to their natural resources and people.<sup>18</sup> Our focus is on identifiable societal losses to governments and municipalities caused by BP and other oil industry defendants. Our argument unfolds in three parts. Part I examines three leading civil justice system alternatives for compensating the victims of the BP oil spill: (1) one-on-one torts; (2) private dispute resolu-

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13. *Id.* at vii.

14. *United States v. BP Products North America Inc.*, 610 F. Supp. 2d 655, 660 (S.D. Tex. 2009).

15. *Id.*

16. The National Commission concluded that BP did not have a credible plan to respond to an offshore oil spill, which was a statutory requirement imposed by federal law. Its final report castigated BP for copying its contingency plan from another website. BP's plan contained irrelevant provisions such as how they would respond to save sea lions, sea otters, and walruses never found in the Gulf region. NAT'L COMM'N REPORT, *supra* note 11, at 283 (discussing BP's sham plan to deal with an emergency oil spill).

17. As Marc R. Stanley notes:

Local officials at the BP Texas City refinery repeatedly had been rebuffed in their appeals for upgraded machinery and safety equipment. On March 23, 2005, aging equipment and poor safety precautions led to an explosion that killed fifteen workers and injured more than 200 . . . . OSHA fined the company \$21.3 million, the largest penalty of its kind ever levied. Why? Instead of putting excess cash into requested maintenance and safety, BP executives had ordered the company to 'bank the savings.' BP had led the industry in the number of refinery deaths from 1995 to 2005, and over that entire decade, there was a fire a week at the Texas City plant.

Marc R. Stanley, *Risk and Responsibility in the Twenty-First Century: When Bad Companies Happen to Good People*, 56 *DRAKE L. REV.* 517, 522 (2008).

18. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L. J.* 348, 351-52 (2003) (conceptualizing societal damages as fulfilling a "societal compensation goal: the redress of harm caused by defendants who injure persons beyond the individual plaintiffs in a particular case.").

tion in the form of the Gulf Coast Claims Facility, which is funded by BP; and (3) private class actions certified for diverse victim categories. Our litigation roadmap will illustrate the challenges confronting each of these approaches due to both the diverse categories of potential plaintiffs and the heterogeneous corporate families named as defendants.

We propose public crimtorts in the form of *parens patriae* environmental litigation to supplement, but not to supplant, the other three approaches by addressing the societal damages incurred by the Gulf States independently from the injuries suffered by the private litigants. The claimants seeking the three remedies discussed in Part I face barriers arising out of the sheer magnitude of the spill, the complexity of establishing multiple causation, potential conflicts of interest, judicial reluctance to collectivize claims, and the difficulties of identifying responsible parties. To the extent that these policy alternatives fail, the states could bridge the enforcement gap by establishing alternative compensation schemes funded by *parens patriae* actions.

Part II traces the path of *parens patriae* litigation from its origins in Medieval England to its application in contemporary public health and environmental tort actions. We acknowledge some of the criticisms made about public health and environmental *parens patriae*, but conclude that this collective solution provides a key complement to the proposed alternatives of a private claims facility, class actions, or individual lawsuits in redressing the societal harms caused by the BP oil spill.

Part III explores the crimtort implications of governmental actors deploying private tort remedies such as punitive damages in environmental disaster cases. First, we classify *parens patriae* actions as public environmental crimtorts that blend the deterrence function of criminal law with the compensatory function of the law of torts. Second, we demonstrate that *parens patriae* environmental tort action is the sole remedy that vindicates the states' sovereign or quasi-sovereign interest in protecting its natural environment, habitat, public health, or financial well-being. Third, we argue that public environmental crimtorts provide a collective solution for societal injuries without devolving into an illegitimate fourth branch of government. Thus, we conclude that environmental *parens patriae* crimtort actions potentially fill the enforcement gap left by the inadequacies of legislation, regulation, criminal law, and litigation by private parties.



## II.

PART I: CIVIL JUSTICE ALTERNATIVES FOR  
COMPENSATING THE BP OIL SPILL VICTIMS

## A. "One-on-One" Torts

## 1. The Case for Individualized Environmental Justice

Courts are reluctant to certify punitive damages class actions to aggregate individual claims.<sup>19</sup> Individual participation in the civil justice system is a pillar of Anglo-American liberal democracy.<sup>20</sup> Plaintiffs have greater autonomy and choices in individual trials than in collective proceedings.<sup>21</sup> Individual lawsuits provide plaintiffs with an opportunity to tell their story to an impartial judge and to confront oil executive decision-makers in open court. Individual BP tort litigation will stretch on for decades, maximizing the public relations debacle for the oil industry defendants. One-on-one adjudication might enable individual claimants to recover punitive damages awarded to punish and deter the BP oil spill defendants and others from repeating conduct that recklessly endangers the environment.<sup>22</sup> Individual lawsuits seeking punitive damages send the oil industry a deterrent signal that environmental torts do not pay.<sup>23</sup> The underlying jurisprudence behind deterrence is to extract a sufficient sum from the oil industry defendants to "make a repetition of the misconduct unlikely."<sup>24</sup> Trial lawyers, armed with the engine of

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19. See, e.g., *Abed v. A.H. Robins Co.*, 693 F.2d 847, 855 (9th Cir. 1982) (vacating nationwide class action for punitive damages in Dalkon Shield IUD Products Litigation). See generally Richard A. Nagareda, *Engle v. R.J. Reynolds Tobacco Co.: Lessons in State Class Actions, Punitive Damages, and Jury Decision-Making: Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943 (2001) (arguing that the punitive damages class action is not a viable option in the U.S. civil justice system).

20. See generally THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 1-68 (2001) (reviewing the historical evolution of U.S. tort law).

21. MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS 4 (2009).

22. Punitive damages have been a part of the Anglo-American landscape since the eighteenth century. See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-20 (1982) (describing history of punitive damages in supplementing criminal law). "For law-and-economics scholars, deterrence is the primary rationale for torts, easily outstripping corrective justice and compensation." Michelle M. Mello & Troyen Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1603 (1995).

23. *Rookes v. Barnard*, [1964] A.C. 1129 at 66 (Eng.).

24. DAN B. DOBBS, THE LAW OF TORTS 1063 (2000).

discovery, may uncover “smoking gun” evidence of the need to punish BP and other oil industry defendants.

Proponents of one-on-one lawsuits argue that attorneys do not adequately represent individual plaintiffs in class actions.<sup>25</sup> Class actions create the potential for “legal blackmail” and a “race to the bottom” where plaintiffs’ attorneys sell out the interests of their clients. Class action lawyers may be tempted to design a settlement that provides lucrative attorneys’ fees but inadequate compensation for class members.<sup>26</sup>

Trial lawyers in the Gulf States have filed thousands of individual lawsuits against BP oil spill defendants, seeking compensation and punitive damages for a wide variety of actual and potential losses. Prospective plaintiffs include guides, fishermen, charter boat owners, shrimpers, oystermen, real estate rentals and sales agencies, condominium associations, seafood and tourism trade associations, vacation services providers such as lessors of charter boats, t-shirt and novelty makers, and countless other categories of victims.<sup>27</sup> Transocean Ltd. alone is the target of at least fifty individual lawsuits in state and federal courts, in which “plaintiffs are generally seeking awards of unspecified economic, compensatory and punitive damages, as well as injunctive relief.”<sup>28</sup> Numerous practical problems, unfortunately, may make this approach unworkable as a remedy for an environmental disaster of this magnitude and complexity.

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25. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371-72 (2000) (contending that class members are often not well served by their class action attorneys).

26. REDISH, *supra* note 21, at 2.

27. The beachfront plaintiffs alone include countless categories such as event planners, hotel owners, boat operators, and other tourism-oriented categories. See Kristine B, *The BP Oil Spill: The Fallout and Who's Affecting . . . Including You*, PLEADING IGNORANCE BLOG (May 27, 2010), <http://www.lawyersandsettlements.com/blog/bp-oil-spill-fallout-whos-affected-03758.html>. The Birmingham, Alabama law firm of Beasley Allen “has filed a number of lawsuits in District Courts in Alabama, Florida and Louisiana to help protect businesses and individuals harmed by the oil spill.” See Press Release, Beasley Allen Law Firm, Beasley Allen Files BP Lawsuit in the Southern District of Alabama (July 27, 2010), <http://www.prnewswire.com/news-releases/beasley-allen-files-bp-lawsuit-in-the-southern-district-of-alabama-99329754.html>. The U.S. Judicial Panel on Multidistrict Litigation transferred and consolidated a number of plaintiffs’ classes from the Gulf States. See *In Re Oil Spill*, *supra* note 6 (listing consolidation of Louisiana cases).

28. Transocean SEC Filing, *supra* note 3, at 17.

## 2. Difficulties in Proving Causation in Environmental Torts

Individual claimants will find it difficult to secure legal representation because of complex causal issues and difficulties proving damages. Establishing lost profits, for example, will typically require expert testimony by biologists, economists, and property appraisers.<sup>29</sup> For example, an attorney would be unlikely to file a case on behalf of a bed-and-breakfast owner with 20% fewer bookings after the BP oil spill. Proving that the lost hotel bookings resulted from the oil spill will be nearly impossible for new businesses, and difficult even for established businesses, if the number of bookings also varies with fluctuations in the weather, the unemployment rate, gasoline prices, airline fares, conditions at rival vacation destinations, and numerous other variables. Only when the hotel owner's quantifiable losses are aggregated with other small business owners into a class action will the case become financially justifiable.

## 3. The David v. Goliath Imbalance in Legal Resources

Together, the BP oil spill defendants constitute one of the most powerful blocs of joint tortfeasors in world history.<sup>30</sup> As the National Commission on the BP Deepwater Horizon Oil Spill noted, "[t]he immediate causes of the Macondo well blowout can be traced to a series of identifiable mistakes made by BP, Halliburton, and Transocean that reveal such systematic failures in risk management that they place in doubt the safety culture of the entire industry."<sup>31</sup> BP's internal study attributed the oil spill disaster to a "complex and interlinked series of mechanical failures, human judgments, engineering design, operational imple-

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29. Claimants will need experts to establish "restoration or replacement of a damaged resource, but also from welfare economists, who will testify that certain difficult-to-quantify lost use values, existence values, and option values." Frederick B. Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B.C. ENVTL. AFF. L. REV. 405, 457 (1989).

30. BP PLC is a multinational entity, incorporated under the laws of the United Kingdom, which owns stakes in a complex variety of oil and gas companies around the world. Complaint at 6-7, *T&D Fishery, LLC v. BP PLC*, No. 2:10-cv-01332 (E.D. La. May 4, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 724 [hereinafter *Complaint of T&D Fishery*]. This multinational corporation is the world's third largest integrated energy company. Complaint at 11, *Thigpen v. BP PLC*, No. 1:10cv280 (S.D. Miss. June 22, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 1317. BP is the world's fourth largest oil producer. Nuveen Tradewinds Global Flexible Allocation Fund, Annual Report (Class I) (July 31, 2010) (available on LEXIS/NEXIS SEC Filing).

31. NAT'L COMM'N REPORT, *supra* note 11, at vii.

mentation and team interfaces.”<sup>32</sup> Claimants will find themselves enmeshed in a maze of indemnification lawsuits, jurisdictional disputes, choice of law dilemmas,<sup>33</sup> and costly discovery disputes.<sup>34</sup>

An individual lawsuit against even a single mega-corporation such as BP is analogous to the unequal combat between David and Goliath. A brief description of the multifaceted,<sup>35</sup> multinational,<sup>36</sup> and complexly intertwined<sup>37</sup> BP families illustrates the disparity in resources if individuals pursue these powerful oil in-

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32. Mark Clayton, *Transocean, Halliburton Blast BP Report on Cause of Blowout, Oil Spill*, CHRISTIAN SCI. MONITOR, July 13, 2010, [http://www.csmonitor.com/ USA/2010/0908/Transocean-Halliburton-blast-BP-report-on-cause-of-blowout-oil-spill](http://www.csmonitor.com/USA/2010/0908/Transocean-Halliburton-blast-BP-report-on-cause-of-blowout-oil-spill).

33. The co-defendants are already pointing fingers at each other and some will seek indemnification for the alleged negligence or recklessness of others who had a causal connection to the disaster. Halliburton, for example, installed the cement in the BP PLC oil well. Halliburton allegedly had prior knowledge of problems with the cement formulation it used in BP PLC's oil well. Courts will need to determine whether to apply Texas or Saudi Arabian conflict of law principles because Halliburton has places of business in the United Arab Emirates as well as in Houston, Texas. Ben Casselman & Siobhan Hughes, *Contractor Accused of Flawed Job on Rig*, WALL ST. J., Oct. 29, 2010, at 1 (describing Halliburton's principal places of business). Halliburton, in turn, leveled blame at BP for failing to follow its design specifications and sought indemnification from BP Exploration or BP PLC for claims arising out of the Deepwater Horizon explosion and the incident at the Macondo well that led to oil spill disaster. See Halliburton Co., Quarterly Report (Form 10-Q) (Oct. 22, 2010) (available on LEXIS/NEXIS SEC Filings) [hereinafter Halliburton SEC Filing].

34. BP levels blame at codefendants, including the “crews of Transocean, which operated the Deepwater Horizon rig, and of Halliburton, the company that cemented the well.” Mark Clayton, *Transocean, Halliburton Blast BP Report on Cause of Blowout, Oil Spill*, CHRISTIAN SCI. MONITOR, Sept. 8, 2010, <http://www.csmonitor.com/USA/2010/0908/Transocean-Halliburton-blast-BP-report-on-cause-of-blowout-oil-spill>.

35. Transocean, Inc., “the world’s largest offshore drilling contractor, has its principal place of business in the Cayman Islands where it is organized.” Complaint at 7, *Ferguson v. BP PLC*, No. 1:10cv281 (S.D. Ala. June 3, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 1693 [hereinafter Complaint of Ferguson]. Transocean is the parent corporation controlling a number of interrelated entities and subsidiaries that are legally responsible parties. *Id.* Transocean Holdings LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its principal office in Houston, Texas, and is doing business in the State of Louisiana and in this district.” *Id.* Transocean Offshore Deepwater Drilling Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal office in Houston, Texas, and is doing business in the State of Louisiana and in this district; Transocean Deepwater Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal office in Houston, Texas, and is doing business in the State of Louisiana and in this district. Complaint of Louisiana, *supra* note 5, at 3.

36. BP oil spill defendants include multinational companies organized in Switzerland, the United Kingdom, and affiliated U.S. subsidiaries of companies headquartered in foreign countries. Tom Hamburger & Kim Geiger, *Maze of Authority Cited*

dustry defendants alone. Discovery will be immensely difficult because so many interrelated multinational corporate families played some role in the disaster.

a. *The BP Corporate Family*

British Petroleum, a Public Limited Company (BP PLC) headquartered in London, England, is a global oil and gas company. Defendants BP Products of North America and BP America Inc. are U.S.-based wholly owned subsidiaries of BP PLC.<sup>38</sup> This BP American corporate family includes entities organized in Delaware, Maryland, Indiana, and several other states.<sup>39</sup>

b. *The Transocean Corporate Family*

Transocean Holdings, Transocean Offshore, and Transocean Deepwater (collectively Transocean) owned and operated the Deepwater Horizon, a semi-submersible movable drilling rig. Transocean used this rig in “operations for BP, BP Exploration, BP American, and BP Products on the outer Continental Shelf, at the site from which the oil spill [originated].”<sup>40</sup> Transocean was the owner of the Deepwater Horizon rig, which was being leased to BP Exploration & Production, Inc.<sup>41</sup>

Triton Asset Leasing GmbH is a Transocean-related entity organized under the corporate laws of the Swiss Confederation.<sup>42</sup> Along with the Transocean subsidiaries,<sup>43</sup> Triton owned and op-

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*in Spill; Rig was Registered with Tiny Republic of Marshall Islands, Reducing the Role of the U.S.*, CHI. TRIB., June 15, 2010, at 13.

37. As an illustration of the interrelated network of corporations affiliated with this industrial giant, BP PLC issued a press release noting its intention of selling its interest in gas fields, pipeline and power generation in Venezuela and Vietnam to an affiliated entity, TNK-BP, for \$1.8 billion. Press Release, BP, BP to Sell Venezuela and Vietnam Businesses to TNK-BP (Oct. 18, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7065603>.

38. Complaint of T&D Fishery, *supra* note 30, at 5.

39. *Id.*

40. Complaint at 4, *Marine Horizons Inc. v. BP PLC*, No. 1:10cv227 (S.D. Ala. June 28, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 836.

41. Press Release, The St. Joe Co., The St. Joe Company Files Lawsuit against Transocean for Role in Deepwater Horizon Oil Spill (Oct. 12, 2010), <http://ir.joe.com/releasedetail.cfm?releaseid=517766>.

42. “Defendant Triton Asset Leasing GmbH is a Transocean Ltd.-affiliated entity and is a Swiss limited liability company with its principal place of business in Zug, Switzerland.” Complaint of Dr. Stricker, *supra* note 4, at 3.

43. The Transocean corporate family, including Transocean Ltd, Transocean Offshore Deepwater Drilling, Inc., Transocean Deepwater, Inc. and other Transocean affiliates, is described in Complaint of T&D Fishery. *Supra* note 30, at 7.

erated the Deepwater Horizon.<sup>44</sup> Transocean's liability stems from its operation of the Deepwater Horizon's mobile offshore drilling unit.<sup>45</sup>

*c. The Halliburton Corporate Family*

Halliburton Energy Services, Inc. (Halliburton) is a Delaware corporation doing business around the world. Halliburton, headquartered in Houston, Texas,<sup>46</sup> as well as in Dubai, one of seven members of the United Arab Emirates, is a defendant because this industrial giant performed a variety of services on the Macondo well, including cementing, mud logging, directional drilling, measurement-while-drilling, and rig data acquisition services.<sup>47</sup>

*d. The Andarko Corporate Family*

Anadarko Petroleum Corporation (Anadarko) is a Delaware-based oil and gas exploration and production company with its principal place of business located in Woodlands, Texas. Andarko is potentially liable for environmental damages because it holds a 25% share in the lease agreement that enabled BP PLC to drill for oil at the Macondo offshore oil well.<sup>48</sup>

*e. The Moex Offshore Corporate Family*

Moex, a Delaware corporation, is a potentially responsible party because it is a 10% stakeholder in the Macondo prospect lease where the oil well blowout occurred. Moex's liability is that of a joint venture along with its corporate parent, Mitsui Oil Exploration.<sup>49</sup>

*f. Cameron International Corporation*

Cameron International Corporation (Cameron), a Delaware corporation, is a responsible defendant because of its role in providing "pressure control, processing, flow control, and compression services" for the Deepwater Horizon platform.<sup>50</sup> Cameron

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44. Complaint at 3, *City of Panama City Beach v. Triton Asset Leasing GmbH*, No. 5:10-cv-00255-RS (N.D. Fla. Sept. 23, 2010) [hereinafter *Complaint of Panama City Beach*].

