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OPIOID ACCOUNTABILITY

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The opioid crisis has steadily killed Americans for twenty years. In total, we have lost more than 500,000 American lives since the 1990s, and countless more suffer from chronic addiction.

After years of piecemeal efforts to address this massive loss of life and health, the opioid litigation, largely centralized in Ohio federal district court, has brought significant hope for change. But there is a notable divide between the popular sense of the litigation and its reality. A full 57% of Americans believe that opioid companies should be held accountable for precipitating a public health crisis. However, the litigation has been dedicated to a quick but modest monetary settlement, and scholars have generally been hostile to corporate accountability.

This paper, together with its companion piece,[1] seeks to resurrect the idea of tort accountability. The U.S. has experienced several opioid

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crises over the last 150 years, yet we have never held opioid corporations accountable. Meanwhile, it is fairly standard in other areas of law, such as administrative law, to hold an agency accountable for legal violations. This paper articulates a double standard between tort and administrative law and makes a strong call for corporate accountability in tort. Accountability is a form of ex post *incentive-based liability, which has potent ex ante effects on actors choosing how to market dangerous products. Accountability has the power to change incentive structures and to support the rule of law. If we hope to prevent recurrence of mass harms, we must hold the actors who perpetrate them accountable. Current proposals to hold only agencies accountable for the opioid crisis risk kneecapping regulators and further liberating defendant companies from essential public health regulations. Instead, we must embrace corporate accountability in tort as a necessary check on corporate power. Beyond accountability, this paper makes several suggestions to maximize the public health benefits of the opioid litigation.*

INTRODUCTION

In September 2019, the Washington Post issued an editorial called "We're finally getting some accountability for the opioid crisis—long after victims are dead."[2] Beneath the headline is a striking photograph at the intersection of activism and loss. A middle-aged woman with sandy blond hair and big black glasses closes her eyes, frowning, her head tilted up as if in suffering. She holds a placard with purple ribbons abutting a photograph of someone who is ostensibly dead from opioids. Behind her, protesters have gathered outside Purdue Pharma's headquarters in Stamford, Connecticut. The

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Food and Drug Administration, the Department of Health and Human Services, or the United States Government.

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1. Dr. Daniel G. Aaron, *Public Health in the Opioid Litigation*, 53 LOY. U. CHI. L.J. 11 (2021).

2. Editorial Board, *We're Finally Getting Some Accountability for the Opioid Crisis—Long After Victims Are Dead*, WASH. POST (Sept. 2, 2019), https://www.washingtonpost.com/opinions/were-finally-getting-some-accountability-for-the-opioid-crisis--long-after-victims-are-dead/2019/09/02/9dfa1428-c9b7-11e9-a1fe-ca46e8d573c0_story.html.

article revels in the good news that, alas, we are finally pursuing accountability for the opioid crisis through the opioid litigation,[3] now centralized in multidistrict litigation in Cleveland, Ohio. But is it true we are pursuing accountability?

The Washington Post is not alone for praising the prospect of opioid accountability. It has become such a popular topic that both major candidates in the 2020 United States presidential election extolled its virtues. In 2019, President Donald Trump announced new federal opioid-related charges and declared, "We are holding Big Pharma accountable."[4] On his candidacy website, Joe Biden asserted that he "will demand accountability from pharmaceutical companies and others responsible," and he will appoint an "Opioid Crisis Accountability Coordinator" to manage federal enforcement efforts.[5] Emily Walden, chair of the opioid coalition FED UP!, has urged, "We need some accountability . . . . They're getting away with murder."[6] Currently, 57% of Americans believe opioid companies should be "held responsible" for contributing to the opioid crisis.[7]

The calls for accountability come as one of the largest public health crises in American history is now being litigated in federal court. The opioid crisis has cost more than 500,000 American lives.[8] Drug overdose killed about 72,000 Americans in 2019—of these, most involved opioids—and the annual overdose death toll increased to more than 100,000 in 2021.[9] Opioid overdose has contributed to the

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3. *Id.*

4. Dartunorro Clark, *Trump on Opioid Crisis: 'We Are Holding Big Pharma Accountable'*, NBC NEWS (Apr. 24, 2019, 4:04 P.M.), https://www.nbcnews.com/politics/donald-trump/trump-opioid-crisis-we-are-holding-big-pharma-accountable-n998186.

5. *The Biden Plan to End the Opioid Crisis*, BIDEN HARRIS DEMOCRATS, https://joebiden.com/opioidcrisis (last visited May 17, 2022).

6. Chris McGreal, *Four Big Drug Firms Agree To $260m Opioid Payout Hours Before Trial Set to Begin*, GUARDIAN (Oct. 21, 2019, 11:44 A.M.), https://www.theguardian.com/us-news/2019/oct/21/opioid-makers-drug-industry-trial-cleveland-ohio.

7. *See* Brian Mann, *Majority of Americans Say Drug Companies Should Be Held Responsible for Opioid Crisis*, NPR (Apr. 25, 2019, 5:12 A.M.), https://www.npr.org/2019/04/25/716691823/majority-of-americans-say-drug-companies-should-be-held-responsible-for-opioid-c.

8. *Opioid Overdose: Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 19, 2020), https://www.cdc.gov/drugoverdose/epidemic/index.html.

9. *Drug Overdose Deaths in the U.S. Top 100,000 Annually*, CTRS. FOR DISEASE

longest continuous fall in American life expectancy since 1915.[10] The traceability of these changes to corporate misconduct[11] has increased the public desire for corporate accountability in the opioid litigation.

Despite the apparent utility of and public calls for accountability, scholars and litigants have minimally advanced it as a goal of the opioid litigation. When accountability is mentioned, it rarely receives the engagement it deserves, and is instead mainly used as a drive-by for its normative punch in defending the goals of the litigation: *We must hold opioid companies accountable.*[12] Sometimes accountability is downright criticized.[13] For an outcome the public so dearly wants, the lack of serious attention to defining and securing accountability is striking. Meanwhile, the litigation has been dedicated to rapid monetary returns for plaintiffs and their attorneys, to the exclusion of many important public health goals.[14]

Drawing from growing literature on the public health goals of the opioid litigation,[15] this article argues that the most impactful way the

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CONTROL & PREVENTION (Nov. 17, 2021), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm; *see also* Josh Katz, Abby Goodnough & Margot Sanger-Katz, *In Shadow of Pandemic, U.S. Drug Overdose Deaths Resurge to Record*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/interactive/2020/07/15/upshot/drug-overdose-deaths.html (describing increase in overdose deaths during COVID-19 pandemic).

10. Abby E. Alpert et al., *Origins of the Opioid Crisis and Its Enduring Impacts* 1, (Nat'l Bureau of Econ. Rsch., Working Paper No. 26500, 2019), https://www.nber.org/papers/w26500.pdf.

11. *See infra* Section I.A.

12. *See* Rebecca L. Haffajee & Michael R. Abrams, *Settling the Score: Maximizing the Public Health Impact of Opioid Litigation*, 80 OHIO ST. L.J. 701, 704 (2019); Cheryl Healton, Robert Pack & Sandro Galea, *The Opioid Crisis, Corporate Responsibility, and Lessons From the Tobacco Master Settlement Agreement*, 322 JAMA 2071, 2071 (2019); James G. Hodge, Jr. et al., *Exploring Legal and Policy Responses to Opioids: America's Worst Public Health Emergency*, 70 S.C. L. REV. 481, 496 (2019).

13. *See, e.g.*, Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 649–53 (2019).

14. Aaron, *supra* note 1.

15. *See, e.g., id.*; Richard C. Ausness, *The Current State of the Opioid Litigation*, 70 S.C. L. REV. 565, 565 (2019); Micah Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 KAN. L. REV. 1029, 1029 (2019); Derek Carr, Corey S. Davis & Lainie Rutkow, *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons from the Tobacco Wars*, 133 PUB. HEALTH REPS. 207, 209–10 (2018); Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 GA. L. REV. 1287, 1287 (2019); Abbe R. Gluck, Ashley Hall & Gregory Curfman, *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J.L., MED. & ETHICS 351, 351 (2018); Rebecca L. Haffajee, *The Public Health Value of Opioid Litigation*, 48 J.L., MED. & ETHICS 279, 279 (2020); Haffajee & Abrams, *supra* note 12; Rebecca L. Haffajee & Michelle M. Mello, *Drug*

opioid litigation could serve public health is to hold accountable the companies that ignited and fueled the opioid crisis. At the same time, this paper recognizes that accountability is, in some ways, an unhelpful and omnibus concept. It is all too easy for an attorney general seeking reelection, or a plaintiffs' attorney asserting their good intent, to declare their desire to hold opioid companies accountable. Hence, this paper articulates a clear definition of accountability inspired by administrative law, which has recognized accountability as a paramount goal. Accountability, generally, is the monitoring of conduct for consistency with basic norms and rules and the application of sanctions for breach.[16] The goal is that these sanctions be sufficiently robust so as to produce an incentive for defendants and similarly situated parties, who hold a choice of how to behave.[17] When companies violate state and federal law in order to increase the sales of addicting and dangerous products and fuel a historic health crisis, accountability is a necessary and beneficial response. This genre of accountability bears strong ties to discussions

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Companies' Liability for the Opioid Epidemic, 377 NEW ENG. J. MED. 2301, 2301 (2017); Healton et al., *supra* note 12; James G. Hodge, Jr. & Lawrence O. Gostin, *Guiding Industry Settlements of Opioid Litigation*, 45 AM. J. DRUG & ALCOHOL ABUSE 432, 432 (2019); Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175, 230–31 (2019); Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO ST. L.J. 663, 664–65 (2020); Michael J. Purcell, Note, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 136, 136 (2018); Terry, *supra* note 13; ADDICTION SOLUTIONS CAMPAIGN, OPIOID SETTLEMENT PRIORITIES: RECOMMENDATIONS FROM THE ADDICTION SOLUTIONS CAMPAIGN (May 22, 2018), https://addictionsolutionscampaign.org/wp-content/uploads/2018/05/Opioid-Settlement-Priorities_5.17.18.pdf.

16. *See* Benjamin C. Zipursky & John C.P. Goldberg, *Torts as Wrongs*, 88 TEX. L. REV. 917, 986 (2010).

17. *See infra* Section II.B.1; Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24, 49–50 (2005) (quoting GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24 (1970)); Gluck et al., *supra* note 15, at 352; Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 187 (2004); Kyle D. Logue, *In Praise of (Some) Ex Post Regulation: A Response to Professor Galle*, 69 VAND. L. REV. EN BANC 97, 108 (2016); Andrew Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183–85 (2011) (arguing deterrence extends to similarly situated entities); *see also* Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 189 (2014); Jon Hanson, Kathleen Hanson & Melissa Hart, *Game Theory and the Law*, *in* GAME THEORY AND BUSINESS APPLICATIONS (Kalyan Chatterjee & William Samuelson eds., 2nd ed. 2014).

of *ex post* incentive-based regulation.[18] It is worth floating the idea that accountability could be a new default social response to mass harms. Although this proposal may sound radical, it should not be: holding a company accountable for injuring others is consistent with basic human decency.

The consequences of the decision to pursue accountability (or not) will be significant and long-lasting. Delivering strong accountability could offer a semblance of justice for the hundreds of thousands killed and fundamentally change the incentive for aggressive marketing of addicting products. Beyond opioids, accountability supports a larger vision of public health. Accountability is more than a several-billion-dollar settlement. It is more than offering modest help to people suffering from addiction. Accountability checks the unbridled power that created the opioid crisis in the first place. It bears no shame in tackling the root causes of public health emergencies. Accountability enforces standards of conduct on companies entrusted with selling and marketing risky medicines. Defendants have been brought to court in one of the largest and most significant episodes of litigation in history, over one of the most serious public health disasters the U.S. has seen to date. If there is any time to pursue accountability, that time is now.

As argued by the companion article, the opioid litigation is inextricably intertwined with public health; indeed, it is the agent of public health.[19] The failure to pursue accountability, and more generally public health, would be a breach of the litigation's agency obligations.

Part I of this article will introduce the opioid crisis and the related litigation. Part II will offer suggestions of how the litigation could maximize public health. It emphasizes accountability, but briefly touches on monetary relief and substantive public health provisions. A brief conclusion follows.

I. BACKGROUND ON THE OPIOID CRISIS AND RELATED LITIGATION

The current opioid crisis[20] began in the 1990s with the rising

18. Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1173 (1998); Logue, *supra* note 17.

19. Aaron, *supra* note 1. This companion article addresses several counterarguments, including the contention that consideration of public health falls outside the scope of Article III adjudication. *Id.*

20. This paper will refer to the current opioid crisis as "the opioid crisis" even though there have been prior opioid crises.

marketing, prescription, and use of opioids.[21] To date, it has killed more than 500,000 Americans.[22] Contending that the crisis was largely caused by aggressive and illegal corporate behavior, plaintiffs have sued numerous companies involved in the sale, distribution, and dispensing of opioids in courts across the country.

A. The Opioid Crisis and Corporate Misconduct

It might seem apparent that this Section seeks to provide background on "the" opioid crisis. But this is a misnomer. In truth, the United States has seen a number of opioid crises throughout the last two centuries,[23] collectively spanning at least fifty years.[24] They began with the Civil War, which created large numbers of veterans addicted to opium.[25] Around the same time, the hypodermic syringe was invented, and administration of medicine by syringe became popularized.[26] Syringe marketers played off physicians' fear of falling behind their peers to encourage them to adopt the new technology.[27] By 1881, almost every U.S. physician had learned to use the syringe.[28] An obvious application of the technology was the intravenous administration of morphine, a drug ten times as powerful as opium.[29] The inventor of the syringe touted that injectable morphine was far less addicting than oral morphine.[30] Morphine was peddled for all sorts of ailments, such as menstrual pain and eye inflammation, under minimal regulatory oversight.[31] The unfortunate consequence was an acceleration in the use of injectable morphine, which would later prove to be more addicting than its oral predecessor.[32] Several physicians published articles in journals during the 1870s and 1880s

21. Hodge et al., *supra* note 12, at 485–86.
22. *See Opioid Overdose*, *supra* note 8.
23. *See* DAVID T. COURTWRIGHT, DARK PARADISE: A HISTORY OF OPIATE ADDICTION IN AMERICA 183 (2001).
24. *Id.* at 183; BETH MACY, DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA 22–30 (2018).
25. Erick Trickey, *Inside the Story of America's 19th-Century Opiate Addiction*, SMITHSONIAN MAG. (Jan. 4, 2018), https://www.smithsonianmag.com/history/inside-story-americas-19th-century-opiate-addiction-180967673.
26. COURTWRIGHT, *supra* note 23, at 45.
27. *Id.* at 46.
28. *Id.*
29. MACY, *supra* note 24, at 23.
30. *Id.* at 22.
31. *Id.* at 29.
32. COURTWRIGHT, *supra* note 23, at 46.

warning of the addiction risk of morphine, but they were largely ignored.[33] Most opioid addiction was iatrogenic[34]—that is, originating in medical practice—although medical practice was heavily influenced by those who stood to gain financially.

Morphine was soon joined by a new competitor, and "[h]istory repeated itself."[35] In the late 1890s, a scientist at the drug company Bayer stumbled upon the recipe for heroin—twice as potent as morphine—and after rapid clinical testing Bayer deployed the drug.[36] Bayer advertised heroin as safe and effective for a variety of unproven uses, such as colds, influenza, and baby colic.[37] Sales took off, and by 1899 Bayer was selling one ton of heroin each year to purchasers in twenty-three countries.[38] Heroin became seen as it was advertised: a "wonder drug," non-addictive, and even a cure for morphine addiction.[39] By 1900, 1 in 200 Americans was addicted to opioids.[40]

The tide of this opioid epidemic was eventually turned through the establishment of the U.S. Food and Drug Administration in 1906[41] and by passage of the Harrison Narcotics Act of 1914, which severely restricted the sale and possession of narcotics.[42] In addition, in 1906, the American Medical Association issued an important statement declaring that heroin was a large health risk.[43] Over time, medical practice adapted to the increasing awareness that opioids were risky substances.[44]

The recent opioid crisis (hereinafter "opioid crisis") is a replay of history,[45] though considerably worse. Today, 1 in 25 Americans

33. Trickey, *supra* note 25.
34. COURTWRIGHT, *supra* note 23, at 2.
35. MARTIN BOOTH, OPIUM: A HISTORY 80 (1999).
36. MACY, *supra* note 24, at 23–24.
37. *Id.* at 24.
38. *Id.*
39. BOOTH, *supra* note 35.
40. Trickey, *supra* note 25.
41. *See Part I: The 1906 Food and Drugs Act and Its Enforcement*, U.S. FOOD & DRUG ADMIN. (Apr. 24, 2019), https://www.fda.gov/about-fda/fdas-evolving-regulatory-powers/part-i-1906-food-and-drugs-act-and-its-enforcement. FDA's establishment may have had more to do with the regulation of food than narcotics; however, FDA was established during an opioid epidemic, and the 1906 statute creating FDA had some bearing on heroin, including requiring labeling of any drug containing any quantity of morphine, opium, or cocaine. *Id.*; Pure Food and Drug Act of 1906, 59 Pub. L. No. 384, § 8, 34 Stat. 768, 770–71 (1906).
42. MACY, *supra* note 24, at 32.
43. *Id.*
44. COURTWRIGHT, *supra* note 23, at 2.
45. Andrew Kolodny et al., *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 18 ANNUAL REVS. PUB. HEALTH 559, 561 (2015).

misuse an opioid each year,[46] compared with 1 in 200 at the start of the twentieth century.[47] The modern crisis arguably began in 1996 with the commercial introduction of the new opioid OxyContin (controlled-release oxycodone).[48] OxyContin's maker, Purdue Pharma ("Purdue"), leveraged fraudulent evidence to persuade the U.S. Patent and Trademark Office to grant an unwarranted patent.[49] With a broad period of market exclusivity,[50] Purdue aggressively marketed OxyContin to physicians and orchestrated a push for the more expansive clinical use of opioids.[51] In its marketing, Purdue promoted OxyContin as being safer than competitor opioids.[52] It trained its salespeople to instruct doctors that the addiction risk was less than one percent.[53] It advertised OxyContin as having a more convenient dosing schedule than prior opioids.[54] These promotional claims turned out to be false,[55] but the marketing was successful: sales grew 2300% between 1996 and 2000.[56] Reports of OxyContin misuse surfaced as early as the year 2000.[57] Other opioid companies soon recognized the profitability of opioids and began to participate heartily, sometimes illegally.[58] Collectively, pharmaceutical company marketing to

46. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES: UNITED STATES, 2019 16–19 (2019), https://www.cdc.gov/drugoverdose/pdf/pubs/2019-cdc-drug-surveillance-report.pdf.

47. Trickey, *supra* note 25.

48. *See* Theodore J. Cicero & Matthew S. Ellis, *The Prescription Opioid Epidemic: a Review of Qualitative Studies on the Progression from Initial Use to Abuse*, 19 DIALOGUES IN CLINICAL NEUROSCIENCE 259, 263 (2017); Hodge et al., *supra* note 12, at 485–86; Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221 (2009).

49. Ameet Sarpatwari, Michael S. Sinha & Aaron S. Kesselheim, *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL'Y REV. 463, 470 (2017); Purdue Pharma L.P. v. Endo Pharm. Inc., 438 F.3d 1123, 1131 (Fed. Cir. 2006).

50. *See* Sarpatwari et al., *supra* note 49, at 471.

51. Van Zee, *supra* note 48, at 221–22.

52. *Id.* at 223.

53. *Id.*

54. *See id.* at 221; Harriet Ryan, Lisa Girion & Scott Glover, *'You Want a Description of Hell?' OxyContin's 12-Hour Problem*, L.A. TIMES (May 5, 2016), https://www.latimes.com/projects/oxycontin-part1.

55. Ryan et al., *supra* note 54; Sarpatwari et al., *supra* note 49, at 468–70; Van Zee, *supra* note 48, at 223.

56. *See* Van Zee, *supra* note 48, at 221.

57. Theodore J. Cicero, James A. Inciardi & Alvaro Muñoz, *Trends in Abuse of OxyContin® and Other Opioid Analgesics in the United States: 2002–2004*, 6 J. PAIN 662, 662 (2005).