45. *Id.*

46. Halliburton SEC Filing, *supra* note 33, at 17.

47. *Id.* at 9.

48. Complaint of Dr. Stricker, *supra* note 4, at 3.

49. *Id.*

50. Complaint of Panama City Beach, *supra* note 44, at 3.

also has potential liability as a manufacturer or supplier of the blowout preventer that failed to work in the aftermath of the explosion on the Deepwater Horizon.<sup>51</sup> “Cameron manufactured, designed, supplied, installed and/or maintained a sub-sea device known as a blowout preventer (BOP) installed . . . at the well-head at the location of the initial incident involving the Deepwater Horizon that failed to operate at the time of the initial blowout.”<sup>52</sup>

*g. Miscellaneous Additional Defendants*

Vessels of Opportunity, a BP program that enlisted local contractors to assist in the containment and cleanup of the oil in several Gulf Coast states, stands accused of failing to properly protect the health of its subcontractors. A Louisiana seafood company, for example, filed a state action against BP PLC (and its corporate family), Halliburton, Andarko, Cameron, Moex, and two Louisiana companies, O’Brien Response Management, Inc. and Tiger Safety, LLC, in the civil court for the Parish of Orleans.<sup>53</sup> Even the most sophisticated and well-financed trial lawyers may fall short when faced with these enormously powerful and complexly interwoven families of defendants.

4. One-on-One Environmental Torts Will Overwhelm the Civil Justice System

A torrent of tens or even hundreds of thousands of individual oil spill lawsuits will paralyze state and federal courts throughout the Gulf States region.<sup>54</sup> If the courts recognize noneconomic damages that are decoupled from physical injury, millions of additional claims are possible. The president of the American Psychiatric Association, for example, argues that compensation is appropriate for the mental health injuries that have resulted

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51. *Id.*

52. Complaint of Dr. Stricker, *supra* note 4, at 3 (describing Cameron’s roles as providing services and manufacturer of devices to prevent blowouts).

53. Complaint at 1-2, *Cajun Crab LLC v. BP PLC*, No. 2:10cv1516 (E.D. La. May 19, 2010).

54. As of October 2010, “[r]esidents and businesses from all 50 states have submitted claims to BP to request compensation for losses and damages from the oil spill.” Some claims come from “as far away as upstate New York, Oregon and Alaska.” David Segal, *Should BP’s Money Go Where the Oil Didn’t?*, N.Y. TIMES, Oct. 23, 2010, <http://www.nytimes.com/2010/10/24/business/24claim.html> (providing graphs showing claims by place of residence and location of loss).

from the spill, radically increasing the number of potential plaintiffs.<sup>55</sup>

A much less destructive oil catastrophe, the 1989 Exxon Valdez spill, resulted in over two decades of litigation before resolution. Exxon was sued by “approximately 52,000 plaintiffs [who] filed more than 200 suits against Exxon in federal and state court,” a number that will be dwarfed if one-on-one litigation proceeds as the chief alternative.<sup>56</sup> The BP oil spill involves multiple corporate defendants and extremely diverse classes of plaintiffs, making it far more difficult to resolve than the Exxon Valdez case.

The BP oil spill requires a solution that collectivizes injuries in products liability, toxic torts, and many other substantive areas, an approach that is antithetical to civil recourse theory’s narrow concept of individualized “private wrongs.”<sup>57</sup> It is already clear that hundreds of thousands of BP oil spill plaintiffs will not be able to find representation if no collective injury mechanism is available. Many victims will fail to sue, creating under-deterrence because the defendants will not pay the cost of wrongdoing.<sup>58</sup> One possible solution is to replace the civil justice system with an administrative body that is empowered to determine fair compensation, an alternative championed by President Barack Obama.

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55. Press Release, Am. Psychiatric Ass’n, American Psychiatric Association Calls for Payment of Oil Spill Mental Health Claims (Aug. 13, 2010), <http://www.psych.org/MainMenu/Newsroom/NewsReleases/2010-News-Releases/Oil-Spill-Mental-Health-Claims.aspx?FT=.pdf> (“[M]ental illnesses brought on by difficult situations surrounding the BP oil spill may be less visible than other injuries, but they are real. An entire way of life has been destroyed, and this is causing anxiety, depression, post-traumatic stress disorder, substance use disorders, thoughts of suicide and other problems.”).

56. William H. Rodgers, Jr., et al., *The Exxon Valdez Reopener: Natural Resources Damage Settlements and Roads Not Taken*, 22 ALASKA L. REV. 135, 173 (2005).

57. John C.P. Goldberg & Benjamin C. Zipursky, *Calabresi’s The Cost of Accidents: A Generation of Impact on Law and Scholarship*, 64 MD. L. REV. 364, 402-03 (2005) (describing civil recourse theory as superior to consequentialist compensation/deterrence approaches such as the crim tort).

58. Thomas C. Galligan, Jr., *The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1033 (2001) (“[T]he extent that injured persons do not sue—and to the extent that actors anticipated that those injured will not sue—the relevant actors face potential damage awards that are less than the actual accident costs caused by the activities.” See also Sharkey, *supra* note 18, at 366-67 (explaining reasons for systematic under deterrence in the tort system and the need for socially compensatory damages to redress societal damages).



## B. *The Gulf Coast Claims Facility (GCCF)*

### 1. The Formation of the Gulf Coast Claims Facility

In June of 2010, President Obama and BP announced an agreement to establish a neutral organization that bypasses the tort system entirely.<sup>59</sup> They jointly appointed Kenneth Feinberg, a prominent Washington lawyer,<sup>60</sup> as the Claims Administrator. Feinberg has been invested with complete discretion to design, implement, and administer the claims facility<sup>61</sup> and resolve BP oil claims.<sup>62</sup> BP PLC established an escrow account of \$20 billion over a four-year period to fund the GCCF as an alternative to

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59. President Obama and BP announced in a press release the following agreement to establish a neutral organization to evaluate claims:

Pursuant to the Oil Pollution Act of 1990 (OPA), BP was designated a responsible party that is strictly liable for removal costs and damages resulting from the oil spill. In order to comply with OPA, BP created a claims process that, as of July 14, 2010, had reportedly received 110,000 total claims and paid out \$183 million. Because of criticism that the BP claims process was opaque, slow, and unfair, the Administration and BP agreed to create the Gulf Coast Claims Facility, an independent claims process that will be administered by Kenneth Feinberg. The agreement also provided that BP would contribute \$20 billion over a four-year period to an escrow account that will be used to pay claims adjudicated by the Gulf Coast Claims Facility.

Press Release, Office of Rep. Jerrod Nadler, Rep. Nadler Chairs Judiciary Hearing on Ensuring Justice for Victims of Gulf Coast Oil Disaster (July 21, 2010), [http://nadler.house.gov/index.php?option=com\\_content&task=view&id=1522&Itemid=119](http://nadler.house.gov/index.php?option=com_content&task=view&id=1522&Itemid=119).

60. Kenneth headed the September 11 Victim Compensation Fund and assisted Judge Jack Weinstein in developing claims procedures for the Agent Orange cases. Chief Judge Weinstein issued an order authorizing Special Master Kenneth R. Feinberg, the principal drafter of the plan, to defend it during the *mandamus* proceedings. Foreword, *Procedural History of the Agent Orange Product Liability Litigation*, 52 BROOKLYN L. REV. 335, 340 (1986) (describing Kenneth Feinberg's role as special master in the Agent Orange litigation). Terry Carter, *The Master of Disasters: Is It Just Him, or Is Kenneth Feinberg Changing the Course of Mass Tort Resolution?*, 97 A.B.A.J. 32 (2011) (referring to Kenneth Feinberg as a "brand onto himself").

61. "All of the design, all of the implementation and all of the administration of the claims process is basically a handshake between the Obama administration, BP and me," Jackie Calmes, *For Gulf Victims, Mediator With Deep Pockets and Broad Power*, N.Y. TIMES, June 22, 2010, [http://www.nytimes.com/2010/06/23/us/23feinberg.html?\\_r=2](http://www.nytimes.com/2010/06/23/us/23feinberg.html?_r=2) (quoting Feinberg in an interview).

62. GULF COAST CLAIMS FACILITY DRAFT PROTOCOL 1 (Gulf Coast Claims Facility, Draft No. 9 2010), available at <http://viewer.zoho.com/api/urlview.do?url=http://bpoilspill.us/wp-content/uploads/2010/06/Draft-Claims-Protocol-7-9-10.pdf>.

the tort system.<sup>63</sup> Citigroup was appointed as the “corporate trustee and paying agent for the account.”<sup>64</sup>

The GCCF replaced the BP Immediate Action Claims Facility in August of 2010.<sup>65</sup> The GCCF, unlike the BP Claims Process, was envisioned as a neutral claims entity that would be perceived as fair and efficient.<sup>66</sup> BP, President Obama, and Kenneth Feinberg justified the GCCF as a “vast improvement over the black hole” that existed with BP’s immediate action teams.<sup>67</sup> The GCCF has sole authority to determine who may make a claim and what proof is required to document a claim.<sup>68</sup> The GCCF Draft Protocol carves out four types of recoverable costs: (1) removal and clean-up costs; (2) real personal property; (3) lost profits and lost earning capacity; and (4) physical injury/death.<sup>69</sup> In addition, the GCCF administrator issued a Protocol for Emergency Advance Payments.<sup>70</sup> Removal and cleanup costs, for example, “must be approved by the Federal On-Scene Coordinator and be consistent with the National Contingency Plan.”<sup>71</sup>

Feinberg released the Gulf Coast Claims Facility Draft Protocol on July 9, 2010, and the U.S. Department of Justice, public interest groups, and other stakeholders commented on ways to make the GCCF more equitable, transparent, and neutral than the BP Claims Process.<sup>72</sup>

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63. Press Release, White House, Office of the Press Secretary, Claims and Escrow Fact Sheet (June 16, 2010); <http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow>.

64. Press Release, BP, BP Forms Gulf of Mexico Oil Spill Escrow Trust (Aug. 9, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064316>.

65. *Id.*

66. GULF COAST CLAIMS FACILITY DRAFT PROTOCOL, *supra* note 62, at 1.

67. Sebastian Kitchen, *Riley Tells BP People Are Hurting, Waiting for Claims Related to Oil Spill*, MONTGOMERY ADVERTISER, Aug. 30, 2010, available at 2010 WLNR 17317810 (“BP is out of the private claims process . . . BP is no longer processing private individual loss claims or private business claims.”).

68. Courts generally determine the question of who has a duty of care and whether categories of plaintiffs are excluded. State and federal courts are subject to judicial review. The GCCF tribunal is a secret chamber whose decisions are not even published. Calmes, *supra* note 61.

69. GULF COAST CLAIMS FACILITY DRAFT PROTOCOL, *supra* note 62, at 1-3.

70. GULF COAST CLAIMS FACILITY, PROTOCOL FOR EMERGENCY ADVANCE PAYMENTS 1-9 (2010), available at [http://www.tpcg.org/emgevents/pdf/AUGUST%2023%202010%20PROTOCOL%20\\_2.pdf](http://www.tpcg.org/emgevents/pdf/AUGUST%2023%202010%20PROTOCOL%20_2.pdf) (explaining guidelines for emergency advance payments).

71. GULF COAST CLAIMS FACILITY DRAFT PROTOCOL, *supra* note 62, at 1.

72. *See, e.g.*, Letter from Vietnamese American Volunteer Law Corps to Kenneth R. Feinberg (Aug. 13, 2010), available at <http://www.bpoilspilllawblog.com/>

Under Feinberg's guidelines, owners or lessors of property may recoup real or personal property damages.<sup>73</sup> The basic measure of damages is the difference between the value of the property before and after the oil spill.<sup>74</sup> Claimants may seek damages for the destruction of specific property, lost earnings, or profits as well as overhead and other expenses.<sup>75</sup> Individuals or businesses may make subsistence use of natural resources claims.<sup>76</sup> For example, damages can include "loss of fish or other wildlife used for food."<sup>77</sup>

The Draft Protocol called for the BP Claims Process to transfer all filed individual and business claims to the GCCF.<sup>78</sup> If claimants receive a final payment from the GCCF, they are deemed to have received full and final satisfaction of their losses and waive any right to go to court. Feinberg has unbridled authority to determine the level of compensation for removal and cleanup costs, damages to real or personal property, lost profits and lost earning capacity, subsistence use of natural resources, and claims for physical/injury or death.<sup>79</sup> He plans to informally consult with lawyers and forensic accountants to determine what constitutes a direct compensable claim attributable to the oil spill and which claims will be rejected as ripple effects that are too indirect or unforeseeable.<sup>80</sup>

BP has a statutory obligation to establish a tribunal to make emergency payments to claimants. The Oil Pollution Act of 1990 (OPA) requires BP and other legally responsible oil spill parties "[to] establish a procedure for payment or settlement of claims for interim, or short term damages."<sup>81</sup> BP PLC fulfilled this statutory duty by forming an Immediate Action Claims Team shortly after the oil spill.<sup>82</sup> The company invested its adjusters with the ability to promptly evaluate claims and expedite payments for

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Vietnamese%20American%20Voluntary%20Law%20Corps%20Problems%20With%20BP%20Oil%20Spill%20Protocol.pdf [hereinafter Law Corps Letter].

73. Law Corps Letter, *supra* note 72, at 2.

74. *Id.*

75. *Id.*

76. *Id.* at 3.

77. *Id.*

78. *Id.*

79. Law Corps Letter, *supra* note 72, at 3.

80. Calmes, *supra* note 61.

81. Law Corps Letter, *supra* note 72, at 2 (citing 28 U.S.C. § 2705(a)).

82. Press Release, BP, BP to Fast-Track Claims for Gulf Coast Businesses (Aug. 3, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064163>.

“businesses with urgent cash flow needs.”<sup>83</sup> BP managed its private claims system by hiring ESIS, Inc., which, in turn, hired Worley Catastrophe Response and Innovation First Notice to adjust claims and handle claims intake. BP disbursed “\$303 million in claim payments to more than 40,000 individuals and businesses impacted by the oil spill in the Gulf of Mexico.”<sup>84</sup> Critics charged that BP’s claims process was slow and overly bureaucratic.<sup>85</sup>

## 2. Advantages of the Gulf Coast Claims Facility

Even before the BP oil spill, tort reformers charged that the civil justice system was too time-consuming, expensive, and uncertain in its outcome.<sup>86</sup> Congress acted quickly after 9/11 to ensure that the victims of the terrorist attack and their families would receive quick and fair compensation rather than face the costs and delays inherent in pursuing individual tort claims.<sup>87</sup> The Victim Compensation Fund (VCF) processed more than 2,600 personal injury claims and gave awards ranging from \$500 to \$8.6 million.<sup>88</sup> Feinberg’s prior experience as VCF Administrator and Special Master on other mass tort actions including Agent Orange<sup>89</sup> makes him well qualified to administer the GCCF alternative dispute mechanism. The BP disaster has the potential of rupturing the civil justice system with an avalanche

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83. *Id.*

84. *BP Claim Payments Exceed \$300 Million*, ENP NEWSWIRE (Aug. 10, 2010) (accessed by searching for article in LEXIS Most Recent Two Years News index).

85. BP responded to these claims acknowledging that many were frustrated by the claims settlement process:

While we have paid thousands of business claims over the past 13 weeks, we recognize the frustration of small business owners who still have claims pending as we transition from the BP claims process to the Gulf Coast Claims Facility,” said Darryl Willis, of the BP Claims Team. “We heard from many businesspeople who are suffering, so we acted. These changes are designed to cut through paperwork and expedite payments.”

BP Press Release, *supra* note 82.

86. *See, e.g.*, Stephen Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 596 (1985).

87. Air Transportation Safety & System Stabilization Act of 2001, 49 U.S.C. § 40101 (2006). *See also* Daniel A. Farber, *Disaster Law and Inequality*, 25 LAW & INEQ. 297, 316-17 (2007).

88. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to a National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 181 (2005).

89. Charles Wallace, *BP Fund Czar Is Skilled at Weighing Compensation for Victims of Disaster*, DAILY FIN., June 20, 2010, <http://www.dailyfinance.com/story/bp-fund-czar-is-skilled-at-weighing-compensation-for-victims-of/19522388/>.

of cases decided one at a time. The sheer number of BP oil spill plaintiffs and the complex causation issues cry out for collective solutions.<sup>90</sup> The GCCF has the virtue of “quick pay” for the plaintiffs and makes claims “go away” for the BP oil spill defendants.<sup>91</sup> Delays between injury and compensation are far shorter under the GCCF than under the torts system. Kenneth Feinberg argues that the GCCF will “come up with a system that will be more generous, more beneficial, than if you go and file a lawsuit. It is not in your interest to tie up you and the courts in years of uncertain protracted litigation when there is an alternative that has been created.”<sup>92</sup>

The GCCF process dramatically decreases transaction costs such as attorneys’ fees, the cost of discovery, and court personnel who are necessary in both individual litigation and class actions. The GCCF is a flexible administrative mechanism that enables the Administrator to change course when necessary, unlike traditional adjudication in which judicial decision makers are bound by precedent and statutory controls. In December of 2010, for example, Feinberg “announced that geographic proximity to the BP oil spill would not prevent a legitimate individual or business claim from being processed.”<sup>93</sup>

### 3. Concerns about the Gulf Coast Claims Facility

#### a. *Kenneth Feinberg: The \$20 Billion Dollar Man*

One of the lessons of the Exxon Valdez disaster is that it is hazardous to predict the long-term effects of an oil spill on the marine environment. Claimants risk settling before understand-

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90. Professor Harry Wellington, a former Yale Law School Dean, developed an administrative mechanism to adjudicate asbestos cases. Harry H. Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375, 375 (1984).