58. MACY, *supra* note 24, at 32.

doctors increased sixty-four percent between 1996 and 2000, reaching a total of $4 billion annually.[59]

Corporate opioid-related misconduct has been the subject of high-profile litigation. In 2007, Purdue and three of its executives settled criminal and civil charges for $634.5 million.[60] As part of the settlement, Purdue admitted to downplaying OxyContin's risks in its marketing.[61] Purdue remains under investigation for suspected failure to properly monitor opioid sales and report doctors illegally prescribing opioids.[62] Insys Therapeutics admitted to bribing doctors,[63] and its founder was sentenced to 66 months in prison.[64] McKesson settled with the Department of Justice for $13 million for failure to report suspicious sales of opioids, and then settled again for $150 million after failing to adhere to its own remedial program.[65] Purdue bribed an electronic health records company called Practice Fusion, Inc. to create software that nudged doctors to prescribe more opioids; Practice Fusion settled with the Department of Justice for $145 million.[66] Johnson & Johnson suffered a $465 million judgment

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59. *Id.*

60. Sara Randazzo, *Purdue Pharma in Talks with Justice Department to Resolve Criminal, Civil Probes*, WALL ST. J. (Sept. 6, 2019, 1:50 PM), https://www.wsj.com/articles/purdue-pharma-in-talks-with-justice-department-to-resolve-criminal-civil-probes-11567792243.

61. Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html.

62. *Id.*

63. Gabrielle Emanuel, *Opioid-Maker Insys Admits to Bribing Doctors, Agrees to Pay $225 Million Settlement*, NPR (June 5, 2019, 10:12 PM), https://www.npr.org/2019/06/05/730173846/opioid-maker-insys-admits-to-bribing-doctors-agrees-to-pay-225-million-settlemen ("[T]he drugmaker admitted orchestrating a nationwide scheme in which it set up a sham 'speaker program.' Participating doctors were not paid to give speeches, but to write prescriptions of Insys Therapeutics' fentanyl-based medication, Subsys.").

64. Tim McLaughlin, *Insys Founder Kapoor Sentenced to 66 months in Prison for Opioid Scheme*, REUTERS (Jan. 23, 2020, 7:42 AM), https://www.reuters.com/article/us-insys-opioids/insys-founder-kapoor-sentenced-to-66-months-in-prison-for-opioid-scheme-idUSKBN1ZM1QB.

65. *McKesson Corporation Agrees to Pay More than $13 Million to Settle Claims that it Failed to Report Suspicious Sales of Prescription Medications*, U.S. DEP'T JUST. (May 2, 2008), https://www.justice.gov/archive/opa/pr/2008/May/08-opa-374.html; *McKesson Agrees to Pay Record $150 Million Settlement for Failure to Report Suspicious Orders of Pharmaceutical Drugs*, U.S. DEP'T JUST. (May 2, 2008), https://www.justice.gov/opa/pr/mckesson-agrees-pay-record-150-million-settlement-failure-report-suspicious-orders.

66. *Electronic Health Records Vendor to Pay $145 Million to Resolve Criminal and Civil Investigations*, U.S. DEP'T JUST. (Jan. 27, 2020), https://www.justice.gov/

after thirty-three days of trial in Oklahoma; state Judge Thad Balkman concluded the company engaged in "false, misleading, and dangerous" marketing that "caused exponentially increasing rates of addiction" in the state.[67] Judge Balkman also determined that Johnson & Johnson intentionally obstructed public health regulations of opioids.[68] This and other misconduct was essential to the establishment of the opioid epidemic.[69]

The consequences of this conduct were a year-over-year rise in opioid sales, addiction, and overdose deaths.[70] Medical opioid use (in grams) increased 1,448% from 1996 to 2011,[71] and drug overdose deaths increased 417% between 1999 and 2017.[72] Americans of all socioeconomic classes are at risk of opioid addiction.[73] About 130 Americans die every day from opioid misuse.[74] Experts in the field have labeled opioids as the "juggernaut" of public health

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opa/pr/electronic-health-records-vendor-pay-145-million-resolve-criminal-and-civil-investigations-0; Mike Spector & Tom Hals, *Exclusive: OxyContin maker Purdue is 'Pharma Co X' in U.S. opioid kickback probe – sources*, REUTERS (Jan. 28, 2020), https://www.reuters.com/article/us-purdue-pharma-investigation-opioids-e/exclusive-oxycontin-maker-purdue-is-pharma-co-x-in-us-opioid-kickback-probe-sources-idUSKBN1ZR2RY.

67. State *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *2, *37–38, *44, *61 (Okla. Dist. Aug. 26, 2019), *rev'd*, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021); Lenny Bernstein, *Oklahoma Judge Lowers Johnson & Johnson Payment in Opioid Verdict*, WASH. POST (Nov. 15, 2019), https://www.washingtonpost.com/health/oklahoma-judge-lowers-johnson-and-johnson-payment-in-opioid-verdict/2019/11/15/e5b8fce2-07d4-11ea-818c-fcc65139e8c2_story.html. Although the Supreme Court of Oklahoma held that public nuisance law was an inappropriate fit for Oklahoma's opioid claims, it did not address many of the troubling factual findings of the district court.

68. State *ex rel.* Hunter, 2019 Okla. Dist. LEXIS 3486, at *24.

69. *See* Haffajee & Mello, *supra* note 15, at 2302–03 (cataloging many of the allegations and resulting settlements).

70. NAT'L ACADEMIES OF SCI., ENG'G, AND MED., PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE 51 (Richard J. Bonnie et al. eds., 2017); Nat'l Inst. on Drug Abuse, *Overdose Death Rates*, NAT'L INST. OF HEALTH (Jan. 20 2022), https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates.

71. Sairam Atluri, Gururau Sudarshan & Lexmaiah Manchikanti, *Assessment of the Trends in Medical Use and Misuse of Opioid Analgesics from 2004 to 2011*, 17 PAIN PHYSICIAN E119, E119 (2014).

72. *See* Nat'l Inst. on Drug Abuse, *supra* note 70. Most drug overdose deaths are opioid-related.

73. Hodge et al., *supra* note 12, at 482.

74. *Id.* at 482–83.

emergencies.[75]

Today, some commentators argue the prescription opioid component of the epidemic has waned, and other types of opioids (i.e., illicit heroin and fentanyl) now drive the epidemic.[76] While this carries some truth, prescription opioids are still involved in about 30% of opioid-related deaths.[77] Furthermore, prescription opioid misuse remains remarkably common. In 2017, 4.1% of the U.S. population (over twelve years of age) misused a prescription opioid, and 0.7% of the U.S. population initiated prescription opioid misuse.[78] Prescription opioids, therefore, remain a strong locus of misuse. It is also well known that those who use illicit opioids generally started with prescription opioids.[79]

The opioid crisis has taken many lives, foisted disability on millions, and irreparably torn families apart. As of 2018, 71% of Americans say that opioid addiction is a "very serious" problem.[80] In

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75. *Id.* at 483.

76. *See* Hodge, *supra* note 12, at 488–89; Nabarun Dasgupta, Leo Beletsky & Daniel Ciccarone, *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 182–83 (2018); *cf.* Purcell, *supra* note 15, at 142–43.

77. *See Prescription Opioid Overdose Death Maps*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 24, 2021), https://www.cdc.gov/drugoverdose/data/prescribing/overdose-death-maps.html.

78. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 46, at 18–19.

79. Cicero & Ellis, *supra* note 48, at 263; Michael Fendrich & Jessica Becker, *Prior Prescription Opioid Misuse in a Cohort of Heroin Users in a Treatment Study*, 8 ADDICTIVE BEHAVS. REPS. 8, 8 (2018) ("[R]esearch suggests that many heroin users started with opioid-related pain medications and then, once they became dependent, transitioned to heroin, which is less expensive, more accessible, and more potent."); Haffajee & Mello, *supra* note 15, at 2301 ("[T]he majority of persons with opioid addiction started with prescribed painkillers."); Christopher M. Jones, *Heroin Use and Heroin Use Risk Behaviors Among Nonmedical Users of Prescription Opioid Pain Relievers—United States, 2002–2004 and 2008–2010*, 132 DRUG & ALCOHOL DEPENDENCE 95, 95 (2013) (finding that in 2008–10, people who frequently misused prescription opioids had more than four times the risk of injecting heroin, and 82.6% of people who frequently misused prescription opioids and used heroin in the past year reported initiating prescription opioid misuse first); Laura B. Monico & Shannon Gwin Mitchell, *Patient Perspectives of Transitioning from Prescription Opioids to Heroin and the Role of Route of Administration*, 13 SUBSTANCE ABUSE TREATMENT, PREVENTION, & POL'Y 4 (finding a "remarkably high" correlation between heroin abuse and non-medical use of prescription opioids); Kyle Simon et al., *Abuse-Deterrent Formulations: Transitioning the Pharmaceutical Market to Improve Public Health and Safety*, 6 THERAPEUTIC ADVANCES IN DRUG SAFETY 67, 69 (2015) ("[M]any people who abuse substances have switched from prescription drugs to illicit drugs, particularly heroin .... This progression may have occurred because heroin is cheaper and easier to obtain in some locations.") (citations omitted).

80. Jennifer De Pinto et al., *Opioid Addiction in U.S.: 7 in 10 Say It's a Very*

addition, 57% of Americans believe that pharmaceutical companies should be held accountable for contributing to the opioid crisis.[81]

B. The Opioid Litigation

The initial wave of opioid litigation began in the early 2000s and mostly involved Purdue Pharma's OxyContin, as well as several high-prescribing doctors.[82] Claims were varied, requested unambitious damages, and largely failed, arguably due to the blaming of individual victims.[83] The major success of the first wave was a $634.5 million criminal settlement between the Department of Justice and Purdue.[84]

The modern wave of the opioid litigation began in 2014 when the opioid epidemic became nationally recognized.[85] Almost every state has brought suit.[86] Local governments, fearful they might be left out of settlement or judgment funds as they were in the big tobacco settlement, have joined the fray.[87] The defendants in the new wave of litigation include manufacturers, distributors, and pharmacies, as well as some physicians.[88] Most claims are predicated on false and misleading opioid marketing or failure to monitor or report suspiciously high sales.[89] Common claims include fraud, negligence, unjust enrichment, public nuisance, and several causes of action under consumer protection statutes and the Racketeer Influenced and Corrupt Organizations (RICO) statute.[90]

In 2017, the Judicial Panel on Multidistrict Litigation (JPML)

Serious Problem—CBS News Poll, CBS NEWS (May 8, 2018, 7:00 AM), https://www.cbsnews.com/news/opioid-addiction-in-u-s-7-in-10-say-its-a-very-serious-problem-cbs-news-poll.

81. *See* Mann, *supra* note 7.