91. *Feinberg Has “Quick Pay” Option for BP Spill Claims*, REUTERS (Dec. 13, 2010, 3:06PM), [http://www.cnbc.com/id/40645460/Feinberg\\_Has\\_Quick\\_Pay\\_Option\\_for\\_BP\\_Spill\\_Claims](http://www.cnbc.com/id/40645460/Feinberg_Has_Quick_Pay_Option_for_BP_Spill_Claims).

92. Brian J. Donovan, *BP Oil Spill Victims: Gulf Coast Claims Facility, Litigation or Oil Spill Liability Trust Fund?*, DONOVAN LAW BLOG (Nov. 3, 2010), <http://donovanlawgroup.wordpress.com/2010/11/03/bp-oil-spill-victims-gulf-coast-claims-facility-litigation-or-oil-spill-liability-trust-fund/>.

93. *FRLA Applauds GCCF Administrator Ken Feinberg for Changing Position on Oil Spill Proximity Issue for Hospitality Industry Claimants*, FLA. RESTAURANTS & LODGING ASS’N (FRLA), <http://www.frla.org/oil-spill-updates/item/467-frla-applauds-gccf-administrator-ken-feinberg-for-changing-position-on-oil-spill-proximity-issue-for-hospitality-industry-claimants> (last visited Jan. 13, 2011) (reporting Feinberg’s decision not to require claimants of economic loss to demonstrate physical proximity from the spill” so long as the claim is legitimate).

ing the true magnitude of their losses.<sup>94</sup> As the National Resources Defense Council observes, “[r]ight now, what we do know about the spill’s impacts is striking. And just as striking are the unanswered questions and possible repercussions we won’t have any sense of for some time.”<sup>95</sup> Among the unknown factors are the impact on deep-sea animal and plant life, the amount of toxics that have entered the food chain, the long-run damage to several economically important species, and the degree of harm to the Gulf of Mexico’s entire ecosystem.<sup>96</sup>

In clear contrast to the 9/11 Victim Compensation Fund, which operated under legislatively approved guidelines, the Gulf Coast Claims Facility is the product of a private agreement between BP, President Obama, and Kenneth Feinberg. This secret, non-legislative arrangement places the authority to create rules for payouts in the hands of a single individual.<sup>97</sup> Critics charge that the “GCCF’s primary goal appears to be the limitation of BP’s liability via the systematic postponement, reduction or denial of

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94. Rodgers describes the magnitude of the risk from the Exxon Valdez oil spill:

One of the more profound outcomes of the 1989 Exxon Valdez oil spill was the recognition of our limited ability to realistically predict the effects of an oil spill on marine resources. The ongoing debate over long-term damages further highlights just how inadequate previous knowledge was in attempting to discern cause and effect in natural environments. This lack of knowledge was, on one level, an incomplete understanding of what resources were present. But even more fundamental was a lack of understanding of the structure and functioning of complex ecosystems.

Rodgers, *supra* note 56, at 153.

95. NRDC blogger, Lisa Suatoni, explains what we know and still do not know about the damage causally connected to the oil spill and the use of dispersants in the clean up effort:

The Deepwater Horizon blowout was a unique ‘oil spill’ in many ways. The event occurred offshore and in deep water and was responded to with an unprecedented application of chemical dispersants. As a consequence, the ecological toll will differ from that of a near-shore, surface spill, such as the Exxon Valdez. The Gulf Coast was significantly affected (in terms of both social and environmental impacts), though, a lot of the harm was directed to the marine environment. The evaluation of this impact will require innovative research and considerable time.

Lisa Suatoni, *The Evaluation of Deepwater Horizon’s Environmental Toll (Challenges of a Novel Oil Spill)*, SWITCHBOARD: THE NAT’L RES. DEF. COUNCIL STAFF BLOG (Jan. 11, 2011), [http://switchboard.nrdc.org/blogs/lkuatoni/the\\_evaluation\\_of\\_deepwater\\_ho.html](http://switchboard.nrdc.org/blogs/lkuatoni/the_evaluation_of_deepwater_ho.html).

96. *Id.*

97. In contrast to the congressional hearings that lead to the Victim Compensation Fund for the victims of 9/11, the agreement to form the GCCF was based upon a private handshake deal between the President of the United States, Kenneth Feinberg, and BP. Calmes, *supra* note 61 (describing the formation of the GCCF as the product of a “metaphorical handshake” with no paper contract).

claims against BP.”<sup>98</sup> The GCCF does not give victims an opportunity to tell their story in a public forum<sup>99</sup> or to ask a jury to award punitive damages.

The financial arrangement between BP and GCCF Administrator Feinberg raises potential conflict of interest dilemmas.<sup>100</sup> In a January 11, 2011 *Bloomberg News* interview, Feinberg was asked whether he was a “pawn of BP,” because he was paid by BP.<sup>101</sup> Feinberg responded rhetorically: “Who else is going to pay the freight?”<sup>102</sup> Feinberg recently drew criticism when he hired a Jackson, Mississippi law firm to help GCCF claimants despite knowing that this firm also represents BP.<sup>103</sup>

Individuals in court have their claims decided by impartial judges, while claimants filing with the GCCF do not have the

98. Donovan, *supra* note 92.

99. Galligan, *supra* note 58, at 1030 (explaining the importance of narratives and the lawyer’s role in telling stories “in developing their client’s case”).

100. Monroe Freedman, *More Information on BP and Feinberg*, LEGAL ETHICS FORUM (Jan. 15, 2011, 6:28 AM), <http://www.legaethicsforum.com/blog/2011/01/more-information-on-bp-and-feinberg.html> (“Feinberg’s contract with BP as a private [contract], signed only by BP and Feinberg. The only role the government has under the contract is that DOJ must approve Feinberg Rozen’s termination by BP if BP chooses to do that. BP’s power to terminate is otherwise quite broad.”). Freedman notes “[t]he contract [between Feinberg and BP] recites that Feinberg Rozen is an independent contractor and that there is no lawyer-client relationship between the parties. However, the contract states that Feinberg is ‘acting through and as a partner of Feinberg Rozen.’” *Id.* Further, the contract recites the law firm’s obligations to BP, which expressly includes such lawyer-client obligations as confidentiality and an absence of any conflicts with the interests of BP on the part of the law firm. *Id.* Professor Freedman characterizes the fee agreement between Feinberg, Feinberg’s law firm and BP as raising complex ethical issues:

[T]he entire set of transactions is a complex one, and a significant number of claimants might already have relinquished their rights without the benefit of independent services by lawyers who have had access to all of the information about the nature and extent of the relationship between BP and the Feinberg Rozen law firm.

*Id.* See also Byron G. Stier, *Ken Feinberg, Compensation for Administering the BP Fund—A Problem and a Possible Solution*, MASS TORT LITIG. BLOG (July 18, 2010), [http://lawprofessors.typepad.com/mass\\_tort\\_litigation/2010/07/ken-feinberg-compensation-for-administering-bp-fund-a-problem-and-possible-solution.html](http://lawprofessors.typepad.com/mass_tort_litigation/2010/07/ken-feinberg-compensation-for-administering-bp-fund-a-problem-and-possible-solution.html).

101. Harry R. Weber, *Gulf Spill Fund Adviser Being Paid with BP Cash*, BLOOMBERG, Dec. 30, 2010, <http://www.bloomberg.com/news/2010-12-30/gulf-spill-fund-czar-paying-for-ethics-advice.html>.

102. *Id.*

103. Molly Parker, *Jackson Firm with BP Ties Causes Stir*, CLARION-LEDGER (Miss.), Jan. 6, 2011, <http://www.clarionledger.com/article/20110106/NEWS01/101060340/Jackson-firm-with-BP-ties-causes-stir> (reporting that Kenneth Feinberg hired a large Jackson defense firm to work with the Gulf Coast Claims Facility). See also *In re Joint E. & S. Dists. Asbestos Litig.*, 737 F. Supp. 735, 737 (E.D.N.Y. 1990) (holding that the Judicial Code of Conduct should apply to collective proceedings in asbestos cases).

same protection against potential conflicts of interest. Alabama claimants filed a class action against BP defendants and several other entities, alleging that the BP Claims Process violated the Racketeer Influenced and Corrupt Organization Act (RICO).<sup>104</sup> The plaintiffs allege that the BP defendants colluded with non-lawyers in advising individuals and entities about their likely legal claims for damages.<sup>105</sup> The class action charges BP subcontractors with the unauthorized practice of law as well as federal mail and wire fraud.<sup>106</sup> BP stands accused of having “received benefits derived from underpayment of claims and improper processing fees and savings on payment of the true value of claims.”<sup>107</sup>

*b. The GCCF's Legitimacy and Transparency Limitations*

Public interest advocates criticize the GCCF for lack of transparency in its guidelines and decision making processes.<sup>108</sup> The GCCF Administrator does not publish his decisions, criteria tests, rejection rates, or information on his decisions.<sup>109</sup> If the GCCF Administrator would reveal the compensation criteria, BP claimants could compare and contrast the benefits of utilizing this settlement mechanism versus litigation.<sup>110</sup> Claimants “could intelligently assess, when deciding whether to file a claim, their likelihood of qualifying for a compensable award.”<sup>111</sup>

Kenneth Feinberg is one of America's most eminent and experienced experts in resolving complex litigation, but placing any individual above both legislative and judicial oversight appears to

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104. Complaint at 1, *State of Alabama ex rel. Ben Chenault and CMCO, LLC v. BP PLC*, No. 1:10cv331 (S.D. Ala. June 28 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 1695.

105. *Id.* at 3.

106. *Id.* at 14.

107. *Id.* at 22.

108. “The Draft Protocol leaves many important questions unanswered, particularly in the fundamental areas of eligibility, causation, and damages calculation. Generic references to vast bodies of statutory and common law do not provide useful information to the average claimant, who may not have legal counsel.” Letter from Betsy Cavendish, Exec. Director, Appleseed, to Kenneth Feinberg, GCCF Administrator (July 28, 2010) *available at* [http://www.mscenterforjustice.org/glomer/upload\\_repo/docs/Comment%20Letter%20re%20Feinberg%20Claims%20Protocol%207-28-10%20%282%29.pdf](http://www.mscenterforjustice.org/glomer/upload_repo/docs/Comment%20Letter%20re%20Feinberg%20Claims%20Protocol%207-28-10%20%282%29.pdf).

109. *Id.*

110. *Id.* (noting the methodology used by the GCCF to calculate awards also should be published so that each claimant may assess the range of the potential award and be assured that similarly situated claimants will receive comparable awards).

111. *Id.*



be a “bridge too far” in the name of expediency.<sup>112</sup> The GCCF Administrator decides eligibility of claimants and “also gets to pick the three judges to handle appeals of his decisions.”<sup>113</sup> The authority to decide who may make a BP oil spill claim, the level of documentation for proof to support claims, and the eligibility criteria for claimants is ordinarily the province of courts, not an administrator. The traditional power of courts to determine issues such as duty of care, proximate cause, joint and several liability, non-economic damages, and the radius of the collateral source rule is now solely in the hands of a single individual.

*c. Controversial GCCF Proximate Cause Delimiters*

The GCCF Administrator has adopted a “proximate cause” test to limit recoverable damages caused by the BP spill.<sup>114</sup> The concept of proximate cause is a duty-limitation that benefits defendants by eliminating their liability in circumstances in which the damages or injuries are “so unusual, extraordinary, or bizarre . . . that the policy of the law will relieve the defendant of any liability for negligently creating this dangerous situation.”<sup>115</sup> Courts do not typically apply duty limitations and proximate cause to reduce the liability of defendants in strict liability actions. The GCCF Administrator, in contrast, is imposing negligence-like limitations such as proximate cause on strict liability claims under the Oil Pollution Act.<sup>116</sup> Current federal law caps liability for oil spills from offshore facilities at \$75 million.<sup>117</sup> However, the cap is not applicable if the “responsible party [is] guilty of gross negligence or willful misconduct.”<sup>118</sup>

The GCCF Administrator’s assurance that he will apply common law proximate cause principles lacks the checks and balances found when a jury determines exclusions of liability by

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112. GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/faq> (last visited Nov. 1, 2010) (“The Claims Administrator is an independent, neutral fund administrator. BP provides the funding for the GCCF, including the Claims Administrator’s fees and expenses. The Claims Administrator does not report to BP and BP does not control his decisions in any way.”).

113. Calmes, *supra* note 61.

114. *Id.*

115. *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1105, 1116 (Fla. 2005).

116. 33 U.S.C. §§ 2701-2762 (2006).

117. NAT’L COMM’N REPORT, *supra* note 11, at 245.

118. *Id.*

placing limits on the defendant's liability.<sup>119</sup> The GCCF Administrator, for example, will issue guidelines for quantifying the radius of the risk of a cognizable claim. Unlike the Exxon Valdez or other oil tanker spills, the BP disaster was not a "monolithic spill" but "thousands of smaller outbreaks across hundreds of miles of shorelines along four Gulf States."<sup>120</sup> Feinberg makes policy decisions as to what geographic areas to exclude and whether the compensation fund should recognize the interconnectedness of the Gulf States' economies. These important decisions should be made in a public forum, enabling the cross-examination of experts on all sides of the issue.<sup>121</sup> When a Gulf State's seafood prices plummet, for example, because of the mistaken public perception that the oil spill has contaminated shrimp, oysters, and fish, it harms the economy of the entire region, not just the areas affected by the oil spill.

*d. Exclusion of Noneconomic Damages as  
Tort Reform in Disguise*

The GCCF Administrator has unprecedented power to determine eligibility requirements for claims. The GCCF Guidelines do not require the Administrator to consult with psychiatrists, counselors, or other community public health experts to determine the severity of psychological injuries attributable to the oil spill. Severe mental distress is "an inevitable consequence of the disaster, yet one that is difficult to quantify."<sup>122</sup> Counseling teams in Louisiana report finding that "[g]rounded fishermen, owners and employees of shuttered businesses and other residents close to the crisis have been exhibiting signs of acute anxiety, depression, increased and excessive drinking, and suicidal ideation."<sup>123</sup> Feinberg believes that many of these emotional in-

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119. Both duty of care and proximate cause limitations are determinations based upon public policy. See, e.g., *Weirum v. RKO General, Inc.*, 539 P.2d 36, 39 (Cal. 1975).

120. Editorial, *Spill Claims Administrator Must Show Flexibility*, ST. PETERSBURG TIMES (Fla.), Aug. 27, 2010, <http://www.tampabay.com/opinion/editorials/spill-claims-administrator-must-show-flexibility/1117722>.

121. *Id.* (contending that the Gulf States economy is interconnected and that Feinberg should avoid uses proximity-based measures in including or excluding claimants).

122. Cal Woodward, *Gulf Oil Spill Exposes Gaps in Public Health Knowledge*, 182 CAN. MED. ASS'N. J. 1290, 1291 (2010), available at <http://www.cmaj.ca/cgi/content/full/182/12/1290> (describing Feinberg's reluctance to award damages for nonpecuniary or noneconomic damages).

123. *Id.*

juries are too remote and, if compensated, would lead to a flood of questionable claims.<sup>124</sup>

The civil justice system has long recognized compensation for pain and suffering or mental anguish.<sup>125</sup> Special problems arise when the sole basis for recovery is for emotional distress decoupled from physical injury. The GCCF Guidelines undervalue the very serious, foreseeable pain and suffering of those who lost their livelihood due to the oil spill. Class action attorneys representing BP oil claimants charge that the GCCF places arbitrary limitations on recovery and urge victims to reject this process in favor of litigation.<sup>126</sup>

*e. The Abolition of the Collateral Source Rule*

Some GCCF payout decisions appear to be the result of arbitrary line drawing. The GCCF Administrator, for example, has endorsed a collateral source rule that deducts the amount a claimant receives from private insurance, unemployment payments benefits, and other government benefits.<sup>127</sup> Tort reformers have long favored this limitation on recovery but have had only mixed success in state legislatures.<sup>128</sup> The GCCF Administrator proposes deducting any “wages fishermen earned cleaning up the spill from their final settlement with BP.”<sup>129</sup> This proposal appears unjust because “[u]nder federal law, the company (BP and other related defendants) is responsible for paying for both the cleanup and for lost incomes. But by allowing BP to

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124. *Id.* (“[If] you start compensating purely mental anguish without a physical injury . . . we’ll be getting millions of claims from people watching television. You have to draw the line somewhere.”)(quoting Feinberg).

125. Ellen S. Pryor, *The Challenge of Noneconomic Damages in Civil Litigation: Noneconomic Damages, Suffering, and the Role of the Plaintiff’s Lawyer*, 55 DEPAUL L. REV. 563, 563 (2006).

126. Brian J. Donovan, *BP Oil Spill of April, 2010: Why Class Action Lawsuits May Not be in the Best Interests of Potential Plaintiffs*, THE DONOVAN LAW GROUP (May 9, 2010), <http://donovanlawgroup.wordpress.com/2010/05/09/bp-oil-spill-of-april-2010-why-class-action-lawsuits-may-not-be-in-the-best-interests-of-potential-plaintiffs/> (“It was not the legislative intent of Congress for OPA to limit an oil spill victim’s right to seek full compensation from the responsible party. Unfortunately, GCCF, with the complete political and financial support of the Obama administration but without any legal authority for doing so, circumvents many of the rights provided to oil spill victims under OPA.”).

127. GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/faq#Q6> (last visited Nov. 1, 2010).

128. *Collateral Source Rule Reform*, AM. TORT REFORM ASS’N, <http://www.atra.org/show/7344> (last visited Nov. 3, 2010) (reporting that twenty-one states have placed limitations on the collateral source rule).

129. Editorial, *supra* note 120.

deduct wages for fishermen involved with the cleanup, the company would essentially get the manpower for free.”<sup>130</sup> The GCCF has made this strategic policy decision completely outside of the legislative process.

*f. The GCCF Does Not Compensate Societal Damages*

The GCCF does not address the societal consequences of the environmental disaster<sup>131</sup> nor does it “pay claims brought by government” for any purpose.<sup>132</sup> In Part III, we will argue that *parens patriae* litigation filed by the Gulf Coast states is necessary to vindicate the larger societal injury not addressed by individual lawsuits, class actions, or the Gulf Coast Claims Facility.

*C. Class Actions against Oil Industry Defendants*

1. Advantages of Class Actions

Class actions are the traditional approach to sidestepping the bottleneck caused by hundreds of thousands of individual lawsuits.<sup>133</sup> These collective actions enable the aggregation of claims, minimizing transactions costs and enabling an economy of scale.<sup>134</sup> Class actions have the potential of achieving “justice without overwhelming the justice system.”<sup>135</sup> The class action can theoretically lower the cost of litigation for plaintiffs and defendants while giving class members a fair resolution of their claims. Common questions of law and fact can be resolved without the pointless reiteration of “days of the same witnesses, exhibits, and issues from trial to trial to trial.”<sup>136</sup> Class actions

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130. *Id.*

131. Professor Sharkey’s concept of societal damages has much explanatory power in environmental torts cases where a single tortious act causes widespread harm. Sharkey, *supra* note 18, at 354 (arguing that the defendant should be forced to internalize the cost of societal damages).

132. NAT’L COMM’N REPORT, *supra* note 11, at 287.

133. Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 334 (2003) (“Some scholars distinguish between class actions, *parens patriae* civil actions and organizational or associational actions. According to this distinction, “class actions” are brought by the members of the class, “*parens patriae* civil actions” are brought by government officials, and “organizational actions” are brought by associations.”).

134. Edward Brunet, *Two Phases of Class Action Thinking: The Dam Period is Replaced by the Present Coffee Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1926 (2000) (discussing the work of legal economist Kenneth Dam).

135. REDISH, *supra* note 21, at 1.

136. *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (certifying a class of asbestos products liability claims).

enable plaintiffs to aggregate claims which would not be cost effective if filed on an individual basis.<sup>137</sup>

Judge Jack Weinstein describes mass torts cases as being “akin to public litigation”<sup>138</sup> because they allow the resolution of societal issues:

In cases such as Agent Orange, DES, asbestos, pharmaceutical, civil rights, school segregation, prison, cigarette, gun, social security, family abuse and other mass actions that I have had, the intersection of substance and procedure is critical . . . . Supervision by the courts when ethical issues arise—such as a fair division of group settlements among clients—and control to make sure that wider populations and classes are not adversely affected are essential.<sup>139</sup>

While class actions are subject to the strictures of Rule 23 of the Federal Rules of Civil Procedure, the GCCF’s decision making process is conducted ad hoc.

Each of the defendants in the family of corporate defendants is a potentially responsible party in a BP-related class action. As of September 30, 2010, Halliburton was a named defendant in 319 class action lawsuits arising out of its role in the Maconda well blowout.<sup>140</sup> Transocean’s corporate family is a defendant in 139 class-action complaints “filed in the federal and state courts in Louisiana, Texas, Mississippi, Alabama, Georgia, Kentucky, South Carolina, Tennessee, [and] Colorado,” among other courts.<sup>141</sup> Additional class actions continue to be filed in federal courts.<sup>142</sup>

The Multidistrict Litigation Panel issued a transfer order on August 10, 2010, consolidating scores of class actions seeking economic, environmental, personal injury, and wrongful death cases

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137. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that class actions resolve “the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”).

138. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS CONSOLIDATED & OTHERS MULTIPARTY DEVICES* 41 (1995).

139. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People*, *Notes for the Fifty-Eighth Cardozo Lecture*, 30 *CARDOZO L. REV.* 1, 114 (2008).

140. Halliburton SEC Filing, *supra* note 33, at 35.

141. Transocean SEC Filing, *supra* note 3, at 16.

142. *New York, Ohio Pension Funds Named Lead Plaintiffs in BP Lawsuit*, *INVS. & PENSIONS EUR.* (IPE), [http://www.ipe.com/news/new-york-ohio-pension-funds-named-lead-plaintiffs-in-bp-lawsuit\\_38601.php](http://www.ipe.com/news/new-york-ohio-pension-funds-named-lead-plaintiffs-in-bp-lawsuit_38601.php) (last visited Jan. 23, 2011).

arising out of the BP oil spill.<sup>143</sup> Judge Carl Barbier of the Eastern District of Louisiana will preside over:

[T]hirty-one actions in the Eastern District of Louisiana, twenty-three actions in the Southern District of Alabama, ten actions in the Northern District of Florida, eight actions in the Southern District of Mississippi, two actions in the Western District of Louisiana, two actions in the Southern District of Texas, and one action in the Northern District of Alabama.<sup>144</sup>

Louisiana shrimpers filed the first class action against the BP entities, Halliburton, and Transocean, seeking damages for their lost profits from the closing of shrimp beds because of the oil spill.<sup>145</sup> Property owners in the Florida Coastal Zone, in another typical example, filed a class action in a Florida federal court, seeking recovery of losses as the result of the Deepwater Horizon fire, explosion, and oil spill.<sup>146</sup> This lawsuit alleges that the oil defendants are liable for “gross negligence, willful misconduct and other claims in the design, construction and operation of the rig, as well as in the response to the disaster.”<sup>147</sup> Table One presents a brief description of representative class actions lawsuits filed in federal courts in the Gulf States.

TABLE ONE: CLASS ACTIONS AGAINST  
OIL SPILL DEFENDANTS

Type of Plaintiff	Case Name	Nature of Claim	Causes of Action & Remedies Sought
Owners, Operators, & Workers such as deck hands on charter boats for commercial fishing businesses	Marine Horizons Inc. v. BP PLC <sup>148</sup>	Loss of income for the operating of charter fishing vessels in the waters of the state of Alabama and the Gulf of Mexico	Negligence; Nuisance; Punitive Damages; Compensatory Damages

143. Susanne Pagnano, *Alabama Sues BP, Transocean, Others for Negligence, Safety Violations in Oil Spill*, BNA ENVTL. REPORTER, Aug. 20, 2010, available at 2010 WL 3267492.

144. *In Re Oil Spill*, *supra* note 6.

145. *Louisiana Shrimpers Sue BP Over Oil Spill*, REUTERS, Apr. 29, 2010, <http://www.reuters.com/article/idUSN2917899720100429> (noting that the class action was also filed against Cameron International Corp., which manufactured the blow out prevention equipment that failed).

146. *Florida Class Action Filed in BP Oil Spill Disaster*, PR NEWSWIRE, <http://www.prnewswire.com/news-releases/florida-class-action-filed-in-bp-oil-spill-disaster-93077039.html> (last visited Jan. 23, 2010).

147. *Id.*

148. *Marine Horizons*, *supra* note 40.

Type of Plaintiff	Case Name	Nature of Claim	Causes of Action & Remedies Sought
Commercial Fishermen	Oser v. Transocean Ltd. <sup>149</sup>	Loss of occupation and inability to perform chosen occupation because of oil spill	Negligence and Strict Liability; Economic Losses Resulting From Destruction of Real or Personal Property; Damages for the Loss of Profits or Impairment of Earning Capacity Due to the Injury, Destruction, or Loss of Real Property, Personal Property, or Natural Fishery Resources
Coastal Property Owners	Kansas v. Transocean Ltd. <sup>150</sup>	Lost profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural fishery resources	Negligence and Strict Liability; Economic Losses; Compensatory Damages; Actual Damages; Costs and expenses; and Other Incidental Damages
Restaurant Owners	Bayona Corp. v. Transocean Ltd. <sup>151</sup>	Restaurant businesses selling seafood caught along the coast of the Gulf of Mexico and in the "Coastal Zone"	Negligence and Strict Liability; Economic Losses Resulting from Destruction of Real or Personal Property; Damages for the Loss of Profits or Impairment of Earning Capacity
Local Conservationists	Doyle v. BP Exploration & Prod. <sup>152</sup>	Private attorney general action seeking an audit of measures of discharged oil, efforts to mitigate damages, and removal steps taken	Continued Violations of the Clean Water Act (33 U.S.C. § 1311, <i>et seq.</i> ), Migratory Bird Treaty Act (16 U.S.C. § 703, <i>et seq.</i> ), Oil Pollution Act (33 U.S.C. § 2701, <i>et seq.</i> ), Endangered Species Act (7 U.S.C. § 136, 16 U.S.C. § 1531, <i>et seq.</i> ), Federal Maritime Law; Negligence

149. Complaint at 1, Oser v. Transocean Ltd., No. 2:10cv1829 (E.D. La. June 25, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 817.

150. Complaint at 1, Kansas v. Transocean Ltd., No. 2:10cv1836 (E.D. La. June 25, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 818.

151. Complaint at 1, Bayona v. Transocean Ltd., No. 2:10cv1839 (E.D. La. June 25, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 819.

152. Complaint at 1, Doyle v. BP Exploration & Prod., No. 2:10cv1827 (E.D. La. June 24, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 822.

Type of Plaintiff	Case Name	Nature of Claim	Causes of Action & Remedies Sought
Fishermen, Shrimpers, and Oystermen in the Gulf of Mexico; Real Estate Owners, Real Estate Brokers of Coastal Properties on the Gulf of Mexico.	Ward v. BP PLC <sup>153</sup>	All Florida residents who live, work in, or derive income from, or any corporation or entity doing business in Florida, within "Coastal Zone"	Negligence; Florida State Pollution Act; Compensation for Lost Income; Punitive Damages
Boat Rental Business	J & M Boat Rentals v. BP PLC <sup>154</sup>	Economic loss by boat rental businesses, including vessels for boat charter to the oil, gas, construction and transportation industries in lower Plaquemines Parish	Negligence; Strict Liability; Breach of Contract; General Maritime Law; Federal Oil Pollution Act; Economic and Compensatory Damages for Lost Earnings; Punitive Damages

The swirl of uncertainty surrounding certification of diverse environmental classes will undermine the effectiveness of class actions.<sup>155</sup> The federal courts require plaintiffs to demonstrate that they comply with Rule 23 of the Federal Rules of Civil Procedure in order to be certified.<sup>156</sup> Courts are increasingly re-

153. Complaint at 1, Ward v. BP PLC, No. 4:10cv157 (N.D. Fla. June 22, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 845.

154. Complaint at 1, J&M Boat Rentals v. BP PLC, No. 10-cv-0206 (N.D. Fla. June 16, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 4935.

155. See, e.g., Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1478-79 (2005) (criticizing the courts' "counterreformation" that limits the utility class actions in mass torts). Nonetheless, courts have on occasion certified classes in environmental cases. EARL L. HAGSTRÖM & BRIAN SCOTT AIKIN, PERCHLORATE: A SCIENTIFIC, LEGAL, AND ECONOMIC ASSESSMENT 224 (2006). Courts have been wary "of certifying a class in cases (such as environmental lawsuits) involving mass torts." *Id.* at 23.

156. Fed. R. Civ. P. 23 governs class certification of the various plaintiffs' classes arising out of the BP oil spill. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (establishing a two-step analysis for analyzing the propriety of class certification). The first step is that a plaintiff must satisfy the four requirements set forth in Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Secondly, the plaintiff class must show that the proposed class qualifies under at least one of the subsections of Rule 23(b). Rule 23(b)(1)(A) enables certification of class actions to prevent the risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). In contrast, 23(b)(1)(b) allows certification of class actions to prevent the risk of "adjudications with respect to individual members



jecting class certification in mass torts litigation.<sup>157</sup> The U.S. Supreme Court's recent decisions have resulted in a "counterreformation" in which "class actions have been reformed to death."<sup>158</sup> The Supreme Court's anti-class action jurisprudence<sup>159</sup> makes it unlikely that courts will certify many of the diverse environmental harm collective actions arising out of the BP oil spill.<sup>160</sup>

Economic losses suffered by sea captains, hotel owners, flower shops, and countless other businesses in the Gulf Coast states will satisfy the numerosity requirement of a Rule 23 class action, but probably not the commonality requirement.<sup>161</sup> Courts, for

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of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). Finally, Rule 23(b)(3) permits a court to certify a class if:

[T]he court finds that the questions of law or fact common to the members of the class predominate or fact common to the members of class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3).

157. Stier describes how courts are increasingly rejecting class certifications in mass torts litigation:

Over the last fifteen years, courts have increasingly rejected class actions for tort claims . . . . For example, the repeated rejection of class treatment for tobacco litigation in numerous courts across the country . . . provides an object lesson in the unsuitability of mass torts for class certification. Thus, the increasing disappearance of class actions might be viewed by some as part of the pessimistic story told by Professors Koenig and Rustad, part of an anti-plaintiff trend that includes the loss of regulatory scrutiny and expansive punitive damages.

Byron G. Stier, *Crimtorts, Class Actions, and the Emerging Mass Tort Method*, 17 WIDENER L.J. 893, 895 (2008), available at [http://lawprofessors.typepad.com/torts\\_prof/files/stier\\_symposium\\_pp\\_893925.pdf](http://lawprofessors.typepad.com/torts_prof/files/stier_symposium_pp_893925.pdf).

158. Cabraser, *supra* note 155, at 1475-76 ("Class actions have been reformed to death. In *Amchem Products Inc.*, the Supreme Court transformed Fed. R. Civ. P. 23(b)(3)'s "superiority" requirement into a mandate of perfection, and reformalized the 'limited fund' doctrine beyond practical utility.").

159. *Id.* at 1484-85 (explaining how the U.S. Supreme Court has created barriers to using class action certification to achieve settlements in mass torts cases). See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing class action certification of a nationwide smoker class); *Amchem v. Windsor*, 521 U.S. 591 (1997) (holding that global asbestos settlement could not be certified because the class did not meet Rule 23 requirements of predominance and adequate representation of class members); *Ortiz v. Fibreboard*, 527 U.S. 815 (1999) (decertifying a class of asbestos claimants because Rule 23(a) was not satisfied in this limited fund class action)

160. Donovan, *supra* note 126 (noting the district court may deny class certification because of the individual factual and legal differences among individual claims of potential plaintiffs and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy).

161. Fed. R. Civ. P. 23.

example, “have commonly refused to certify air pollution cases.”<sup>162</sup> In 2006, the Florida Supreme Court, in another example, approved a lower court’s reversal of a \$145 billion class action against tobacco company defendants.<sup>163</sup> Plaintiffs’ attorneys in the BP cases will face an uphill battle in the wake of these anti-class action precedents.<sup>164</sup> Even if an attorney convinces a court to certify a class, there is no guarantee that plaintiffs’ counsel will enter into a settlement agreement that properly compensates the class members. Commentators have criticized the class action because it creates the risk of a “sweetheart deal” that is inimical to the interests of the entire class.<sup>165</sup> Another potential problem is that liability for offshore oil spills is capped at \$75 million unless the responsible party is found to be grossly negligent or to have failed to fulfill its statutory reporting obligations.<sup>166</sup>

Class actions do little to vindicate the losses suffered by the Gulf Coast states from the more than four million gallons of oil that polluted their shorelines and waterways. As the National Commission on the BP Deepwater Horizon Oil Spill states, the “impacts on the region’s natural systems and people were enormous, and . . . economic losses total tens of billions of dollars.”<sup>167</sup> Offshore drilling and its attendant risks to the states and municipalities create large-scale dangers not addressed by class actions or the GCCF.

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162. NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 50 (2001).

163. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1270 (Fla. 2006).

164. “Plaintiffs’ 1980s class action success set the stage for numerous filings of putative class actions in the 1990s. But increasing court scrutiny and intense litigation of class certification by defendants led to a turning back of the trend for class certification. Across the state and federal courts, jurists recognized that the individualized issues of tort litigation did not allow for class-wide treatment. The course of class actions in the tobacco litigation is emblematic of that trend.” Stier, *supra* note 157, at 901-02.

165. “Professor Coffee has also identified a problem of asymmetric stakes that divides the class action attorney and client members of the class. The class action attorney’s contingent fee stake is not congruent with that of his client. According to this view, the attorney may profit even if the clients do not. Under such conditions, “sweetheart deal” settlements can arise. The problem of asymmetric stakes is exacerbated by the lack of an efficient monitor. Potentially unfair settlements caused by asymmetry cannot be effectively monitored.” Edward Brunet, *Two Phases of Class Action Thinking: The Dam Period is Replaced by the Present Coffee Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1929 (2000).

166. NAT’L COMM’N REPORT, *supra* note 11, at 283.

167. *Id.* at vi.

## III.

PART II: THE RESURRECTION OF PARENS PATRIAE  
FOR COLLECTIVE INJURIESA. *The Gulf States' Parens Patriae Environmental Actions*

*Parens patriae* environmental torts allow collective solutions by public authorities without the requirement of class certification<sup>168</sup> as detailed in the Federal Rules of Civil Procedure.<sup>169</sup> The *parens patriae* doctrine is a well-established legal institution in the United States.<sup>170</sup> To maintain a *parens patriae* action on behalf of its citizens, a state must articulate an interest apart from the interests of private parties harmed by the BP oil spill.<sup>171</sup> Federal courts have been more receptive to the long-established remedy of *parens patriae* environmental tort actions filed by states and municipalities than to comparable class actions.<sup>172</sup> The states should have little difficulty in articulating an interest apart from the fishermen, hotel owners, and other private parties harmed by the oil spill.