82. *See* Gluck et al., *supra* note 15, at 353.

83. *Id.*

84. Randazzo, *supra* note 60. Funds went mostly to law enforcement and Medicaid programs, rather than public health. Associated Press, *Purdue Pharma, Execs to Pay $634.5 Million Fine in OxyContin Case*, CNBC (Aug. 5, 2010, 4:38 PM), https://www.cnbc.com/id/18591525.

85. Gluck et al., *supra* note 15, at 354.

86. Joanna Walters, *Purdue Pharma: Oxycontin Maker Faces Lawsuits from Nearly Every US State*, GUARDIAN (June 4, 2019, 1:00 PM), https://www.theguardian.com/us-news/2019/jun/03/purdue-opioids-lawsuit-oxycontin-california-maine-hawaii.

87. Gluck et al., *supra* note 15, at 355.

88. *Id.* at 354.

89. Terry, *supra* note 13, at 639.

90. Haffajee & Abrams, *supra* note 12, at 707–08.

consolidated sixty-four cases in the Northern District of Ohio,[91] which soon grew to more than 2,000.[92] Bellwether trials have moved slowly. In 2019, the first two bellwether trials, which would have addressed claims by Summit and Cuyahoga Counties in Ohio against pharmaceutical companies, were avoided by settlements whose total value exceeded $300 million.[93] A mid-2021 trial by two West Virginia counties against opioid distributors awaits a verdict.[94] Finally, in late 2021, an Ohio federal jury found that the pharmacies CVS, Walgreens, and Walmart distributed massive quantities of pain pills in a reckless manner.[95] The JPML has remanded several other lawsuits,[96] although most remain consolidated.

The presiding Judge Daniel Aaron Polster has expressed his desire to quickly settle the litigation.[97] This desire appears animated by the belief that quick monetary relief would best mitigate the opioid crisis.[98] To this end, in September 2019, he oversaw the deployment of a new settlement device called the "negotiation class"—a nationwide class comprising every municipality in the United

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91. *See In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1376, 1378 (J.P.M.L. 2017); Eric Heisig, *Cleveland Federal Judge to Hear Dozens of Lawsuits Filed Against Big Pharma Nationwide*, CLEVELAND.COM (Jan. 11, 2019, 2:27 PM), https://www.cleveland.com/court-justice/2017/12/cleveland_federal_judge_to_hea_1.html.

92. Colin Dwyer, *Your Guide to the Massive (and Massively Complex) Opioid Litigation*, NPR (Oct. 24, 2019, 3:30 PM), https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation.

93. Eric Heisig, *Cuyahoga, Summit Counties Received Millions of Dollars Through Opioid Litigation. See the Breakdown of the Settlements*, CLEVELAND.COM (Oct. 23, 2019, 2:03 PM), https://www.cleveland.com/court-justice/2019/10/cuyahoga-summit-counties-received-millions-of-dollars-through-opioid-litigation-see-the-breakdown.html.

94. John Raby, *Trial Against Opioid Distributors Wraps up in West Virginia*, AP NEWS (July 28, 2021), https://apnews.com/article/business-health-trials-west-virginia-opioids-ae42f4a717ecaa7c1aadc03211695268.

95. John Seewer, *Jury Holds Pharmacies Responsible for Role in Opioid Crisis*, ABC NEWS (Nov. 23, 2021, 5:56 PM), https://abcnews.go.com/Business/wireStory/jury-holds-pharmacies-responsible-role-opioid-crisis-81356081.

96. *See* Ken Miller, *Two Federal Opioid Lawsuits Go Back to Oklahoma, California*, AP NEWS (Feb. 10, 2020), https://apnews.com/32057372facdaf8446664182d2d4bda3; Jeff Jenkins, *Trial Date Set in Cabell-Huntington Opioid Trial; Parties Disagree on Discovery Issues*, METRONEWS (Mar. 5, 2020, 3:30 PM), http://wvmetronews.com/2020/03/05/trial-date-set-in-cabell-huntington-opioid-trial-parties-disagree-on-discovery-issues.

97. Transcript of Proceedings at 4, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, No. 1:17-CV-2804 (N.D. Ohio Jan. 9, 2018), ECF No. 58.

98. *Id.* at 12–13; Transcript of Status Conference Proceedings at 25, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, No. 1:17-md-2804 (N.D. Ohio Aug. 2, 2018).

States.[99] The negotiation class was designed to allow coordinated negotiation by all cities and counties, thereby providing defendants an opportunity to settle with tens of thousands of plaintiffs at once in order to obtain global peace.[100] The negotiation class could not litigate, as the claims and issues are certified only for settlement.[101] Several opioid companies and six objecting cities challenged the negotiation class, and the Sixth Circuit held it exceeded the scope of Rule 23.[102] It is possible the negotiation class will be revived during en banc review.[103]

Despite the creation of a negotiation class and substantial efforts dedicated toward negotiation, many litigants have been unable to arrive at a global settlement. However, as the litigation has dragged on and states and municipalities were desperate for funds, several companies were able to achieve large settlements resolving most claims against them. Johnson & Johnson and three distributors recently reached a $26 billion settlement involving almost all states and about 90% of municipalities.[104] Purdue reached a $4.5 billion settlement in bankruptcy court, but Judge Colleen McMahon in New York overturned the settlement because it released the Sackler family (who were not themselves declaring bankruptcy) from future liability without statutory basis.[105]

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99. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. (forthcoming 2020).

100. *See* Order Certifying Negotiation Class and Approving Notice at 1–3, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, No. 1:17-md-2804 (N.D. Ohio Sept. 11, 2019).

101. Memorandum Opinion Certifying Negotiation Class at 32, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, No. 1:17-MD-2804 (N.D. Ohio Sept. 11, 2019) ("In reaching these conclusions, the Court makes clear that it has not certified these claims or issues for trial.").

102. City of North Royalton v. McKesson Corp, 976 F.3d 664, 667, 675–76 (6th Cir. 2020).

103. *See* Petition for Rehearing En Banc at 2–3, *In re* Nat'l Prescription Opiate Litig., Nos. 19-4097/
19-4099 (6th Cir. Oct. 8, 2020).

104. Geoff Mulvihill, *J&J, distributors finalize $26B landmark opioid settlement*, AP NEWS (Feb. 25, 2022), https://apnews.com/article/coronavirus-pandemic-business-health-opioids-camden-dec0982c4c40ad08b2b30b725471e000; Nate Raymond, *Most U.S. local governments opt to join $26 bln opioid settlement*, REUTERS (Jan. 26, 2022), https://www.reuters.com/world/us/most-us-local-governments-opt-join-26-bln-opioid-settlement-2022-01-26.

105. *See* Brendan Pierson, Mike Spector & Maria Chutchian, *U.S. judge tosses*

II. MAXIMIZING PUBLIC HEALTH IN THE OPIOID LITIGATION

This Part, drawing from a growing literature on the litigation's public health goals,[106] will add several important considerations for maximizing public health impact. Accountability should be front and center. To author's knowledge, this paper is unique in making the case for prioritizing accountability in litigation involving the mass loss of life. This article will then touch on other public health considerations, including using litigation proceeds and pursuing other substantive public health provisions, such as transparency and marketing restrictions.

This Part assumes that consideration of public health is both permitted and required in the opioid litigation. While this conclusion is readily apparent for some readers, the companion article offers a thorough explication.[107]

A. Methodology

This article will emphasize what rational humans would choose behind a Rawlsian "veil of ignorance" before they knew which life they would inhabit.[108] Rather than take any stakeholder's perspective, it will take an overarching view, consistent with public health's goal of improving health for everyone. Courts tend to pass over this perspective in favor of the interests of identified litigants.[109] For example, Judge Polster has expressed a desire to settle quickly and "expedite relief" to plaintiffs,[110] which suggests prioritization of financial beneficiaries of the litigation over other possible priorities. A truly public health-maximizing regime would reduce the scope and frequency of accidents, not just address accidents as they come.[111]

$4.5 bln deal shielding Sacklers from opioid lawsuits, REUTERS (Dec. 17, 2021, 5:27 A.M.), https://www.reuters.com/business/judge-tosses-deal-shielding-purdues-sackler-family-opioid-claims-2021-12-17; Decision and Order on Appeal at 4–7, *In re* Purdue Pharma, No. 21-cv-7532 (S.D.N.Y. Dec. 16, 2021), ECF No. 280 (holding that the Bankruptcy Code "does not authorize . . . non-consensual non-debtor releases"). Purdue has appealed. Notice of Appeal, *In re* Purdue Pharma, No. 21-cv-07532-CM (S.D.N.Y. Jan. 16, 2022), ECF No 310.

106. *See supra* note 15.

107. Aaron, *supra* note 1, at 11.

108. *See* JOHN RAWLS, A THEORY OF JUSTICE 11 (rev. ed. 1999); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 840 (2002).

109. Rosenberg, *supra* note 108, at 841.

110. *See* Memorandum Opinion Certifying Negotiation Class, *supra* note 101, at 2.

111. Rosenberg, *supra* note 108, at 843.

B. Accountability

On August 2, 2019, parents and families gathered outside a Boston courthouse holding placards showing the children they had lost to drug overdose.[112] As a hearing proceeded against Purdue Pharma, families of the deceased wanted to convey a message. As one parent said, "[Purdue] need[s] to see the families . . .They need to be held *accountable* for the deaths of our children."[113] About 57% of Americans think opioid companies should be held accountable for fueling the opioid crisis.[114]

Despite the popular desire for accountability, several commentators have noted that MDL in general, and the opioid litigation in particular, have been dedicated to obtaining rapid monetary settlement.[115] Judge Polster is not shy about his goal of settling the case:

> Since we're losing more than 50,000 of our citizens every year, about 150 Americans are going to die today, just today, while we're meeting . . . I don't think anyone in this country is interested in a whole lot of finger-pointing at this point, and I'm not either. People aren't interested in depositions, and discovery, and trials. . . . [M]y objective is to do something meaningful to abate this crisis and to do it in 2018.[116]

The logic is that a faster settlement will provide faster relief with the potential to save lives. Judge Polster's efforts to facilitate trials or to secure broader public health goals than money have been comparatively half-hearted.[117] The initial "litigation track" was so

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112. Philip Marcelo, *Families Say Purdue Pharma Must Be 'Held Accountable'*, AP NEWS (Aug. 2, 2019), https://apnews.com/92641576a74b43569b72fbf53dbfe730.

113. *Id.* (emphasis added).

114. *See* Mann, *supra* note 7.

115. *See, e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 27 (2019); Aaron, *supra* note 1, at 11; Ausness, *supra* note 15, at 566; Erichson, *supra* note 15, at 1289; Howard M. Erichson, *Settlement in the Absence of Anticipated Adjudication*, 85 FORDHAM L. REV. 2017, 2025 (2017); Haffajee, *supra* note 15, at 284; Haffajee & Abrams, *supra* note 12, at 708; Oliva, *supra* note 15, at 673.

116. Transcript of Proceedings, *supra* note 97, at 4.

117. Aaron, *supra* note 1, at 69–73. For an explanation of why rapid settlement may be misaligned with public health, see *id.* at 79–84.

small that the trials were settled for a small slice of defendants' annual corporate revenue, and the pace has been leisurely.[118] The absence of a significant threat of trial almost guarantees that any resulting settlement will not provide for substantial accountability. Of course, we still need to define accountability, but it is probably not satisfied by a settlement voluntarily entered into without the threat of adjudication.

1. What Is Accountability?

Accountability remains a hodgepodge of ideas that have never coalesced into a single definition. Scholars have discussed it in scholarship surrounding police accountability,[119] agency accountability,[120] presidential accountability,[121] judicial accountability,[122] accountability for human rights violations,[123] and corporate criminal accountability.[124]

Accountability can most easily be understood by drawing a comparison with administrative law. Agency accountability has become an extremely popular topic, now discussed in numerous academic articles.[125] The criticisms that administrative agencies

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118. *Id.* at 25. The slow pace may be partially explained by the COVID-19 pandemic. *See, e.g.*, Jeff Overley, *Opioid MDL Bellwether Trial Delayed amid COVID-19 Fears*, LAW630 (Oct. 9, 2020, 4:39 PM), https://www.law360.com/articles/1318581/opioid-mdl-bellwether-trial-delayed-amid-covid-19-fears.

119. Steven Puro, *Federal Responsibility for Police Accountability Through Criminal Prosecution*, 22 ST. LOUIS U. PUB. L. REV. 95, 95 (2003).

120. Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENVER U. L. REV. 1, 1 (2008).

121. Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677, 680 (1999) (arguing for the importance of criminal accountability for a sitting president).

122. *See* O'Connor, *supra* note 118.

123. Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT'L HUM. RTS. 222, 223 (2008).

124. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1790 (2015).

125. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003); Donald Kettl, *Administrative Accountability and the Rule of Law*, 42 POL. SCI. & POL. 11, 11 (2009); Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 610 (2009); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 79 (2017); Susan M. Miller & Alexander I. Ruder, *Holding Agencies Accountable: Exploring the Effect of Oversight on Citizens' Approval of Members of Congress*, J. PUB. POL'Y (2019); Michael Saks, *Holding the Independent*

possess wide discretion subject to little accountability have reached a "fever pitch."[126] As one prominent paper reminds, Americans never elected "largely unaccountable bureaucrats" to make laws.[127] Even staunch defenders of the administrative state admit that agency accountability is a basic building block of government and is constitutionally "embedded."[128] As of 2004, we have a Government Accountability Office, thanks to a name change (from the General Accounting Office).[129] Accountability of agencies is a *hot* topic. This popularity is echoed in a recent Supreme Court case that held the structure of the Consumer Finance Protection Bureau unconstitutional because the agency head, who could only be terminated for cause, was *unaccountable* to the people.[130]

Agency accountability is something that we ensure upfront so that agencies behave properly and in accordance with law. Accountability has three steps:

1. Setting a standard.
2. Monitoring activity for conformity with that standard.
3. Applying sanctions if the standard is not met.[131]

Agencies Accountable: Legislative Veto of Agency Rules, 36 ADMIN. L. REV. 41, 42 (1984); Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 81 (2012); *e.g.*, Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1933 (2018); James E. Swiss, *Holding Agencies Accountable for Efficiency: Learning from Past Failures*, 15 ADMIN. & SOC'Y 75, 76 (1983).

126. Sunstein & Vermeule, *supra* note 125, at 1928; *see also* Metzger, *supra* note 125, at 71 ("Contemporary anti-administrativism's core constitutional attack is that the national administrative state enables the exercise of unaccountable and aggrandized executive power: Unelected bureaucrats wield a combination of de facto legislative, judicial, and executive powers outside of meaningful political or judicial constraint.").

127. *See* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 92 VA. L. REV. 1035, 1037 (2007).

128. *See* Metzger, *supra* note 125, at 79–84.

129. *100 Years of GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, https://www.gao.gov/about/what-gao-is/history (last visited May 17, 2022).

130. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203–04 (2020) ("The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. . . . The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional.").

131. Swiss, *supra* note 125, at 78. Of course, definitions for accountability vary, and accountability may be an undertheorized concept. *See* Nicolas O. Stephanopoulos,

The types of accountability for agencies vary, from democratic accountability (voting out the president), to managerial accountability (hierarchy of employees), to legal accountability.[132] Justice Samuel Alito has written that it is a "vital constitutional principle" that agency officials own up to the consequences of the regulations they produce.[133] In his words: "Liberty requires accountability."[134]

a. Accountability in tort

Tort law is a set of social standards that, if breached, can lead to various types of sanctions, including paying damages.[135] Eminent tort scholars have described tort law as "a law of responsibility" that "defines duties not to injure others" and makes those who breach these duties "vulnerable to being held responsible or *accountable* to the victim through the court system."[136]

Tort law can be seen as a fairly clear instrument of accountability, and yet some academics have dismissed or omitted accountability as a viable goal of the opioid litigation.[137] Professor Nicolas Terry has called out the "strong retributive and deterrent motives" of the litigation, explaining that while they are "understandable," they are ultimately misguided and dangerous.[138] He writes,

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Accountability Claims in Constitutional Law, 112 NW. U. L. REV. 989, 998–99 (2018) (quoting Jane S. Schacter, *Accounting for Accountability in Dynamic Statutory Interpretation and Beyond*, 2 ISSUES IN LEGAL SCHOLARSHIP 2–3 (2002)).

132. Stephanopoulos, *supra* note 131, at 999–1000, 1006.

133. *See* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 56–57 (2015) (Alito, J., concurring).

134. *Id.* at 57. More recently, in *Seila Law*, the Supreme Court reiterated that agency accountability has been a feature of our Constitution "[s]ince 1789." 140 S. Ct. at 2198 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010)).

135. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 17, 17–18 (John Oberdiek ed., 2014)

136. *See id.* (emphasis added).

137. *See, e.g.*, Hodge & Gostin, *supra* note 15, at 435 ("Negotiated settlements must align with highly effective public health priorities. The goal of litigation is not to bankrupt industries that could promote the public's welfare, but rather to motivate and lock-in changes among manufacturers, distributors, and retailers of opioids."); Terry, *supra* note 13, at 660–66 (expressing skepticism of deterrence and opioid marketing restrictions, and framing public health as provision of services rather than opioid regulation).

138. Terry, *supra* note 13, at 649–52; *see also* Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. L. REV. 1765, 1812–14 (2009) (describing and critiquing the argument that tort accountability is vengeful).

> Clearly there are strong retributive and deterrent motives behind the opioid litigation. As the City of Chicago's corporation counsel stated, "We brought suit because we recognized that the companies had to . . . be held *accountable* for their long-term marketing practices that really created this market and fostered a misleading attitude toward these drugs as pain management . . . ."
>
> These motives and related emotions are equally understandable.[139]

The remarks by the Chicago attorney invoke straightforward accountability, yet to Professor Terry, they feel "retributive" and "emotion[al]." To him, accountability for the opioid crisis possesses little social function; instead, it may lead us to forget systemic factors contributing to the opioid crisis.[140] Accountability, then, is not the answer. Professors James Hodge and Lawrence Gostin agree but for different reasons, stating that the goal of litigation is not to "bankrupt" industries that "could promote the public's welfare," but to lock in changes moving forward.[141]

It is important to pause for a second and consider how different this analysis might be in the administrative context. Accountability is a virtue of government, but when a private entity engages in misconduct, accountability is emotional and retributive, even counterproductive. This view is especially surprising in the context of the opioid crisis, in which some defendant corporations skirted obligations under state and federal law, failed to engage honestly with regulators, bribed doctors and medical software companies, committed fraud, and lied to the U.S. Patent and Trademark Office.[142] There is also quite a lot of evidence that the opioid epidemic might not have occurred, or would have been much less severe, with honest and

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139. Terry, *supra* note 13, at 649 (emphasis added).

140. *See id.* at 651–52.

141. Hodge & Gostin, *supra* note 15, at 435. Professors Hodge and Gostin say numerous times in their paper that society must hold opioid companies accountable/responsible, but the only method they provide in doing so is releasing documents that "expose" misbehavior and assigning responsibility through money payments. *See id.* Under the definition of accountability used in this paper, the release of documents or a voluntarily tendered pot of money would probably not constitute sufficient "sanctions" for violation of a standard of conduct to produce accountability.

142. *See supra* Section I.A.

reasonable marketing and compliance with law.[143] According to one expert witness in the opioid litigation, between 45% and 67% of opioid sales from about 1995 to 2018 were due to illegal marketing.[144] Given the importance of private misconduct in creating the modern opioid crisis, the lack of scholarly calls for accountability is quite striking.[145]

The relationship between agency and corporate accountability has an important place in the opioid crisis. Part of some defendants' argumentative strategy is to shift responsibility onto the agencies that approved the opioids in question and regulated their distribution.[146] Numerous opinion pieces have rebuked agency actions contributing to the opioid crisis.[147] The FDA Accountability for Public Safety Act, first introduced in 2015[148] and re-introduced multiple times as recently as 2021,[149] would require FDA to write additional reports and testify before Congress in order to complete approval of

143. *See* Haffajee & Abrams, *supra* note 12, at 735 (noting opioid companies' "liability for public health harms . . . is challenging to dispute given mounting epidemiological evidence and internal evidence of marketing and sales practices"); Kolodny et al., *supra* note 45, at 562–63 (highlighting determined corporate efforts to minimize risks and exaggerate benefits of opioids for pain relief); *supra* Section I.A (offering a description of corporate contributions to opioid crisis and related verdicts, settlements, and criminal sentences).

144. Expert Report of Professor Meredith Rosenthal at 10, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, No. 1:17-MD-2804 (N.D. Ohio July 19, 2019), ECF No. 1899-20 [hereinafter "*Expert Report*"].