B. *History of Parens Patriae*1. The Equitable Roots of *Parens Patriae*

*Parens patriae*<sup>173</sup> originated as an English equitable doctrine where the king served as “guardian for persons legally unable to act for themselves.”<sup>174</sup> The doctrine of *parens patriae* was

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168. See Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1922 (2000).

169. Fed. R. Civ. P. 23.

170. Alfred L. Snapp & Son v. Puerto Rico *ex rel. Barez*, 458 U.S. 592, 607 (1982) (describing how the state exercised its *parens patriae* interests in public nuisances beyond “traditional public nuisances”).

171. *Id.* In order to assert the *parens patriae* doctrine, a “[s]tate must assert an injury to what has been characterized as a ‘quasi-sovereign’ interest, which is a judicial construct that does not lend itself to a simple or exact definition.” First, a quasi-sovereign interest can be in the “health and well being both physical and economic of its residents in general.” *Id.* at 607. Secondly, a state has a quasi-sovereign “interest in not being discriminatorily denied its rightful status within the federal system.” *Id.*

172. Connecticut v. Am. Electric Power Co., 582 F.3d 309, 315 (2d Cir. 2009) (holding that eight states, New York City, and several nonprofit environmental groups had standing to seek an injunction predicated upon public nuisance against electrical utility companies for the environmental impact of greenhouse gases).

173. EDWARD H. P. BRANS, LIABILITY FOR DAMAGE TO PUBLIC NATURAL RESOURCES: STANDING, DAMAGE, AND DAMAGE ASSESSMENT 55 (2001).

174. Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 433 (1997); Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the*

prefigured in the English constitutional system in which the king exercised his “royal prerogative” to act as “father of the country.”<sup>175</sup> The king “had the duty, as *parens patriae*, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the crown for all forensic purposes.”<sup>176</sup> The fiduciary duty of the king to his subjects placed him in the role of guardian of those in need of protection because of incapacity:

Traditionally, the term was used to refer to the King’s power as guardian of persons under legal disabilities to act for themselves. For example, William Blackstone refers to the sovereign or his representative as the ‘general guardian of all infants, idiots and lunatics,’ and the superintendent of ‘all charitable uses in the kingdom.’<sup>177</sup>

## 2. *Parens Patriae* Exported to America

The *parens patriae* function of the king was imported from England into the U.S. legal system.<sup>178</sup> The doctrine of *parens patriae* enabled the state to “make decisions regarding treatment on

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*Common Law Agency, Contract, Tort, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship*, 60 BAYLOR L. REV. 771, 817 (2008) (explaining how the king carried out his fiduciary duties to his subjects through charitable trusts). For a discussion of the more recent uses of *parens patriae* in family law, see Mary Koll, *Growth, Interrupted: Nontherapeutic Growth Attenuation, Parental Medical Decision Making, and the Profoundly Developmentally Disabled Child’s Right to Bodily Integrity*, 2010 U. ILL. L. REV. 225, 244 (2010).

175. Koll, *supra* note 174, at 257; see Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1871-74 (2000) (reviewing the history of the Anglo-American doctrine of *parens patriae*).

176. Charles E. Rounds, *Lawyer Codes Are Just About Licensure, the Lawyer’s Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship*, 60 BAYLOR L. REV. 771, 771 (2008).

177. Michael A. Walker, *CERCLA’s Natural Resource Damage Provisions: A Loophole for Private Landowners?* ADMIN L.J. AM. U. 425, 449-50 (1995).

178. The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. This expansion was first evidenced in *Louisiana v. Texas*, a case in which the State of Louisiana brought suit to enjoin officials of the State of Texas from so administering the Texas quarantine regulations as to prevent Louisiana merchants from sending goods into Texas. 176 U.S. 1 (1900). The Supreme Court recognized that Louisiana was attempting to sue, not because of any particular injury to a business of the State, but as *parens patriae* for all her citizens. *Id.* at 19. While the Court found that *parens patriae* could not properly be invoked in that case, the propriety and utility of *parens patriae* suits were recognized. See Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 430 n.57 (1998).

behalf of one who is mentally incompetent to make the decision on his or her own behalf, but the extent of the state's intrusion is limited to reasonable and necessary treatment."<sup>179</sup> This "judicial patriarchy" gave the judges great discretion in protecting the welfare of minors and other vulnerable persons.<sup>180</sup> "For more than a century, the U.S. Supreme Court has endorsed" *parens patriae* by the states "for the prevention of injury to those who cannot protect themselves,"<sup>181</sup> a category that includes vulnerable consumers.<sup>182</sup> The U.S. Supreme Court recognized that the:

[P]rерogative of *parens patriae* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function often necessary to be exercised in the interest of humanity, and for the prevention of injury to those who cannot protect themselves.<sup>183</sup>

The doctrine has a lengthy history of application to protect "rivers, the sea, and the seashore . . . [that] is especially important to the community's well being."<sup>184</sup>

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179. See Sarah Abramowicz, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1346 (1999).

180. "The use of this individualized power was supported in tradition by the English courts' increasing use of chancery courts to determine the welfare and property of minors under the doctrine of *parens patriae*." MARY ANN MASON, FROM FATHER'S-PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 58 (1996).

181. Today, in both the United States and England, *parens patriae* is used in a variety of contexts, from protection of the mentally ill to the law of juvenile courts" to legitimating state intervention of the "state as parent." Abramowicz, *supra* note 179, at 1346 (discussing the early history of the doctrine of *parens patriae*); see also Seymour Moskowitz, *Save the Children: The Legal Abandonment of American Youth in the Workplace*, 43 AKRON L. REV. 107, 112 (2010).

182. "Most state attorneys general have *parens patriae* authority to sue generally on behalf of victimized consumers within their states." Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 462 (2010).

183. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

184. See, e.g., *North Dakota v. Minnesota*, 263 U.S. 365 (1923); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENV'T'L L. & POL'Y F. 57, 68 (2005) ("After the American Revolution, the rights of the sovereign passed to the governments of the individual colonies" and although the public trust doctrine originally emphasized water-related resources, the doctrine has expanded to include nearly all natural resources."). See *Massachusetts v. E.P.A.*, 549 U.S. 497, 538-39 (2007) (recognizing broad state standing to protect to protect quasi-sovereign interests of citizens in *parens patriae* actions).

### 3. Injunctive Relief in Early *Parens Patriae* Environmental Cases

In early environmental *parens patriae* actions, the plaintiffs sought injunctive relief rather than monetary damages. For example, in *Georgia v. Tennessee Copper Co.*, Georgia used its *parens patriae* powers to enjoin Tennessee from emitting noxious gases from its copper plant in Georgia.<sup>185</sup> The state's standing was predicated upon a "quasi-sovereign" interest of the state as opposed to an action by the state for the benefit of individuals.<sup>186</sup> Similarly, in *Missouri v. Illinois*,<sup>187</sup> the U.S. Supreme Court upheld a *parens patriae* complaint that Missouri filed against Illinois and enjoined Illinois from discharging sewage into the Mississippi River. The Court recognized that a state had standing to protect the health of citizens of its state when threatened by polluters.<sup>188</sup>

#### C. *The Modern Expansion of Parens Patriae*

In recent years, state attorney generals (AGs) have further extended *parens patriae* powers to protect the public's safety<sup>189</sup> to include public health or environmental mass torts such as global warming,<sup>190</sup> lead paint,<sup>191</sup> handguns,<sup>192</sup> tobacco,<sup>193</sup> public hospi-

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185. 206 U.S. 230, 239 (1907).

186. *Id.* at 237.

187. 180 U.S. 208, 248 (1901).

188. *See, e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901); *New York v. New Jersey*, 256 U.S. 296 (1921); *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

189. The American Bar Association's Model Code of Professional Responsibility holds a "government lawyer in a civil action or administrative proceeding" to a higher duty, approaching that of a fiduciary, to "refrain from instituting or continuing litigation that is obviously unfair." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980).

190. Sara Zdeb, *Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L. J. 1059, 1062-63 (2008).

Some of the most high-profile global-warming suits to date have featured states as plaintiffs. Massachusetts played the lead role in *Massachusetts v. EPA*, joining California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington in successfully arguing that EPA violated the Clean Air Act by declining to regulate greenhouse-gas emissions from motor vehicles. In *Connecticut v. American Electric Power Co.*, Connecticut, along with California, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, is seeking injunctive relief from electric utility companies under the common law doctrine of public nuisance and are appealing the dismissal of their case on political-question grounds to the Court of Appeals for the Second Circuit.

*Id.*

tals,<sup>194</sup> predatory lenders,<sup>195</sup> environmental pollution,<sup>196</sup> and cli-

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191. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 770-71 (2003).

One state—Rhode Island—and a number of counties, municipalities, and school districts have filed lawsuits against former manufacturers of lead pigment alleging either that the presence of lead in paint in residences itself constitutes a public nuisance or that the marketing and distribution practices of manufacturers constitutes a public nuisance so long as the lead remains in residences.

*Id.* See also Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 449 (2003) (noting that “products liability style claims have been brought against entire industries, including the lead paint industry, gun manufacturers, and even health maintenance organizations.”).

192. See Edward Winter Trapolin, *Sued into Submission: Judicial Creation of Standards in the Manufacture and Distribution of Lawful Products—The New Orleans Lawsuit Against Gun Manufacturers*, 46 LOY. L. REV. 1275, 1285-87 (2000) (discussing the City of New Orleans lawsuit against fifteen gun manufacturers, pawn shops, and trade associations for expenses incurred because of allegedly defective products and unlawful actions). See also David J. Owsiany, *The Rise and Fall of Lead Paint Litigation in Ohio*, 1 STATE AG TRACKER 1-5 (2009) (describing how states and cities filed public nuisance claims against gun manufacturers in Ohio and these actions were “unsuccessful across the country”), available at [http://www.fed-soc.org/doclib/20090520\\_StateAGTrackerVolume1No1.pdf](http://www.fed-soc.org/doclib/20090520_StateAGTrackerVolume1No1.pdf); David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1164 n.1 (2000) (describing how thirty cities and counties sued handgun manufacturers beginning in the late 1990s); David Kairys, *Legal Claims of Cities against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 12-17 (1998) (explaining legal claims and basis for governmental handgun cases); Scott R. Preston, *Targeting the Gun Industry: Municipalities Aim to Hold Manufacturers Liable for their Products and Actions*, 24 S. ILL. U. L.J. 595, 596-606 (2000) (describing legal claims and basis for governmental handgun cases); Amanda B. Hill, *Ready, Aim, Sue: The Impact of Recent Texas Legislation on Gun Manufacturer Liability*, 31 TEX. TECH. L. REV. 1387, 1391-1409 (2000) (stating the legal theories used to attack gun manufacturers).

193. Ieyoub & Eisenberg, *supra* note 175, at 1860 (“The attorneys general litigation against the tobacco industry broke ground on several fronts” because the “scope of interstate attorney general cooperation was unprecedented” as well as “the size of the settlement . . . against a previously undefeated litigant was unprecedented.”). Bryce A. Jensen, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1363 (2001) (commenting on *parens patriae* lawsuits as improperly permitting judges to take on the role of regulators).

194. Raymond E. Gangarosa, Frank J. Vandall & Brian M. Willis, *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury, and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 81-82 (1994) (describing how economically vulnerable public hospitals incur billions of dollars in costs due to the epidemic of illness caused by tobacco or alcohol and seek to recoup the cost of these industries “marketing of harmful products to vulnerable populations”). See also Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1847-48 (2000) (“The success of the tobacco litigation has stimulated new initiatives respecting guns, lead paint, and, most recently, health maintenance organizations. In these actions the state asserts a cause of action that belongs exclusively to the state.”).

mate change.<sup>197</sup> The AG, for example, “has standing to pursue litigation against directors of nonprofit corporations who breach their fiduciary duties.”<sup>198</sup> States have standing to sue as *parens patriae* so long as they can prove either a sovereign or a quasi-sovereign interest “such as the health, comfort, and welfare of its citizens and the general economy of the state, [is] implicated and [the state] is not merely litigating the personal claims of its citizens.”<sup>199</sup> For example, the United States and the state of Alaska exercised their *parens patriae* powers in settling with Exxon in the wake of the Exxon Valdez oil spill:

In March 1991, the United States and the state of Alaska, acting as trustees for the public, sued Exxon . . . . [T]he three parties reached a civil and criminal settlement that was approved by the district court on October 8, 1991. The resulting Consent Decree stated that the state and federal governments would recover compensatory and remedial relief in their capacity ‘to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill.’<sup>200</sup>

The 1991 settlement between Exxon and the United States and the state of Alaska “required Exxon to pay \$900 million over time to natural resources ‘trustees,’ identified in the settlement

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195. Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 361-71 (2006) (discussing municipalities suing lenders for predatory practices in *parens patriae* cases).

196. Jeffrey Baddeley, Note, *Parens Patriae Suits by a State Under 42 U.S.C. § 1983*, 33 CASE W. RES. L. REV. 431, 446 (1983) (listing the kinds of interests supporting *parens patriae* standing as “the ‘health, comfort, and welfare’ of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state. . . .”). See Deborah G. Musiker, Tom France, Lisa A. Hallenbeck, *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 109-116 (1995) (arguing for the extension of *parens patriae* to wildlife conservation); Kanner, *supra* note 184, at 83 (proposing that *parens patriae* actions protect natural resources such as groundwater). See Comment, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J. L. & SOC. PROBS. 411, 412 (1970).

197. See, e.g., *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010).

198. 3 HEALTH L. PRAC. GUIDE § 43:21 (West 2010) (arguing for a broad *parens patriae* power for state attorneys general to redress the injury to charitable organizations injured by the Madoff investment scandal; and also contending that this power may be deployed where there are “bankruptcies of health care institutions, along with disputes involving charitable mission and use of donated property.”).

199. Romualdo P. Eclavea, *State’s Standing to Sue on Behalf of its Citizens*, 42 A.L.R. Fed. 23 (2010) (Originally published in 1979).

200. Rodgers, *supra* note 56, at 174-81 (describing *parens patriae* lawsuits by the United States and Alaska).



documents as the United States and the State of Alaska.”<sup>201</sup> This fund was to be used “to restore the damaged environment of Prince William Sound and nearby areas.”<sup>202</sup> In the recent BP oil spill, the United States and individual Gulf States have an interest in seeking funds to clean up “millions of gallons of oil, dispersants and other materials and substances discharged into . . . the waters, property, estuaries, seabed . . . and other natural and economic resources.”<sup>203</sup> These losses are societal damages not redressed by individual lawsuits or class actions.<sup>204</sup>

#### D. *The Metamorphosis of Public Nuisance*

Historically, the tort of public nuisance gave government units a means to protect the general welfare. A public nuisance is “conduct regarded as so inimical to so many people” as to warrant remedies such as abatement, injunctions, and criminal prosecution.<sup>205</sup> This equitable remedy is a legal blend because of its roots in the law of equity and the role of governmental entities in pursuing these actions.<sup>206</sup> Public nuisances are on the borderline between crime and tort because they enjoin “low grade criminal offense(s).”<sup>207</sup> These actions have always constrained dangers to public health and welfare, but this ancient remedy has been reshaped to address a broader array of “public health torts” such as defective product and environmental pollution cases.<sup>208</sup> During the 1990s, several *parens patriae* actions employed the tort of

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201. *Id.* at 137.

202. *Id.* at 138.

203. See Complaint of Alabama, *supra* note 4, at 8.

204. Professor Sharkey’s concept of societal damages shares common ground with the *parens patriae* environmental crim tort concept discussed in the next part of the article. See Sharkey, *supra* note 18, at 351-52 (contending that “punitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a societal compensation goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case.”).

205. W. PAGE KEETON & WILLIAM LLOYD PROSSER, PROSSER AND KEETON ON TORTS 643 (5th ed. 1984) (discussing remedies available to the state for public nuisance).

206. *Id.*

207. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 969 (2008) (quoting William L. Prosser).

208. KEETON & PROSSER, *supra* note 205, at 643-44 (noting that public nuisance actions “include interferences with the public health, as in the case of a hog pen, the keeping of diseased animals, or a malarial pond”). See also Galligan, *supra* note 58, at 1024-25 (stating that the public nuisance is reserved for “intrusions on the public good such as “houses of prostitution, sources of pollution, drug houses, and gangs”).

public nuisance “against the manufacturers of other products (e.g., handguns, lead pigment, and automobiles that contributed to global warming).”<sup>209</sup> Public nuisance is the basis for the tobacco master settlement<sup>210</sup> as well as the largest verdict awarded in a lead paint torts action.<sup>211</sup>

### 1. Public Nuisance in Tobacco *Parens Patriae* Actions

The high water mark for *parens patriae* public health torts came when state AGs employed public nuisance theory against the tobacco industry. Professor Richard Daynard of Northeastern University developed the idea of filing state AG actions against tobacco companies to obtain reimbursement for the state’s Medicaid expenditures.<sup>212</sup> In 1994, Mississippi’s AG claimed *parens patriae* standing “to sue as a collective plaintiff on behalf of its citizens suffering from product-related diseases.”<sup>213</sup> The second prong of the state AG’s strategy was the deployment of new theories never before used against big tobacco or other manufacturers such as “public nuisance, unjust enrichment, and indemnity.”<sup>214</sup> Forty-five other state AGs ultimately filed public product liability actions and sought compensation for the funds spent on public health costs of tobacco as well as to gain the right to regulate these harmful products.<sup>215</sup>

At common law, public nuisances “constituted a miscellaneous and diversified group of minor criminal offenses, based on some interference with interests of the community, or the comfort or convenience of the general public.”<sup>216</sup> Historically, a public nuisance action “was not regarded as a tort, but instead as a basis for public officials to pursue criminal prosecutions or seek injunctive

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209. DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* 128 (2010)

210. *Id.* at 120-33.

211. *Id.* at 144 (describing 2006 Rhode Island jury verdict that held the lead paint manufacturers potentially liable for abating the consequences of lead paint rather than landlords).

212. *Id.* at 171.

213. *Id.*

214. *Id.* at 122.