145. Some scholars have discussed accountability for opioids, but only as a rhetorical device, and not as a substantive goal of the opioid litigation. *See supra* notes 12–13 and accompanying text.

146. *See* Gluck et al., *supra* note 15, at 357.

147. *See* Lev Facher, *Protesters' Goodbye for Scott Gottlieb: A Supersized Heroin Spoon and Claims FDA Did Too Little on Opioids*, STAT NEWS (Apr. 5, 2019), https://www.statnews.com/2019/04/05/opioid-protest-fda-hhs; John M. Gray, Opinion, *DEA Had the Full Opioid Data, Not the Pharmaceutical Wholesale Distributors*, USA TODAY (Aug. 12, 2019, 7:46 PM), https://www.usatoday.com/story/opinion/2019/08/12/dea-had-full-opioid-data-not-drug-distributors-editorials-debates/1993320001; Chris McGreal, Opinion, *Don't Pin the Opioid Crisis Just on Purdue. The Guilt Runs Wide*, GUARDIAN (Mar. 21, 2019, 6:00 AM), https://www.theguardian.com/commentisfree/2019/mar/21/opioids-crisis-big-pharma-is-undermining-efforts-to-tackle-the-opioids-crisis-and-winning; Bethany McLean, *"We Didn't Cause the Crisis": David Sackler Pleads His Case on the Opioid Epidemic*, VANITY FAIR (June 19, 2019), https://www.vanityfair.com/news/2019/06/david-sackler-pleads-his-case-on-the-opioid-epidemic; Bill Whitaker, *Did the FDA Ignite the Opioid Epidemic?*, CBS NEWS (Feb. 24, 2019, 7:01 PM), https://www.cbsnews.com/news/opioid-epidemic-did-the-fda-ignite-the-crisis-60-minutes.

148. *Manchin Introduces Bill to Hold FDA Accountable for Approving Dangerous, Addictive Drugs*, JOE MANCHIN (Apr. 15, 2015), https://www.manchin.senate.gov/newsroom/press-releases/manchin-introduces-bill-to-hold-fda-accountable-for-approving-dangerous-addictive-drugs.

149. FDA Accountability for Public Safety Act, S. 1439, 117th Cong. (2021).

certain opioids.[150] Are we to hold agencies accountable for their conduct? And if so, why only agencies?

This is not to say agency accountability is unimportant, but to articulate a double standard in the accountability sought from corporations and agencies. Despite agencies being subject to more accountability checks—including to Congress, courts, the president, and the bureaucracy—a corporation is held accountable predominantly through tort law.[151] That is, tort law, arguably, is the system we have set up for corporate accountability.[152] And it can serve a similar function: securing compliance through application of sanctions. Applying accountability sanctions only to administrative agencies threatens to kneecap regulators, thereby freeing regulated industry even further from essential public health regulation. Therefore, the double standard identified here is not merely a rhetorical point, but carries significant implications for the future balance of power between industry and its regulators.

Some scholars would rather move on, given the changing nature of the opioid epidemic. For example, Professor Terry argues that the current opioid epidemic is one of *illicit* opioids and the root cause is the social determinants of health; therefore, the retributive nature of the *prescription* opioid litigation will distract policymakers.[153] Even assuming Professor Terry is right that the epidemic has

150. *Id.* § 2(b).

151. Tort law is an *ex post* sanction and compensation mechanism, including against corporations. On the contrary, congressional property transfers may constitute takings or violate the Ex Post Facto Clause of the Constitution. E. Enters. v. Apfel, 524 U.S. 498, 522–23, 533–36 (1998). Corporate criminal law is another possibility, but corporations cannot go to prison, and damages resulting from corporate criminal cases are more appropriately a function of tort law. Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320–21 (1996). There have been few opioid-related criminal prosecutions of directors and officers. JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 5 (2020). Finally, public scrutiny is a possible avenue for accountability, but the public must know about actions in order to scrutinize them. Tort law is an important mechanism for learning about corporate conduct related to opioids. Oliva, *supra* note 15, at 699.

152. *See* Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 382 (2007).

153. Terry, *supra* note 13, at 653; *see also* Qiushi Chen et al., *Prevention of Prescription Opioid Misuse and Projected Overdose Deaths in the United States*, JAMA NETWORK OPEN, Feb. 1, 2019, at 2 ("[T]he nature of the opioid epidemic has shifted in recent years."); Theodore J. Cicero et al., Correspondence, *Shifting Patterns of Prescription Opioid and Heroin Abuse in the United States*, 373 NEW ENG. J. MED 1789, 1789–90 (2015). For a discussion about the shifting opioid crisis, see *supra* Section I.A.

"morphed"[154]—although there is strong evidence that prescription opioid misuse continues to be a vast problem[155]—one has to wonder how Professor Terry's argument applies to tort law. How large is the window to bring a claim after a social problem arises? Is there any social problem that is purely static? Given the fluid nature of social problems, it is unclear how, under the Terry view, social problems could ever be traced to discrete episodes of misconduct. For a crisis so clearly stemming from corporate misconduct,[156] the interest in tort accountability is at its height.

A couple historical examples reveal the powerful expressive impact of scrutinizing and securing accountability for past conduct (or failing to do so). Rob Bilott's tort litigation against DuPont has drawn immense news coverage nationwide and brought attention to PFOA, a chemical connected to a number of diseases and a constituent of Teflon pans.[157] In 2017, DuPont settled thousands of PFOA lawsuits for $671 million.[158] The six global companies that made PFOA have ceased production.[159] More than 180 countries have agreed to a ban on PFOA's manufacture and use.[160] The tort litigation that held DuPont accountable was chronicled in the popular film *Dark Waters*.[161] On the contrary, non-accountability can create an opposite expressive effect. In the wake of the 2008 financial crisis, the mantra "Too Big to Fail" summarized the government's willingness to protect corporations that precipitated a financial crisis.[162] And police profiling of and violence against Black, Indigenous, and People of Color (BIPOC) has flourished amid the failure to hold officers

154. Terry, *supra* note 13, at 651.

155. *See supra* Section I.A.

156. *See supra* Section I.A.

157. *See, e.g.*, Nathaniel Rich, *The Lawyer Who Became DuPont's Worst Nightmare*, N.Y. TIMES (Jan. 6, 2016), https://www.nytimes.com/2016/01/10/magazine/the-lawyer-who-became-duponts-worst-nightmare.html.

158. Arathy S. Nair, *DuPont Settles Lawsuits Over Leak of Chemical Used to Make Teflon*, REUTERS (Feb. 13, 2017, 6:49 AM), https://www.reuters.com/article/us-dupont-lawsuit-west-virginia-idUSKBN15S18U.

159. *See Fact Sheet: 2010/2015 PFOA Stewardship Program*, EPA, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-20102015-pfoa-stewardship-program#meet (last visited May 17, 2022); Rich, *supra* note 157.

160. Cheryl Hogue, *Governments Endorse Global PFOA Ban, with Some Exemptions*, CHEMICAL & ENG. NEWS (May 6, 2019), https://cen.acs.org/environment/persistent-pollutants/Governments-endorse-global-PFOA-ban/97/web/2019/05.

161. DARK WATERS (Participant & Killer Films 2019).

162. *See* Matt Phillips, *Too Big to Fail: The Entire Private Sector*, N.Y. TIMES (May 19, 2020), https://www.nytimes.com/2020/05/19/business/too-big-to-fail-wall-street-businesses.html.

accountable.[163]

Despite accountability's focus on past conduct, the resulting sanctions hold a potent future effect. This claim is obvious from the standpoint of agency accountability given its standing as a "hallmark of modern democratic governance."[164] In essence, agency accountability holds authority figures responsible for their decisions, policies, and spending,[165] serving to reign in governmental actors whose interests are misaligned with the people's.[166] Accountability ensures active deliberation of agencies in making decisions and fosters continuity and stability in agency policymaking.[167] Accountability, by reviewing past conduct, ensures that agencies are properly constrained and carry out their duties with sufficient process and sound reasoning.

But accountability has future impact on other actors, too.[168] In particular, tort liability, by attaching consequences to particular acts, disincentivizes risky conduct.[169] Professor Andrew Popper has written that these incentives changes serve an "essential purpose" of tort law: making society safer.[170] The use of tort law to shape *ex ante* incentives and reduce the frequency and costs of accidents was described in Judge Guido Calabresi's classic work *The Costs of Accidents*.[171]

And while agencies are subject to internal checks,[172] modern

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163. *See* Jonathan Witmer-Rich, *Arbitrary Law Enforcement is Unreasonable: Whren's Failure to Hold Police Accountable for Traffic Enforcement Policies*, 66 CASE W. RSRV. L. REV. 1059, 1060–61 (2016); Rashawn Ray, *How Can We Enhance Police Accountability in the United States?*, BROOKINGS (Aug. 25, 2020), https://www.brookings.edu/policy2020/votervital/how-can-we-enhance-police-accountability-in-the-united-states.

164. Shkabatur, *supra* note 125, at 82 (quoting Mark Bovens, *Public Accountability*, *in* THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182, 182 (Ewan Ferlie, Laurence E. Lynn & Christopher Pollitt eds., 2007)).

165. *Id.* (quoting Bovens, *supra* note 164, at 182).

166. *See id.* (quoting Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 54 UCLA L. REV. 909, 917 (2006)).

167. Metzger, *supra* note 125, at 83.

168. *See, e.g.*, Hanson et al., *supra* note 17, at 241 ("Laws, by attaching consequences to actions, can alter people's incentives and behaviors."); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1064–66 (2001) (describing accountability as generally affecting decision-making process).

169. *See supra* note 17.

170. Popper, *supra* note 17, at 190.

171. *See* Benforado & Hanson, *supra* note 17, at 49–50 (quoting CALABRESI, *supra* note 17, at 24, 156).

172. Metzger, *supra* note 125, at 83–84.

corporate law scholarship has, until recently, framed corporations as profit-driven entities,[173] making internal accountability less likely. That leaves a larger role for tort law in securing corporate oversight and responsibility to the public. The main thrust of *ex post* regulation is pressing regulated entities to examine the risks inherent in their own products, forecast liability, and take affirmative steps to mitigate risk.[174]

For example, accountability was vocalized as an important goal of the tobacco litigation, but under a different name: *ex post* incentive-based regulation.[175] Professors Jon Hanson and Kyle Logue wrote a 200-page article explaining why this type of regulation is superior to other types.[176] And yet, as they point out, proposed tobacco settlements contained no provisions of this sort.[177] Rather, the final "Master Settlement Agreement" (MSA) provided mostly command-and-control regulations: limit cigarette advertisements; ban certain cartoon characters associated with smoking; prohibit "branded" merchandise; limit tobacco sponsorship; dissolve trade organizations.[178] The two professors believed this type of restriction would simply provide a temporary "illusion of regulation," and tobacco companies would quickly evade these hurdles and continue in their efforts to deceive consumers.[179] Instead, they argued, public health requires a "fundamental transformation in the industry mindset."[180] Rather than address the symptoms, the goal should be to strike the disease and produce a permanent change in a malfunctioning market.[181] This change could be achieved by allowing victims to initiate proceedings to recover money for harms suffered from the particular brand of cigarettes that victim smoked; that is, the fates of cigarette manufacturers and consumers could be "bonded."[182] Before bonding, tobacco companies would be incentivized to produce the most

173. *E.g.*, Joseph L. Bower & Lynn S. Paine, *The Error at the Heart of Corporate Leadership*, 95 HARV. BUS. REV. 50, 52–53 (2017); Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), at 32.

174. Logue, *supra* note 17, at 108.

175. Hanson & Logue, *supra* note 18.

176. *Id.*

177. *Id.* at 1352.

178. Walter J. Jones & Gerard A. Silvestri, Commentary, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later: Lessons for Physicians About Health Policy Making*, 137 CHEST 692, 698 (2010).

179. Hanson & Logue, *supra* note 18, at 1347–49.

180. *Id.* at 1347.

181. *See id.* at 1179.

182. *See id.* at 1274.

addicting and appealing cigarette, regardless of harm.[183] After bonding, they would seek to minimize harm (and addiction could be stipulated to be a harm).[184] *Ex post* incentive-based liability, the professors argued, could generate large market changes.[185] However, such a regime was not implemented.[186] Tobacco companies remain determined to increase smoking in the U.S; according to 2019 data, they collectively spend $22.5 million each *day* on promotion.[187] Cigarettes take 480,000 Americans to the grave each year.[188] Far from producing a tectonic shift in industry practice, the MSA spurred innovation in tobacco marketing that allowed aggressive promotion and unnecessary deaths to continue.

One could easily envision accountability as a useful regulatory tool for the opioid epidemic. Much like other commercial products, prescription drugs are susceptible to the profit incentive. As sales increase, so, too, does the manufacturer's revenue. And pharmaceutical promotion directly increases opioid sales.[189] In the early years of the opioid epidemic, Purdue used illegal marketing to drive up OxyContin sales, and its revenue grew from $48 million in 1996 to $1.1 billion in 2000.[190] The incentive to promote opioids is even larger given some patients will inevitably become dependent, thus providing a larger return-on-investment. And there are few internal corporate guardrails, save ethics and morality. As mentioned, many scholars have argued that corporations are for-profit entities that should not concern themselves with their greater responsibility to the public.[191] Therefore, a fairly unbridled incentive drives opioid companies toward aggressive promotion.[192]

Even the most responsible patient-physician dyad might not protect against excess prescribing. A typical patient does not have the

183. *Id.*

184. *Id.*

185. *Id.* at 1179.

186. *See* Jones & Silvestri, *supra* note 178, at 698.

187. *Tobacco Industry Marketing*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 14, 2021), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/marketing/index.htm.

188. *Tobacco-Related Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 28, 2020), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm.

189. *Expert Report*, *supra* note 144, at 9.

190. *See* Van Zee, *supra* note 48, at 221.

191. *See supra* note 171 and accompanying text.

192. *See* Mariano-Florentino Cuéllar & Keith Humphreys, *The Political Economy of the Opioid Epidemic*, 38 YALE L. & POL'Y REV. 1, 1 (2019).

medical expertise to determine when prescribing of an opioid is appropriate. Instead, a patient relies on a physician's expertise. Opioid companies hold substantial sway over medical practice.[193] Part of that sway was used to downplay the risks of opioids to physicians.[194] In the wake of the opioid crisis, many physicians have recognized the medical establishment's failure to appreciate the true risks of opioids.[195] The misinformation at play with regard to opioids may compromise the ability of patients and physicians to weigh the risks and benefits of opioid prescribing. Future health cost, then, may insufficiently factor into opioid prescribing decisions. Nor does a typical patient, on being prescribed an opioid, need to worry about the financial cost. Most Americans, as of 2018, are covered by health

193. *See* Kolodny et al., *supra* note 45, at 562–63; Scott E. Hadland et al., *Association of Pharmaceutical Industry Marketing of Opioid Products With Mortality From Opioid-Related Overdoses*, JAMA NETWORK OPEN, Jan. 18, 2019, at 1 ("In this study, across US counties, marketing of opioid products to physicians was associated with increased opioid prescribing and, subsequently, with elevated mortality from overdoses."); Van Zee, *supra* note 48, at 221 ("OxyContin's commercial success did not depend on the merits of the drug compared with other available opioid preparations. . . . Purdue pursued an 'aggressive' campaign to promote the use of opioids in general and OxyContin in particular."); *supra* Section I.A.

194. Kolodny et al., *supra* note 45, at 562–63; Van Zee, *supra* note 48, at 223.

195. *See, e.g.*, Kolodny et al., *supra* note 45, at 563. Martin A. Makary and other physicians noted:

> Many doctors have started, or have had the wisdom all along, to prescribe opioids judiciously. These physicians recognise the drugs' addictive potential and reserve them for their true indications: terminal cancer, second degree burns, and major surgery, for example. Sadly, however, a consumerist mentality of patient satisfaction and pain-free expectations has swept through medicine, resulting in opioids being prescribed for soft indications such as simple procedures, back pain, and chronic joint pain rather than reserving them for persistent pain despite optimal non-narcotic treatments.

Martin A. Makary et al., *Overprescribing is Major Contributor to Opioid Crisis*, BMJ, Oct. 19, 2017, at 2. Teresa A. Rummans and others similarly found:

> Over the past 30 years, the intentions to address and control pain and to have patients directly involved in their care were well-meaning, but the measures taken to achieve these goals contributed to the opioid crisis. Pain is not an opioid-deficient condition but a human, multidimensional disorder often involving more than just physical pain.

Teresa A. Rummans et al., *How Good Intentions Contributed to Bad Outcomes: The Opioid Crisis*, 93 MAYO CLINIC PROC. 344, 349 (2017).

insurance, which almost always covers opioids.[196] Therefore, most patients seeking treatment may justifiably rely on a physician's expertise and need not worry about paying for the resulting prescription.

Opioid markets, then, contain moral hazard[197] as well as incomplete information. The prospect of quick and safe pain relief on the insurance company's dime may supersede a patient's knowledge and appreciation of long-term costs. One can immediately see this market is ripe for exploitation.

Despite some scholarly claims that compensatory relief could mitigate this market failure by "deter[ring]" opioid company misconduct,[198] such an outcome is unlikely. Compensation would have to be large to make a meaningful impact on such a lucrative industry. Alternatively, compensatory relief could, in theory, marginally increase the price of opioids and thus reduce future use. But health insurance already covers this cost for most patients. It is possible a health insurer could alter its formulary to de-prioritize higher-cost opioids.[199] But an insurer would not shift reimbursement toward non-opioid treatments such as physical therapy, as opioids are generally cheaper, and therefore almost "universally" covered by insurance.[200] Furthermore, once approved, pharmaceuticals are cheap to produce,[201] so a "litigation tax" on opioids would likely not stop them from being profitable. According to Professors Aaron Kesselheim, Jerry Avorn, and Ameet Sarpatwari, "Prescription drugs are priced in the United States primarily on the basis of what the market will bear."[202] If this is true, then lucrative opioid drugs such as OxyContin will be priced in a way that maximizes revenue regardless of

196. *See* D. Andrew Tompkins et al., *Providing Chronic Pain Management in the "Fifth Vital Sign" Era: Historical and Treatment Perspectives on a Modern-Day Medical Dilemma*, 173 DRUG & ALCOHOL DEPENDENCE S11, S19 (2017); Edward R. Berchick, Jessica C. Barnett & Rachel D. Upton, *Health Insurance Coverage in the United States: 2018*, U.S. CENSUS BUREAU (Nov. 8, 2019), https://www.census.gov/library/publications/2019/demo/p60-267.html.

197. *Expert Report*, *supra* note 144, at 16.

198. *See, e.g.*, Gluck et al., *supra* note 15, at 352.

199. *See, e.g.*, Shih-Yin Chen et al., *Moving Branded Statins to Lowest Copay Tier Improves Patient Adherence*, 20 J. MANAGED CARE PHARMACY 34, 34 (2014) (finding formulary tier is a lever to adjust a drug's use).

200. Tompkins et al., *supra* note 196, at S19.

201. Fiona Scott Morton & Margaret Kyle, *Markets for Pharmaceutical Products*, *in* 2 HANDBOOK OF HEALTH ECONOMICS 772 (Mark V. Pauly et al. eds., 2011).

202. Aaron S. Kesselheim et al., *The High Cost of Prescription Drugs in the United States: Origins and Prospects for Reform*, 316 JAMA 858, 858 (2016).

compensatory relief—exactly the same way[203]—and opioid companies will face similar incentives to market aggressively. Unless compensatory relief is so significant as to substantially cut into profits of insurers or manufacturers, a tax may have little effect on the resulting market externality.[204] Although this argument contains several assumptions, the main thrust is that it is no certainty that a small or even moderate monetary settlement could have deterred the opioid epidemic or will deter a similar epidemic. However, accountability may have the potential to do so by explicitly aiming to create sanctions that would have discouraged opioid-related misconduct.

Accountability could bring order to a malfunctioning market. The prevalence of misconduct by so many different companies suggests that illegal marketing was a dominant strategy for the sale of opioids. An *ex post* incentive-based regime that bonds opioid companies to their victims could hold malfeasant companies accountable while rewarding companies that engage in proper conduct. Accountability would benefit "good actors," who risk losing market share to companies that misbehave.[205] Therefore, it is quite possible that accountability could change the dominant sales strategy from one of aggressive marketing to one of cooperation and honesty.

b. Accountability as rule of law

Accountability can be framed not just in terms of incentives, but as fundamental to the rule of law. The rule of law, widely considered a basic building block of democratic governance,[206] requires that "all

203. That is, a pharmaceutical company would predict the quantity sold at a given price, and then price the drug accordingly to maximize revenue and therefore profit. Of course, this argument assumes that revenue is proportional to profit ($R \sim P$). If the "tax" depends on the quantity sold, then companies might change their sales patterns, although this change might not necessarily be significant.