215. GIFFORD, *supra* note 209, at 121.

216. KEETON & PROSSER, *supra* note 205, at 643; *see also* State v. Beardsley, 79 N.W. 138, 141 (Iowa 1899) (defining nuisance as “the unlawful use of one’s own property, working an injury to a right of another or of the public, and producing such inconvenience, discomfort, or hurt that the law will presume a consequent damage.”).

relief to abate harmful conduct.”<sup>217</sup> Public nuisance actions in an earlier era included the “harboring of a vicious dog, illegal liquor establishments, bullfights, obstructing a highway, or creating a condition making travel unsafe or ‘highly disagreeable.’”<sup>218</sup>

Under public nuisance theory, state AGs could side-step user-conduct defenses such as assumption of risk and contributory negligence because the state AG has no burden of demonstrating that individuals had used (or misused) products.<sup>219</sup> Mississippi’s AG was able to overcome the individual choice argument by noting that the state of Mississippi had never smoked a single cigarette.<sup>220</sup> Instead, AGs sought recovery for Medicaid expenses attributable to smoking by citizens of the state.

## 2. Public Nuisance in Environmental *Parens Patriae* Actions

### a. *Show Me the Money: Parens Patriae* Actions

As we shall see in Part III, public nuisance theory is center stage in the BP environmental *parens patriae* actions.<sup>221</sup> Government lawyers employed *parens patriae* public nuisance claims for water and air pollution in several interstate environmental lawsuits in the early twentieth century.<sup>222</sup> During this historical period, several states sued other states, using their *parens patriae* powers to protect natural resources and territory.<sup>223</sup> The U.S. Supreme Court decided a 1906 environmental *parens patriae* case in *Georgia v. Tennessee Copper Co.*<sup>224</sup> The Court reviewed Georgia’s request to enjoin a Tennessee manufacturing company from emitting sulphurous acid gas over Georgia’s territory.<sup>225</sup> However, this type of state versus state lawsuit declined with the enactment of federal and state environment regulations.<sup>226</sup>

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217. Gifford, *supra* note 191, at 746 (arguing that in only limited circumstances was public tort an available remedy for an individual “and apparently never to the state or municipality”).

218. KEETON & PROSSER, *supra* note 205, at 644-45 (listing these activities as public nuisances).

219. GIFFORD, *supra* note 209, at 64. “*Parens patriae* litigation thus accomplishes what the victim herself could not have accomplished as a litigant.” *Id.*

220. *Id.* (quoting Mike Moore, Mississippi Attorney General).

221. See Complaint of Alabama, *supra* note 4, at 15-16 (laying out claim for public nuisance and other tort causes of action as well as federal environmental law statutes).

222. GIFFORD, *supra* note 209, at 88-89.

223. See Gifford, *supra* note 207, at 936.

224. 206 U.S. 230 (1907).

225. *Id.* at 238-39.

226. GIFFORD, *supra* note 209, at 89-92.

Today, states have a well-recognized right to file *parens patriae* actions to either prevent or repair pollution of their air or water so long as the state's interest is independent of the rights of private parties.<sup>227</sup> For example, in *Maine v. M/V Tamano*,<sup>228</sup> the state of Maine filed suit against a vessel that discharged 100,000 gallons of oil into the waters of Casco Bay after striking an outcropping of rock. The federal court upheld Maine's right to recover because the state had a sufficient independent interest in its coastal waters and marine life to seek damages in its *parens patriae* capacity.<sup>229</sup>

The BP oil spill dwarfs the mere 100,000 gallons dumped into Casco Bay, Maine. Just as the state of Maine had an independent interest in the quality and condition of her coastal waters, the Gulf States can easily demonstrate damage to their coastal waters and estuaries that has a substantial negative impact on its citizenry.<sup>230</sup> In the Maine oil spill, the court concluded that the state's coastal waters and marine life had sustained damages because of the oil spill that threatened the general welfare of its citizenry.<sup>231</sup> The Gulf States' burden of demonstrating an independent interest in the quality and condition of their coastal waters and wetlands will be easily satisfied. The *parens patriae* actions filed by the Mexican governmental entities seem more remote, absent evidence that their coastal waters were actually polluted.

### b. *The Rise of Public Crim torts*

The *parens patriae* lawsuits by U.S. and Mexican governmental entities against the BP defendants signal the latest evolution in crim torts. In these societal interest lawsuits, government lawyers deploy well-established tort law causes of action for a public purpose. The difference between this governmental crim tort and the ones we conceptualized in the past is that the plaintiff is a public entity.<sup>232</sup> In the lead paint and tobacco public health cases dis-

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227. See, e.g., *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993).

228. *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1098 (D. Me. 1973).

229. *Id.* at 1101.

230. *Id.* at 1100.

231. *Id.* at 1101 (quoting *Georgia v. Penn. R.R. Co.* 324 U.S. 439, 451 (1945)).

232. The Rhode Island Supreme Court noted in the lead paint *parens patriae* litigation the difference in the ethical standards between trial lawyers and government lawyers. *State of Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 471 (R.I. 2008) (quoting *Newport Realty Inc. v. Lynch*, 878 A.2d 1021, 1032 (R.I. 2005)).

cussed in Part II, trial lawyers entered into contingency fee agreements with private plaintiffs.<sup>233</sup>

In their *parens patriae* actions, the states have a choice whether to join forces with private attorneys or to proceed alone against the oil companies.<sup>234</sup> Governmental and private plaintiffs are both cooperating and clashing in the BP litigation, especially in state AG actions.<sup>235</sup> Louisiana's AG contends, for example, that his state's sovereignty will be "compromised if there are not separate tracks, because the states would inevitably be required to defer to private parties' attorneys as liaison or lead counsel."<sup>236</sup> Mississippi's AG, who is considering filing BP-related lawsuits, also favors the separation of the private and public actions.<sup>237</sup> In sharp contrast, Alabama's AG has been cooperating with private attorneys and considered entering into a contingency fee agreement to pursue that state's BP-related claims.<sup>238</sup>

The federal government and at least five Gulf Coast states have potential *parens patriae* standing as the result of the environmental, economic and other damages resulting from the oil

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"[A]ttorneys general have additional special duties, which, because of the nature of that ancient and powerful governmental office, differ from those of the usual advocate. Unlike other attorneys who are engaged in the practice of law, the Attorney General 'has a common law duty to represent the public interest.'" *Id.*

233. Roger A. Fairfax, Jr., *Outsourcing Criminal Persecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 280 (2010). See GIFFORD, *supra* note 209, at 211 (describing hiring of plaintiffs' firms by states and cities in tobacco and lead paint public health litigation).

234. See Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground between Criminal and Civil Law*, 101 YALE L. J. 1795, 1806 n.36 (1992) (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 22 (4th ed. 1971)).

Empirically, as opposed to paradigmatically, civil and criminal law overlap. Civil law includes causes of action for intentional acts; criminal law includes strict and negligent liability. Therefore, no true empirical difference exists between civil and criminal law with respect to the range of mental states resulting in liability. However, most criminal cases require proof of subjective and objective liability, whereas most civil cases require proof only of objective liability. Therefore, we say that the paradigmatic task of the civil law is to compensate for damages caused in the normal conduct of everyday life, usually without regard to actual knowledge or intent. Thus, the distinctive character in the division in the paradigms lies in the requirement of attention to the subjective state of mind in the conventional criminal type.

*Id.*

235. See Rebecca Mowbray, *State Fights Proposal to Lump its BP Oil Spill Litigation Together with other Suits*, TIME-PICAYUNE, Oct. 6, 2010, [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/10/state\\_fights\\_proposal\\_to\\_lump.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/10/state_fights_proposal_to_lump.html).

236. *Id.*

237. *Id.*

238. *Ala. Governor Limits Attorneys Fees in Oil Spill Lawsuit*, ASSOCIATED PRESS (Aug. 17, 2010), <http://www.law.com/jsp/article.jsp?id=1202469951114>.

discharges. BP and other oil industry defendants have potential liability under the Clean Water Act<sup>239</sup> and other environmental statutes at the state and federal level.<sup>240</sup> These *parens patriae* actions are filed on behalf of their larger citizenry. Table Two describes environmental tort lawsuits filed by governmental entities.

TABLE TWO: ENVIRONMENTAL *PARENS PATRIAE* ACTIONS

Description of Plaintiffs	Type of Action	Chief Remedies Sought	Chief Causes of Action
State of Alabama <sup>241</sup>	<i>Parens Patriae</i> lawsuit against BP PLC, Transocean and Halliburton; Assistance by Outside Attorneys Working for a Fee; Tort Action	Recovery of compensatory damages; remediation costs; punitive damages; interest; attorneys' fees; other litigation costs	Negligence; Nuisance; Public Nuisance; <sup>242</sup> Negligence and the Oil Company's Violation of Safety Standards
State of Louisiana	Complaint for Declaratory Judgment	Ruling that Transocean Ltd. is broadly liable for damages to Louisiana	Declaratory Judgment that Transocean is a Responsible Party under Federal Statutes <sup>243</sup>
Panama City, Florida (Municipality) <sup>244</sup>	Tort Action	Compensatory damages and attorneys' fees; monetary remedy for lost tourism and revenues	Negligence; Gross Negligence; Negligence Per Se; Strict Liability for Abnormally Dangerous Activities; Trespass; Florida State Environmental Law
Mexico	Action by Environmental Minister for Environmental Torts	\$20 million (cost of monitoring, evaluating, and taking preventative action)	Unclear from complaint <sup>245</sup>

239. 33 U.S.C. § 1251 *et seq.* (2006).

240. See Halliburton SEC Filing, *supra* note 33, at 35.

241. See generally Complaint of Alabama, *supra* note 4.

242. George Talbot, *Alabama AG Candidates Critical of Troy King's Lawsuit against BP*, AL.COM BLOG (Sept. 13, 2010, 3:18 PM), [http://blog.al.com/live/2010/09/alabama\\_ag\\_candidates\\_vow\\_to\\_g.html](http://blog.al.com/live/2010/09/alabama_ag_candidates_vow_to_g.html).

243. Thomas Catan, *Louisiana Files Suit against Transocean*, WALL ST. J., Sept. 15, 2010, <http://online.wsj.com/article/SB10001424052748703743504575494253381504666.html>.

244. See generally Complaint of Panama City Beach, *supra* note 44.

245. See, e.g., Nacha Cattan, *Mexico May Seek \$20 Million from BP to Monitor Gulf Spill, Prevent Pollution*, 41 ENV'T REP. (BNA) 1438 (June 25, 2010), available at 2010 WL 2545260.

Description of Plaintiffs	Type of Action	Chief Remedies Sought	Chief Causes of Action
Mexican States	Environmental Tort Actions by States of Veracruz, Quintana Roo and Tamaulipas to recover damages for loss of tourism	Recovery of damages for oil appearing on beaches; costs of gathering information to monitor oil spill and disseminate information; costs of clean-up activities. <sup>246</sup>	Assertion that Roman Code applies to lawsuit and jurisdiction is in Mexico; Negligence

### 3. Alabama's Pioneering Environmental *Parens Patriae* Action

On August 12, 2010, Alabama became the first Gulf Coast state to sue BP and other oil industry defendants, seeking to collect damages for collective injuries from oil and toxic dispersants to its waters, wetlands, and other real property assets. Alabama's AG has filed a public environmental tort lawsuit in federal court, contending that BP and other defendants in the Deepwater Horizon "oil rig explosion . . . were negligent and exacerbated the environmental disaster that resulted from the Deepwater Horizon oil spill."<sup>247</sup> The state's public nuisance<sup>248</sup> complaint alleges that the accident "has caused and will continue to cause extensive economic, environmental, and other damage

246. The complaints by the Mexican states of Veracruz, Quintana Roo, and Tamaulipas were filed by the same law firm and are mirror images of each other. *See, e.g.*, Complaint at 1, State of Tamaulipas, Republic of Mexico v. BP PLC, No. 5:10-cv-00762-OLG (W.D. Tex. Sept. 15, 2010) [hereinafter Complaint of Tamaulipas].

247. The state attorney general filed one public environmental tort complaint against British Petroleum (BP) and its corporate affiliates connected to the oil spill. *See* Complaint of Alabama, *supra* note 4. The same day, the Alabama Attorney General filed a virtually identical complaint against non-BP companies, such as Transocean Ltd., the provider of drilling management services, designer of the oil rig, and Halliburton Energy Services, who completed the cementing operations. State of Alabama v. Transocean Ltd., No. 2:10cv00691-MHT-CSC, (M.D. Ala. Aug. 12, 2010) [hereinafter Complaint of Alabama v. Transocean]. *See* Eric Hornbeck, *Ala. AG Sues BP, Transocean, Others Over Oil Spill*, LAW360, Aug. 13, 2010, <http://www.law360.com/articles/187051> (discussing State of Alabama v. BP PLC and State of Alabama v. Transocean).

248. A complaint for public nuisance must prove by a preponderance of the evidence that BP and other oil industry defendant were liable for "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred; and (4) causation." *State of Rhode Island*, 951 A.2d at 446-47 (stating the elements of public nuisance).

to the State of Alabama.”<sup>249</sup> The Alabama AG’s *parens patriae* complaint includes claims for “gross negligence, trespass, public and private nuisance,” and seeks a statutory remedy under the Oil Pollution Act of 1990.<sup>250</sup>

The Alabama AG’s complaint charges the oil industry defendants with misleading the Interior Department’s Minerals Management Service about the effectiveness of the oil well’s blowout safety precautions.<sup>251</sup> The Alabama AG also charges the oil industry defendants with negligently dumping millions of gallons of toxic dispersants,<sup>252</sup> which are likely to cause permanent environmental damage.<sup>253</sup> Alabama filed its environmental tort action pursuant to a state law authorizing the AG to “institute and prosecute, in the name of the state, all civil actions, and other proceedings necessary to protect the rights and interests of the state.”<sup>254</sup> Alabama’s *parens patriae* action was opposed by that state’s governor, Bob Riley.<sup>255</sup> Governor Riley blamed this litigation for BP’s refusal to pay Alabama’s \$148 million claim for lost tax revenue caused by the oil spill.<sup>256</sup>

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249. Complaint of Alabama v. Transocean, *supra* note 247, at 2; *see also* Complaint of Alabama, *supra* note 4, at 2.

250. The causes of action in Alabama v. BP and Alabama v. Transocean are mirror images in every important respect. Complaint of Alabama, *supra* note 4, at 9-11; Complaint of Alabama v. Transocean, *supra* note 247, at 11-18.

251. *See* Complaint of Alabama, *supra* note 4, at 8; Complaint of Alabama v. Transocean, *supra* note 247, at 9.

252. “Defendants have trespassed and continue to trespass by allowing oil, dispersants, and other materials and substances to contaminate State property.” Complaint of Alabama v. Transocean, *supra* note 247, ¶ 47; Complaint of Alabama, *supra* note 4, ¶ 15(c) (charging the BP and its corporate family with discharging “oil, dispersants, and other materials and substances. . . into the Gulf of Mexico. . . [causing] damages for generations to come . . . [to the] waters, property, estuaries, seabed, animals, plants, beaches, shorelines, islands, marshlands, and other natural and economic resources of the State of Alabama.”).

253. *See* Complaint of Alabama v. Transocean, *supra* note 247, at 5; Complaint of Alabama, *supra* note 4, at 3.

254. ALA. CODE § 36-15-12 (2010).

255. Press Release, Office of Bob Riley, Governor of the State of Alabama, Lawsuit Filed by King Stops Payment from BP Resulting in Increased Proration for Schools (Sept. 16, 2010), [http://governorpress.alabama.gov/pr/pr-2010-09-16-01-lawsuit\\_proration.asp](http://governorpress.alabama.gov/pr/pr-2010-09-16-01-lawsuit_proration.asp) (stating that the Governor was forced to “increase proration for the education budget by two percent” in order to balance the budget because it was not receiving BP payments due to the *parens patriae* lawsuit).

256. *See* Sebastian Kitchen, *AG to Lead Oil Spill Fight*, MONTGOMERY ADVERTISER, Jan. 27, 2011, available at 2011 WLNR 1660431. *See also* Mike Esterl, *Spill Payouts Called Slow in Alabama*, WALL ST. J. ABSTRACTS, Sept. 27, 2010, available at 2010 WLNR 19240704.



#### 4. Louisiana's Declaratory Judgment Action

James "Buddy" Caldwell, Louisiana's AG, has filed a declaratory judgment action on behalf of the state and several state agencies to hold Triton Asset Leasing and several other Transocean entities legally responsible for the discharge of oil into the Gulf of Mexico.<sup>257</sup> The Louisiana action is a response to Transocean and related entities' contention that they are not responsible parties "for the discharges emanating from the Macondo Project."<sup>258</sup> Louisiana seeks compensation for damages caused by the oil spill to its "marshes, wetlands, shores, ecology, economy, tourism, fisheries, waters, and wildlife."<sup>259</sup>

#### 5. Mexican States' Lawsuits

Veracruz, Quintana Roo, and Tamaulipas have filed lawsuits against BP PLC in the Western District of Texas, seeking recovery for "costs that include formulating contingency plans, monitoring the spill, and cancelling investment projects."<sup>260</sup> The Mexican state actions consist of nearly identical complaints, filed by the same attorney, seeking reimbursement for the costs of responding to the oil spill.<sup>261</sup> Each Mexican complaint states that the BP oil spill will cause future injury to the "coast waters, offshore waters, beaches, lagoons, estuaries, delicate wetlands and intertidal zones on the coast of Veracruz, Tabasco, Campeche, Yucatán and Quintana Roo."<sup>262</sup> The Mexican lawsuits seek recovery for environmental damages that have not yet occurred.<sup>263</sup> As with many U.S. class actions arising out of the BP oil spill, the Mexican states charge BP oil defendants with negligence, gross negligence, negligence per se, violation of the Oil Pollution Act of 1990, and nuisance (private and public).<sup>264</sup> The Mexican states also charge the oil industry defendants with "wanton, reckless,

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257. Complaint of Louisiana, *supra* note 5.

258. *Id.* at 3.

259. *Id.* at 12-13.

260. Nacha Cattán, *Additional Mexican States Could Join in Filing Lawsuits against BP over Oil Spill*, 41 ENV'T REP. (BNA) 2212 (Oct. 1, 2010), available at 2010 WL 3821204.

261. *Id.* (noting that the same law firm filed the environmental tort actions on behalf of three Mexican states).

262. Complaint of Tamaulipas, *supra* note 246, at 22-23.

263. *Id.* at 12.

264. *Id.* at 22-25.

egregious, grossly negligent, fraudulent, and malicious actions” supporting punitive damages.<sup>265</sup>

#### 6. Panama City’s Environmental *Parens Patriae* Lawsuit

Panama City Beach, Florida (PCB) has filed suit against Triton Asset Leasing, Transocean, Halliburton, and Cameron contending that the city suffered the loss of revenue because of the decline in tourism after the oil spill.<sup>266</sup> The municipality seeks compensatory damages for the lost excise taxes and other revenues after the Gulf disaster.<sup>267</sup>

The environmental *parens patriae* actions filed by Alabama, Louisiana, several Mexican government entities, and a Florida municipality are public crimtorts in that government attorneys are deploying tort law to achieve a larger societal purpose. Each of these environmental *parens patriae* actions are examples of government lawyers entering the world of crimtorts by using tort law to recoup lost revenues and to restore natural habitat.

#### 7. Justice Department Oil Spill Lawsuit

On December 15, 2010, the U.S. Department of Justice filed suit against BP Exploration & Production and other oil industry defendants for their role in the oil spill.<sup>268</sup> The Justice Department is seeking a declaratory judgment that the BP oil spill defendants are “responsible and strictly liable for unlimited removal costs and damages under the Oil Pollution Act of 1990.”<sup>269</sup> The Justice Department’s action is predicated upon the Clean Water Act and the Oil Pollution Act but not for public nuisance, so this federal government litigation is beyond the scope of this article.<sup>270</sup>

In Part III, we will argue that the latest doctrinal development, “public crimtorts,” is a much better mechanism to supplement one-on-one tort actions, the GCCF, and class action lawsuits than “private crimtorts.” The BP Deepwater Horizon Report to the

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265. *Id.* at 25.

266. Complaint of Panama City Beach, *supra* note 44, at 10.

267. *Id.* at 14. “In addition, [Panama City Beach] has been damaged by the loss of certain excise tax revenues directly related to tourism, but which are imposed solely by the State of Florida and distributed to [Panama City Beach] along with other local governments.” *Id.* at 10.

268. Complaint at 1, United States of America v. BP Exploration & Production Inc., No. 2:10-cv-04536-CJB-SS (E.D. La. Dec. 15, 2010).

269. *Id.* at 2.

270. *Id.* at 20.

U.S. President calls for greater legal accountability of oil industry defendants that endanger the environment.<sup>271</sup> The existing law is inadequate because it “limits liability well below levels that may actually be incurred.”<sup>272</sup> We contend that the governments of the Gulf Coast region have an affirmative duty to file environmental tort lawsuits to recover losses to the delicate ecosystem caused by the BP oil defendants. These public environmental tort actions will ensure that the BP corporate defendants bear the entire cost of their activities.

#### IV.

### PART III: PUBLIC CRIMTORTS TO REDRESS ENVIRONMENTAL MASS DISASTERS

#### A. *Crimtorts to Vindicate Societal Damages*

The term “crimtort” is a *portmanteau*<sup>273</sup> that combines criminal and tort in order to describe the myriad ways that tort law reflects public law purposes.<sup>274</sup> The term is used heuristically to explain the overlap between principles of criminal law and tort law in such contexts as class actions and punitive damages in mass products or environmental litigation:

Crimtort remedies serve as powerful weapons against defendants who threaten the environment through irresponsible disposal of toxic substances. The distinctive feature of crimtorts is that private litigants contribute to the societal goal of protecting the public interest while, at the same time, receiving compensation for their own personal injury or property damage.<sup>275</sup>

The “nascent field of crimtorts speaks” to the borderline between crimes and torts and “has considerable promise” so long as

271. The National Commission did not mince words in contending that the Gulf Oil Disaster was preventable by safer practices. See NAT'L COMM'N REPORT, *supra* note 11, at vii.

272. NAT'L COMM'N REPORT, *supra* note 11, at 284.

273. A *portmanteau* is “a word or morpheme whose form and meaning are derived from a blending of two or more distinct forms (as *smog* from *smoke* and *fog*).” MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/portmanteau> (last visited Feb. 5, 2011).

274. See Thomas Koenig & Michael Rustad, ‘Crimtorts’ as Corporate Just Deserts, 31 U. MICH. J. L. REFORM 289, 294 (1998) (describing how tort law shares common ground with criminal law). The late Grant Gilmore developed the “contort” bridging the gap between the law of contracts and torts. See GRANT GILMORE, THE DEATH OF CONTRACT 91-98 (1974).

275. Thomas H. Koenig & Michael L. Rustad, *Toxic Torts, Politics, and Environmental Justice: The Case for Crimtorts*, 26 LAW & POL'Y 189, 190 (2004), available at <http://web.law.suffolk.edu/faculty/addinfo/rustad/TOXICTORTSARTICLE.pdf>.

it can avoid “oversimplified instrumentalism and . . . an excessive demand for doctrinal purity and insulation.”<sup>276</sup> Crimtort lawsuits seek to compensate claimants while simultaneously patrolling conduct that is inimical to society but not addressed explicitly by criminal law. Crimtorts are civil actions that simultaneously advance societal purposes such as punishment, deterrence, and the social control of corporate wrongdoers.<sup>277</sup> The concept of crimtorts formally recognizes that the public/private split does not adequately address the common ground between criminal law and the law of torts. The borderline between criminal and tort law has been increasingly blurred over the past quarter century by the emergence of new “crimtort” remedies which have evolved to deter and punish corporate polluters.

Environmental *parens patriae* is the latest stage in the evolution of crimtorts to address societal damages caused by corporate wrongdoers. Societal damages are necessary to compensate “absent plaintiffs” who do not yet have legally cognizable claims.<sup>278</sup> In the BP oil spill disaster, a Gulf Coast municipality may find it difficult to quantify costs such as the lost beauty of the formerly pristine wetlands.<sup>279</sup> “Gulf Coast hotel owners” will not likely have cognizable claims “unless they had actually owned beach-front property that was physically drenched with oil.”<sup>280</sup> Similarly, the municipalities of the Gulf Coast states suffered lost revenue due to cancellations by tourists that will be difficult to document.<sup>281</sup> Governmental entities in the Gulf Coast states will suffer intangible damages such as the lost brand name value of their products and services. The widespread devastation of state waters, shorelines, and natural habitat created by the cata-

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276. Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 732 (2008).

277. Koenig & Rustad, *supra* note 274, at 330 (noting how real world crimtorts did not live up to the paradigmatic ideal in the Exxon Valdez spill).

278. Sharkey, *supra* note 18, at 392 (describing the need to “recognize societal damages for absent individuals with present legally cognizable tort injury claims . . . that lack legally cognizable tort injury claims”).

279. Roger Parloff, BP’s Gulf Coast Oil Spill—A Legal Primer, CNNMONEY.COM (June 6, 2010, 9:10 AM), [http://money.cnn.com/2010/06/04/news/companies/bp\\_legal\\_fortune/index.htm](http://money.cnn.com/2010/06/04/news/companies/bp_legal_fortune/index.htm).

280. *Id.* (noting that the Oil Pollution Act of 1990 will bar claims based solely upon economic losses such as cancellations and lost revenue).

281. *Id.* (stating that businesses such as a New Orleans barber will also suffer lost revenues due to fewer tourists).

strophic BP oil spill is clearly a societal injury not addressed by existing legal mechanisms.<sup>282</sup>

Crimtorts vindicate societal injuries by bridging the gap left by inadequate regulation, the limitations of the criminal justice system, and the shortcomings of tort law and class actions.<sup>283</sup> Crimtort litigants seek to uncover health, safety, environmental, employment, or other mass tort hazards that are inadequately policed under public law. The anomalous is increasingly becoming the expected as state AGs use their *parens patriae* powers to fill in the interstices between criminal law, tort law, and regulation. Tort law's signature has been its flexibility in enabling injured parties to uncover developing dangers or risks to the larger society.<sup>284</sup>

Public nuisance, by its very nature, is a crimtort because the conduct that it enjoins is a crime as well as a tort.<sup>285</sup> This tort vindicates interests "common to the general public, rather than peculiar to one individual or several."<sup>286</sup> In the traditional nuisance case, a government seeks abatement of the nuisance rather than monetary damages. In contrast, the BP *parens patriae* litigation, like the tobacco settlement, seeks monetary damages with injunctive relief secondary. In our earlier work, we conceptualized class actions filed by trial lawyers as the chief crimtort mechanism for redressing societal harm.<sup>287</sup> However, since 1998 when we published our earlier crimtort article, federal courts have sharply scaled back on the availability of class actions to redress toxic torts, products liability, and environmental tort lawsuits.<sup>288</sup> The Exxon Valdez class crimtort action enabled Alaskans to recover for societal damages to their territorial waters.<sup>289</sup> However, in the contemporary legal environment, it will be difficult

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282. Sharkey, *supra* note 18, at 353 (proposing split recovery of punitive damages between plaintiffs' attorneys and the government to redress societal damages).

283. NAT'L COMM'N REPORT, *supra* note 11, at vii.

284. Constantly evolving health care technologies requires a tort law that keeps pace. See generally Nicolas P. Terry, *When the "Machine That Goes 'Ping'" Causes Injuries*, 46 ST. LOUIS U. L. J. 37 (2002) (developing the case for a flexible and progressive tort law that keeps pace with changes in the health care industry).

285. KEETON & PROSSER, *supra* note 205, at 644.

286. *Id.* at 645.

287. See Koenig & Rustad, *supra* note 274, at 315, 321-22 (explaining range of possible social sanctions versus corporate wrongdoers).

288. Stier, *supra* note 157, at 895, 898-99 (explaining the increasing trend for courts to reject class certification for mass tort claims and the impact it has had on the area of crimtorts).

289. Koenig & Rustad, *supra* note 274, at 331 (interpreting the Exxon Valdez oil spill as lying on the borderline between crime and tort).

for the diverse plaintiff classes to be certified and receive compensation.

### B. *Public Crimtors as Parens Patriae Actions*

In public crimtort cases, government lawyers deploy punitive damages to benefit society as seen in the environmental and public health *parens patriae* actions. In the *parens patriae* actions against big tobacco and the manufacturers of lead paint, the state AGs asserted that they were “entitled to amalgamate the claims of individual victims of product-caused harms and collect damages that, at least initially, were experienced by the individual victims and not by the state itself . . . . [T]he state becomes a ‘super plaintiff.’”<sup>290</sup> The tobacco settlement redresses societal damages not recoverable by individual or class action lawsuits.

The environmental *parens patriae* actions are crimtorts in which the states have a direct societal interest in restoring their “marshes, wetlands, shores, ecology, economy, tourism, fisheries, waters, and wildlife.”<sup>291</sup> The BP oil spill *parens patriae* action requires no aggregation of individual claims, because the Gulf States are vindicating their larger societal interest against a public nuisance. States serve as “trustee of the public trust” for natural resources and have “an interest in them as *parens patriae*.”<sup>292</sup>

The public trust doctrine recognizes that the government has a fiduciary duty to prevent environmental degradation.<sup>293</sup> The public trust was prefigured in Roman law and later developed in England where the Crown used the concept of a public fiduciary to protect natural resources for its subjects.<sup>294</sup> The public trust doctrine must be deployed by the Gulf Coast states to protect their navigable waters, wetlands, and ecosystems.

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290. Gifford, *supra* note 207, at 931. See also Koenig & Rustad, *supra* note 274, at 331 (interpreting the Exxon Valdez oil spill as lying on the borderline between crime and tort).

291. See, e.g., Complaint of Louisiana, *supra* note 5, at 12-13.

292. See, e.g., Puerto Rico v. SS Zoe Colocotroni, 456 F. Supp. 1327, 1337 (D. P.R. 1978).

293. See Zachary C. Kleinsasser, Note, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 453-54 (2005).

294. Walker, *supra* note 177, at 444; see also Kanner, *supra* note 184, at 63-70.

### C. Public Crimtorts versus Alternative Pathways

Table Three compares and contrasts criminal law, tort law, and the Gulf Coast Claims Facility with both public and private crimtorts.

TABLE THREE: PRIVATE AND PUBLIC CRIMTORTS COMPARED TO POLICY ALTERNATIVES

Feature	Criminal Law	Tort Law	Gulf Coast Claims Facility (GCCF)	Private Crimtorts	Public Crimtorts
<b>Branch of Law</b>	Public	Private	Private alternative dispute resolution	Trial lawyers deploy private law for public purpose	Public officials deploy tort law for public purpose
<b>Purposes</b>	Punishment, deterrence	Compensation	Speedy recovery	Private attorneys achieve social purposes and pursue private gain	Government lawyers use (quasi) sovereign powers to achieve social purpose
<b>Enforcers</b>	Public prosecutors	Trial lawyers	Kenneth Feinberg	Trial lawyers	Government lawyers, some in partnership with trial lawyers
<b>Function of Punitive Damages</b>	N/A	To achieve settlement or full compensation	None permitted	To punish wrongful corporate acts and pursue compensation for private litigants	To punish and deter defendant and to vindicate societal interest
<b>Procedural Justice Framework</b>	Criminal law protections	Common law supplemented by statutes	None; printed guidelines	Mid-level procedural protections	Mid-level procedural protections
<b>Proceeding Where Punishment is Imposed</b>	Individual criminal trial in open court	N/A	Private closed proceeding	Jury or judge imposed in open court proceeding	Collective open proceeding: <i>parens patriae</i>

#### 1. Punitive Damages as the Paradigmatic Crimtort Remedy

Our earlier work highlighted the centrality of punitive damages as a crimtort remedy that enabled trial lawyers to uncover and punish corporate wrongdoing midway between criminal law

and the law of torts.<sup>295</sup> This amalgamated remedy is extremely important in both public and private crimtorts. As the U.S. Supreme Court acknowledges, states have a “legitimate interest in punishing unlawful conduct and deterring its repetition” through punitive damages.<sup>296</sup> Punitive damages serve larger societal purposes such as punishing the defendant, specific and general deterrence, and enforcing societal norms.<sup>297</sup> Private attorneys general and now public attorneys general employ this crimtort remedy to vindicate threats to public health and the environment. Punitive damages are the prototypical crimtort remedy because they serve society through punishment and deterrence.<sup>298</sup> In New York, punitive damages are regarded as “a social exemplary ‘remedy,’ [and] not a private compensatory remedy.”<sup>299</sup> This potent legal institution combines elements of both compensation and punishment and requires heightened procedural protections midway between those available in tort and criminal law.

## 2. Crimtorts’ Procedural Justice Framework

Because crimtorts combine elements of public and private law, defendants are entitled to “intermediate procedural protections.”<sup>300</sup> Corporate defendants, for example, have the right in many jurisdictions to fortified jury instruments, post-verdict re-

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295. See, e.g., Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 739-40 (2008) (conceptualizing punitive damages as the ideal crimtort remedy because of deterrent power in constraining abuses of power such as Blackwater and importers of dangerous Chinese products).

296. *Philip Morris U.S.A. v. Williams*, 549 U.S. 346, 346 (2007) (quoting *BMW of North America Inc. v. Gore*, 517 U.S. 559, 568 (1996)).

297. Guido Calabresi, *The Complexity of Torts: The Case of Punitive Damages*, in *EXPLORING TORT LAW* 337-46 (M. Stuart Madden ed., 2005) (describing five functions beyond compensating a particular plaintiff including the enforcement of social norms through the attorney general, the multiplier, the ‘tragic choice’ function, recovery of generally non-recoverable compensatory damages, and righting private wrongs).

298. The Fifth Circuit, too, agrees that punitive damages claimants in the context of private actions should be viewed as acting on the State’s behalf, as “private attorneys general.” *Jackson v Johns-Manville Sales Corp.*, 781 F.2d 394, 408 (5th Cir. 1986) (upholding punitive damages in asbestos products liability lawsuit).

299. *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 795 (N.Y. 1976).

300. We proposed “middle range” procedural protections to protect corporate defendants since punitive damages are the classic crimtort remedy. See Koenig & Rustad, *supra* note 274, at 343-48 (describing middle range procedural protections, such as bifurcation, heightened standard of proof, and clarifying jury instructions, for crimtorts).



view, bifurcation, and a heightened standard of proof.<sup>301</sup> Table Four presents a fifty-one-jurisdiction study of procedural protections employed in punitive damages litigation.

TABLE FOUR: CRIMTORT PROCEDURAL PROTECTIONS—  
A MULTI-JURISDICTIONAL SURVEY<sup>302</sup>

Procedural Protection for Defendants	Number of Jurisdictions
Fortified Jury Instructions	22
Post-Verdict Review for Excessive Punitive Damages	51
Required Bifurcated Proceeding Separating Compensatory Damages Stage from Punitive Damages Stage	14
Heightened Standard of Evidence: Either Clear or Convincing or Beyond a Reasonable Doubt.	34

Since the mid-1990s, the U.S. Supreme Court and a majority of states have reduced the deterrent power of punitive damages by imposing due process limitations, statutory caps, state-sharing, enhanced standards of proof, and other limitations.<sup>303</sup> State legislatures and courts have recognized that punitive damages require intermediate procedural rights for corporate defendants.<sup>304</sup>

### 3. Unresolved Policy Issues in Environmental Crimtorts

#### a. Separation of Powers

While American courts “recognize a state attorney general’s authority to sue, as *parens patriae*, to vindicate the state’s and its citizens’ interests,”<sup>305</sup> this government litigation raises challeng-

301. Michael L. Rustad, *The Supreme Court and Me: Trapped in Time with Punitive Damages*, 17 WIDENER L.J. 783, 799-803 (2008) (explaining all of these intermediate protections in punitive damages litigation).

302. *Id.* at 799 (adapting table).

303. Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L. A. L. REV. 1297, 1370-1417 (2005) (summarizing fifty-one jurisdiction study of punitive damages limitations). See also Rustad, *supra* note 301, at 803-04 (“The Court’s latest decision in *Philip Morris USA v. Williams* was the last rites, if not the obituary, for the crimtort paradigm. The Court’s punitive damages cases, taken as a whole, are a step backward into the jurisprudence of the eighteenth and early nineteenth centuries”).

304. See, e.g., Rustad, *supra* note 303, at 1322-23 (documenting that many states have enacted reforms such as bifurcation, clear and convincing evidence requirements, and capping but noting the “significant variation among the states in the availability of punitive damages” with a handful of states not recognizing them, capping them, or allocating a portion to a state fund).

305. Kanner, *supra* note 184, at 101 (explaining that *parens patriae* actions are well established).

ing public policy issues. Critics of state *parens patriae* argue that these governmental lawsuits are anti-democratic because they displace the legislature as well as the regulatory state. Governments should be cautious about expanding this remedy because of separation of powers concerns.<sup>306</sup> In the tobacco *parens patriae* actions, the issues of justiciability, standing, separation of powers, and regulation by litigation arose because the settlement included a new regulatory regime for the marketing of tobacco products.<sup>307</sup> The danger in letting trial lawyers and government attorneys pursue “regulation by litigation” is that this policy undermines the democratic process. For example, in the tobacco litigation, state AGs and trial lawyers developed a regulatory framework without approval of any elected body or regulatory agencies.<sup>308</sup> Conversely, state AGs acting in their *parens patriae* capacities can be seen as simply carrying out their fiduciary duties to protect their states’ environments so that no separation of powers problem exists. From this perspective, state AGs are not overstepping their authority but simply carrying out their duty as public trustees to uphold state environmental and public health law.<sup>309</sup>

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306. Professor Gifford tacitly assumes that because the legislature has acted in a given area, that the “separation of powers” precludes public tort actions. See GIFFORD, *supra* note 209, at 205. He also acknowledges that state statutes authorize attorneys general to file *parens patriae* actions. Nevertheless, he contends “[s]eparation of powers principles calls for the diffusion of power among the legislative, executive, and judicial branches of government. *Id.* But see G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. LAW 329, 330 (2003) (arguing that states are not “miniature versions of the national government”).

307. For example, Ohio enacted “legislation to control, such litigation, which nearly resulted in a constitutional crisis, requiring the Ohio Supreme Court to determine whether the legislation was properly enacted into law. Owsiany, *supra* note 192, at 5 (discussing how Ohio’s Attorney General voluntarily ended the litigation after a separation of powers challenge). See also *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997).

308. Gifford, *supra* note 207, at 914.

309. “The AG, as the enforcer of the state’s laws, is the perfect candidate to pursue the state’s interests as trustee of the public trust and *parens patriae* over sovereign and quasi-sovereign state interest. Actions by the AG should not be considered partisan political maneuvers. The assertion of public trust rights by states is consistent with both liberal and conservative ideas of stewardship, sustainability, and property (albeit public property) rights in an environmental context. Kanner, *supra* note 184, at 112.

b. *Market-Based Solution to Cost-Shifting*

As Judge Guido Calabresi noted, “America is a rights-based society” and this cultural value creates a “desire to make others ‘pay’ for the wrongs they have done us.”<sup>310</sup> *Parens patriae* actions reallocate the true cost of environmental degradation from the taxpayer to the corporate defendant. Public torts provide efficient deterrence because they force corporate polluters “to take account of, or at least to consider, all the costs of their proposed activity.”<sup>311</sup> The fear of government *parens patriae* litigation incentivizes oil companies like BP to efficiently invest in safety.<sup>312</sup>

The *parens patriae* action is a market-based solution to the problem of reallocating the cost of injuries to the polluters without creating costly new government agencies. When state AGs enter into contingency fee agreements with experienced environmental torts lawyers, the state can pursue complex litigation in an era of austerity.<sup>313</sup> The severe federal budgetary deficit may result in Congress reallocating funds from the Environmental Protection Agency to other priorities.<sup>314</sup> The states may need to employ *parens patriae* actions to fund their enforcement efforts.<sup>315</sup> Where environmental *parens patriae* actions involve political or controversial issues, state AGs may be advised to seek legislative advice or consent.<sup>316</sup>

4. *Parens Patriae* Actions as a “Fourth Branch of Government?”

Even though government lawyers owe a fiduciary duty to the public, profit-driven trial lawyers have the potential to control the litigation, thus subverting the common good. Critics fear that an unseemly alliance of greedy trial lawyers and publicity-seeking government attorneys will undermine the public interest.<sup>317</sup> If a state enters into contingency fee agreements with private at-

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310. Calabresi, *supra* note 297, at 345.

311. Galligan, *supra* note 58, at 1031.

312. *Id.* (noting the “primary justification” for public tort lawsuits “lies in the deterrence function of tort law”).

313. *Id.* at 113.

314. *Id.*

315. *Id.*

316. Under the AG approach, “the AG can ‘pick and choose’ cases which enjoy a broad political appeal, avoiding a political fight while helping to clean up the environment and gain revenue for cash - strapped states.” *Id.* at 114.

317. See, e.g., Michael DeBow, *Out-of-Control AGs*, NAT’L REVIEW ONLINE, May 21, 2002, <http://old.nationalreview.com/comment/comment-debow052102.asp>.

torneys who assume control of the litigation, the goal of the *parens patriae* lawsuit is subverted.<sup>318</sup>

Public health torts by state AGs raise the objectionable prospect of trial lawyers receiving multi-billion dollar payouts.<sup>319</sup> Critics contend these public/private partnerships in effect give trial lawyers excessively generous no-bid government contracts.<sup>320</sup> Cash-strapped states may be tempted to misuse the legal system by extorting concessions from deep-pocketed corporations even when the legal liability is unclear.<sup>321</sup> Still, “[b]y contracting with private attorneys on a contingency fee basis, the state can regulate and protect its resources while shifting the cost of doing so onto other parties.”<sup>322</sup> This “regulation through litigation” is an important legal innovation that evolved to address social problems when the legislature and regulators fall short.<sup>323</sup>

A “*de facto* fourth branch of government”<sup>324</sup> may be a pragmatic necessity. Hundreds of thousands of potential plaintiffs will be unable to find representation if no collective injury mechanism is available. Tort reforms such as the caps on punitive damages enacted in Alabama make it likely that attorneys will screen out many worthy cases.<sup>325</sup> Government-sponsored *parens*

318. The problem of asymmetry will be reduced to the extent that the state AG has control of the litigation. *Id.*

319. See *State of Rhode Island*, 951 A.2d at 467 (discussing ethic and public policy issues in the Rhode Island state AG action against lead paint manufacturers where law firms were to receive 16.67% of the total recovery on behalf of the state). See Patrick E. Tyler, *Tobacco-Busting Lawyers on New Gold-Dusted Trails*, N.Y. TIMES, Mar. 10, 1999, at A1.

320. Editorial, *The Pay-to-Sue Business: Write a Check, Get No-Bid Contract to Litigate for the State*, WALL ST. J., Apr. 16, 2009, <http://online.wsj.com/article/SB123984994639523745.html>.

321. A government lawyer’s goal is to represent the sovereignty “whose obligation . . . is not that it shall win a case but that justice be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

322. Kanner, *supra* note 184, at 115.

323. Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 514 (2001).

324. “You don’t need a legislative majority to file a lawsuit . . . in New Orleans and in many other cities boasted that the plaintiffs’ bar was “a *de facto* fourth branch of government.” GIFFORD, *supra* note 209, at 134. See also Gifford, *supra* note 207, at 921 (contending the contingency fee arrangements with the state create “a *de facto* fourth branch of government”); Robert Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at 15A; Myron Levin, *Teaming Up to Aid Consumers With Activism and Sheer Numbers, State Attorneys General Emerge as Powers Regulating Business*, L.A. TIMES, July 6, 1999, at A1.

325. See, e.g., ALA. CODE § 6-11-20 (1975) (increasing evidentiary standard in punitive damages cases from preponderance of the evidence to clear and convincing

*patriae* lawsuits result in efficiency by reducing the cost of environmental and public health enforcement.<sup>326</sup> Crimtorts in *parens patriae* actions are public torts<sup>327</sup> that punish corporate wrongdoers when regulators and prosecutors lack resources or the will to enforce the law.<sup>328</sup>

### 5. Limiting the Overkill Problem

In criminal law, defendants are protected against double jeopardy by the Fifth Amendment, which is inapplicable to civil actions.<sup>329</sup> Punitive damages best serve the public interest when they sting, but do not destroy, the corporate defendant.<sup>330</sup> The danger of overkill through multiple damages verdicts for the same corporate wrongdoing has been “the most discussed and debated issue in the law of punitive damages.”<sup>331</sup> The possibility of overkill is present in the BP oil spill because there is the potential for countless punitive damages awards. Multiple punitive damages may deprive later plaintiffs of even compensatory damages if the defendant is bankrupt.<sup>332</sup> Only a handful of jurisdic-

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evidence); ALA. CODE § 6-11-21 (1975) (capping punitive damages at three times compensatory damages or \$500,000, whichever is greater with exceptions). *See generally* Rustad, *supra* note 303 (documenting that all but a few states have enacted one or more tort reforms limiting the availability or capping punitive damages).

326. Galligan, *supra* note 58, at 1033 (“If a government entity could recover losses suffered by those who did not sue, there would be an efficiency gain as long as the costs of the government entity’s suit were less than the deterrence gain from prosecuting the suit.”).

327. *Id.* at 1022-23 (noting that public torts are narrowly defined as cases “where the plaintiff is a government entity where the defendant has caused some injury to the government such as the expenditure of funds on public services necessitated by the tort.”).

328. “The reality of tort law in twenty-first century America is that at least one of the parties is a huge entity, such as a major corporation or insurer.” *Id.* at 1022.

329. *But see* Koenig & Rustad, *supra* note 274, at 349 (“[T]ort law imposes no limitations on multiple lawsuits arising out of the same act.”).

330. *See, e.g.*, Richard L. Blatt, *ADR Can Help Fend off Big Punitive Awards: Tools such as Mediation Enable Cost-Effective Resolution of Claims*, BUS. INS., Apr. 23, 2001, at 10 (noting that “[p]unitive damages can wreak all kinds of havoc, from damaging corporate financial performance in the short run, to threatening a company’s very existence.”).

331. Rustad, *supra* note 303, at 1328 (quoting Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 587 (2003)). *See also* Sharkey, *supra* note 18, at 352 (“The multiple punishments problem has confounded jurists and scholars for the better part of the past three decades.”).

332. Jonathan Hadley Koenig, Note, *Punitive Damage ‘Overkill’ After TXO Production Corp. v. Alliance Resources: The Need for a Congressional Solution*, 36 WM. & MARY L. REV. 751, 754 (1995).

tions have adopted tort reforms to address the hazards of multiple punishments for the same course of conduct.<sup>333</sup>

The overkill problem can best be resolved in a collective proceeding where the punitive damages amounts are determined for all BP defendants. The collective proceeding can take the form of a class certification or a consolidated *parens patriae* solution.<sup>334</sup> The Exxon Valdez case exemplifies the class certification solution. The Alaska federal district court “certified a mandatory class for the more than 32,000 plaintiffs seeking punitive damages against Exxon.”<sup>335</sup> Another policy option is to certify a mandatory punitive damages class with no opt-out rights as shown in the Exxon Valdez federal litigation.<sup>336</sup>

A *parens patriae* solution could achieve the same result by consolidating punitive damages claims by reconceptualizing them as societal damages. Resolving punitive damages in a *parens patriae* proceeding not only deals with overkill and defendants’ due process rights,<sup>337</sup> but is desirable because the government has been conducting much of the investigation that has established the culpability of the oil industry defendants.<sup>338</sup>

## V.

### CONCLUSION: ENVIRONMENTAL CRIMTORTS AS A SUPPLEMENT TO PRIVATE LITIGATION

*Parens patriae* environmental lawsuits are true crimtorts because they blend private, public, and administrative law princi-

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333. For example, Florida gives the trial judge the discretion to determine whether a defendant’s prior punitive damages awards are sufficient to punish and deter. Missouri’s tort reform statute enables defendants to receive “credits” for prior punitive damages awards. See Rustad, *supra* note 303, at 1329.

334. *Parens patriae* imposes certification requirements unlike class actions. In the tobacco products liability cases, courts have decertified class actions. See Harold C. Reeder, *Engle, State Farm, Florida Law, and Punitive Damages: Was the \$145 Billion Award Truly Excessive?*, 31 NOVA L. REV. 57, 58 (2006).

335. Jeff Kerr, Comment, *Exxon Shipping Co. v. Baker: The Perils of Judicial Punitive Damages Reform*, 59 EMORY L. J. 727, 758 (2010).

336. “Where multiple suits for punitive damages have been brought in a single jurisdiction . . . there is a very real risk that two punitive damages awards in different courts . . . could result in a doubling up on deterrence and punishment.” Cabraser, *supra* note 155, at 1510-11.

337. *Id.* at 1511 (noting explicitly defendant’s due process right to be protected from excess punitive damages).

338. See *Initial Findings on Causes of BP Oil Spill*, REUTERS (Nov. 17, 2010, 11:50 AM), <http://www.reuters.com/article/idUSN1719107920101117> (reporting government studies of causes of BP oil spill). Harry R. Weber, *Feds: Forensic Testing of Blow out Preventer Begins*, ASSOCIATED PRESS (New Orleans), Nov. 16, 2010, available at <http://abcnews.go.com/Business/wireStory?id=12163857>.

ples, seeking a collective mechanism to redress environmental harm. Government-sponsored *parens patriae* lawsuits result in a deterrence gain from prosecuting cases that could not be brought if filed on an individual basis.<sup>339</sup> Thus, public environmental crimtorts, like private crimtorts, serve as a gap-filler when criminal law and regulation fail. In a world in which the oil industry has the capacity to subvert democracy, manipulate legislators, and capture regulatory agencies,<sup>340</sup> environmental crimtorts are a practical necessity to constrain abuses of power.<sup>341</sup> The legislative oversight over BP and the other oil industry defendants clearly left much to be desired. The National Commission on the BP Deepwater Horizon disaster called for immediate reform of regulatory oversight of offshore oil production:

As the energy industry works to satisfy these requirements, the Department of the Interior must work promptly to reorganize its divisions, augment its regulatory staff, and enhance their [sic] skill. The American public has every reason to insist that Congress provide regulators with adequate resources to do their vital job—and that the industry apply its resources and expertise to improving practices. Both must focus on the substantial challenges of making offshore drilling safe, reliable, and productive.<sup>342</sup>

President Barack Obama has acknowledged that his administration had failed to reform the Mineral Management Service,<sup>343</sup> “the scandal-ridden federal agency that for years had essentially allowed the oil industry to self-regulate.”<sup>344</sup> This extreme failure of regulation requires a powerful remedy such as *parens patriae* to redress the industry’s capture of the regulatory agency charged with overseeing Big Oil.<sup>345</sup> Halliburton’s political connections

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339. Galligan, *supra* note 58, at 1036-37 (arguing that *parens patriae* lawsuits result in an efficiency gain because of the difficulties faced by individual plaintiffs in establishing cause-in-fact).

340. The power of big oil to corrupt legislatures is a long-standing problem in American society. See STEVE WEINBERG, *TAKING ON THE TRUST: HOW IDA TARBELL BROUGHT DOWN JOHN D. ROCKEFELLER* 198 (2009).

341. STEVEN C. HACKETT, *ENVIRONMENTAL AND NATURAL RESOURCES ECONOMICS: THEORY, POLICY, AND THE SUSTAINABLE SOCIETY* 206 (3d. ed. 2006) (explaining how firms capture the regulatory process and discussing political economy of lobbying for favorable regulation).

342. NAT’L COMM’N REPORT, *supra* note 11, at 299.

343. See Complaint of Ferguson, *supra* note 35, ¶ 14.

344. Tim Dickinson, *The Spill, the Scandal, and the President*, *ROLLING STONE* (June 8, 2010, 4:30 PM), [http://www.rollingstone.com/politics/news/17390/111965?RS\\_show\\_page=0](http://www.rollingstone.com/politics/news/17390/111965?RS_show_page=0).

345. *Id.*

through former Vice President Cheney are evident.<sup>346</sup> A company that produced chemical dispersants used to break up BP's spilled oil was only one of many energy corporations that spent hundreds of thousands of dollars in federal lobbying.<sup>347</sup>

The doctrine of *parens patriae*, which originated to enable courts to protect those who cannot protect themselves, is being appropriately stretched to safeguard society. Environmental crimtorts fill the gaps in criminal law and grossly inadequate regulation of the oil industry.<sup>348</sup> The state may also use its *parens patriae* standing to ensure that the "absent plaintiffs" excluded by the GCCF are vindicated.<sup>349</sup> Crimtort causes of action such as public nuisance need to be restored and replenished in order to address collective human and environmental injuries in the future. A strong regime of public crimtorts ensures that not even multi-billion dollar industries are beyond the reach of the law.

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346. See Joshua Dornier, *Cheney's Culture of Deregulation and Corruption*, CTR. FOR AM. PROGRESS (June 9, 2010), [http://www.americanprogress.org/issues/2010/06/chenev\\_deregulation.html](http://www.americanprogress.org/issues/2010/06/chenev_deregulation.html).

347. Michael Beckel, *Nalco, Company Behind Dispersants Used in Gulf of Mexico Oil Spill Clean Up, Ratchets Up Politicking in 2010*, OPENSECRETSBLOG (Oct. 27, 2010, 6:00 AM), <http://www.opensecrets.org/news/2010/10/nalco-company-behind-dispersants-us.html>.

348. Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 86, 96-99 (2001) (arguing that criminal law lags behind information-based and other technologies).

349. Sharkey, *supra* note 18, at 354 (arguing that punitive damages serve to vindicate societal damages in widespread harm cases).