204. *See* COFFEE, JR., *supra* note 151, at 64 (arguing Purdue's continued expansive marketing of OxyContin continued after $600 million settlement because the "penalty here fell way below the expected gain"); Terry, *supra* note 13, at 660 (noting opioid company defendants have been "unfazed by some strong deterrent messages," including hundreds of millions of dollars in penalties and settlements).

205. Professor Coffee has noted that, in the presence of fraudulent or illegal corporate conduct, "good actors" who are struggling to compete often do one of two things: (1) they, too, engage in misconduct in order to compete (the "contagion effect"), or (2) they abandon the market. John C. Coffee Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1565–66 (2006).

206. Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional*

persons, institutions and entities, public and private, including the State itself, are *accountable* to laws that are publicly promulgated, equally enforced and independently adjudicated."[207] One might say there cannot be a rule of law sans accountability to said law.

In the opioid context, there can be no rule of law without serious accountability of opioid companies to the laws that regulate them. These laws include marketing laws, consumer protection laws, public nuisance laws, the Controlled Substances Act, and the Racketeer Influenced and Corrupt Organizations Act. A modest settlement amount hardly guarantees that these legal rules possess significant import. That is, the rule of law holds little influence if parties can engage in profitable conduct, then spend a fraction of the proceeds to resolve litigation. As described by Professor John C. Coffee, Jr., the opioid crisis reflects "persistent intentional misbehavior that flies in the face of government policies and regulations on the apparent premise that the government can be safely disregarded."[208] What Professor Coffee describes, at its core, is a degradation of the rule of law.

Moreover, once a severe harm is done, the rule of law can only be secured *ex post*. Especially if we believe the marketing and distribution of pharmaceuticals in the United States are underregulated on the *ex ante* side,[209] tort liability becomes even more important for accountability and the rule of law; as written by Professor Samuel Issacharoff, "It is precisely the availability of meaningful *ex post* accountability that comes to define much of the

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Democracy, 74 S. CAL. L. REV. 1307, 1307 (2001) (noting rule of law is "cornerstone of contemporary constitutional democracy" (citing Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 3, 3 (Michel Rosenfeld ed., 1994))); *see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) (asserting rule of law, in particular legislative law, holds a "special claim" in democratic government).

207. Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOUS. L. REV. 185, 188 (2019) (emphasis added) (quoting U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004)).

208. COFFEE, JR., *supra* note 151, at 13.

209. *See* Lisa M. Schwartz & Steven Woloshin, *Medical Marketing in the United States, 1997-2016*, 321 JAMA 80, 89 (2019); Joshua Weiss, Note, *Medical Marketing in the United States: A Prescription for Reform*, 79 GEO. WASH. L. REV. 260, 263–65 (2010).

operation of the rule of law in the United States."[210] A failure to achieve accountability *post hoc* weakens the rule of law moving forward. Conversely, if the rule of law is enforced, then companies, which are generally sophisticated parties, will be more inclined to follow the law *ex ante*.

Of course, perhaps this discussion is putting the cart before the horse, as most of the opioid litigation has not yet been adjudicated or settled and is still in the pre-trial MDL phase. Therefore, what grounds are there to say opioid companies behaved unlawfully? While this author believes that public health literature, medical literature, public investigations, and journalism have highlighted an array of corporate misconduct,[211] and some companies have even admitted fault,[212] the conduct should absolutely be assessed in court. This assessment is arguably contained within the second part of accountability—monitoring. The rule of law requires monitoring as well as the application of sanctions for breach.

c. Accountability within historical tort law doctrine

It is worth considering how accountability would fit into tort law as a historical and philosophical matter. Those familiar with the subject are aware that much ink has been spilled about the proper purposes of tort law.[213] These purposes historically include *personal redress* and *compensation* for injuries,[214] *deterrence* of misconduct,[215] *deterrence* of future injury,[216] *efficiency* (in the sense of wealth

210. Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007) (emphasis added).

211. *See supra* Section I.A.

212. *See supra* Section I.A; Haffajee & Mello, *supra* note 15, at 2303.

213. *See, e.g.*, Benforado & Hanson, *supra* note 17; Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383 (2012); Goldberg & Zipursky, *supra* note 135; Goldberg & Zipursky, *supra* note 16, at 986; John C.P. Goldberg, *Inexcusable Wrongs*, 103 CALIF. L. REV. 467, 470 (2015) [hereinafter Goldberg, *Inexcusable Wrongs*]; John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012) [hereinafter Goldberg, *Pragmatism*]; John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO L.J. 513 (2003) [hereinafter Goldberg, *Twentieth-Century Tort Theory*]; Hanson & Logue, *supra* note 18; Hanson et al., *supra* note 17; King, Jr., *supra* note 17; Logue, *supra* note 17; Popper, *supra* note 17; William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009).

214. Goldberg, *Twentieth-Century Tort Theory*, *supra* note 213, at 517, 525.

215. *Id.* at 525.

216. *Id.* at 544.

maximization),[217] correcting power disparities,[218] and correcting injustices.[219] More recently, public health has emerged as a preeminent goal of litigation,[220] as has transparency.[221] Tort scholars have been unable to coalesce around a particular theory, and debates have been pluralistic and nuanced.[222]

Accountability is not easily categorized within existing tort frameworks. As noted, tort serves as an accountability system, but that alone does not mean accountability is always secured. Accountability leverages high degrees of compensation, damages, transparency, and other sanctions to deter harms and place a check on corporate power. Its most ambitious component is probably its impact on future corporate incentives. Despite the similarities, accountability cannot be boiled down to deterrence, even if both aim to alter behavioral incentives.[223] Accountability involves sanctions aimed at securing compliance with law, and therefore may be more specific and grounded than deterrence.[224] In addition, while deterrence pulls the analysis away from the past and toward the future, accountability has no shame in scrutinizing past conduct to secure future benefits. Accountability, then, seems more consistent with the goals and precepts of an *ex post* tort system. Unlike deterrence, accountability embeds corporations into society by defining the contours of the relationship between the corporation and the larger community and its social values and norms.[225] A victim ought to have the moral authority to make claims against a perpetrator of harm, including a corporation, to protect and enforce

217. *Id.* at 548.

218. *Id.* at 560.

219. *Id.* at 570.

220. Wendy E. Parmet & Richard A. Daynard, *The New Public Health Litigation*, 21 ANN. REV. PUB. HEALTH 437, 437–43 (2000).

221. *See* Oliva, *supra* note 15, at 683–85.

222. Goldberg, *Twentieth-Century Tort Theory*, *supra* note 213, at 582.

223. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 415 (1999) (describing deterrence as being concerned with incentives).

224. For example, Gluck et al. wrote that any litigation award would generate a "tax" that deters future misconduct. Gluck, et al., *supra* note 15, at 352. This incremental characterization of deterrence would not necessarily secure accountability.

225. *See* Solomon, *supra* note 213, at 1793 (citing Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* 40 LOY. L.A. L. REV. 891, 893 (2007)); *see also* Goldberg, *Inexcusable Wrongs*, *supra* note 213, at 470 (defining tort law as relational and granting victims the right to demand responsive conduct from injurers).

this relationship.[226] Accountability can therefore serve as a society's moral glue[227]—much like the role of the rule of law.[228] Deterrence, on the other hand, is more of an instrumentality.[229] Of course, the deterrent element of accountability is fundamental to its operation. Indeed, accountability would be far less effective if it amounted to a wrist slap, and the defendant remained willing, able, and incentivized to engage in the same conduct. Accountability, though composed of familiar ingredients, is a distinct dish with inherent value in its pursuit.

Accountability is distinct from the concept of internalization of cost, which some literature argues is necessary for optimal deterrence.[230] Although cost internalization of a costly public health crisis would likely create a large amount of accountability, accountability may be satisfied in other ways. For example, removing all benefit from engaging in harmful marketing (i.e., disgorgement of revenue or profit) would likely secure compliance with tort law rules.[231] In addition, sanctions need not be related to the product at issue. For example, a company found to have engaged in illegal marketing could be barred through injunctive relief or settlement provision from all pharmaceutical marketing, given the company's dangerous prior conduct and the inherent danger of unhinged marketing.[232] Or revenues from non-opioid drugs could be used to

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226. *See* Solomon, *supra* note 213, at 1793.

227. As Goldberg has written:

> Tort law also attends to basic social virtues . . . . One of its main points is to identify, articulate, and reinforce certain responsibilities that we owe to one another, responsibilities that are sensitive to distinct social roles and relationships and to the myriad ways in which persons interact with one another. In doing so, it helps achieve various goods, including the good of holding people accountable to one another.

Goldberg, *Pragmatism*, *supra* note 213, at 1662 n.111.

228. *See supra* Section II.B.1.b.

229. Kahan, *supra* note 223, at 415 (describing deterrence as consequentialist).

230. *See* Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 16 (2000) ("The goal of deterrence typically requires the injurer to internalize the harm that he caused."); Omer Y. Pelled, *The Proportional Internalization Principle in Private Law*, 11 J. LEGAL ANALYSIS 160, 161 (2019); Ronen Perry, *Economic Loss, Punitive Damages, and the Exxon Valdez Litigation*, 45 GA. L. REV. 409, 452 (2011).

231. *See infra* Section II.B.4.a.

232. On unhinged pharmaceutical marketing, see Eugene McCarthy, *The Pharma Barons: Corporate Law's Dangerous New Race to the Bottom in the Pharmaceutical Industry*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 29, 29–31, 68–69 (2018); Sarpatwari et al., *supra* note 49, at 480.

satisfy opioid liabilities, even if these funds do not match the amount needed to internalize costs. While internalization of costs is predicated on microeconomic theory of optimal deterrence,[233] accountability asks tort law to bear its teeth. That is, accountability strongly discourages harmful conduct through monitoring and *ex post* sanction.

Although accountability overlaps with other concepts in the tort literature (and it could be defined in ways that more-or-less overlap), it has distinct properties that make it exceptionally useful in the opioid litigation. It is a necessary response to serious misconduct intolerable in a prosperous and equitable world.

2. Counterarguments to Accountability

It is instructive to look further at why scholars argue accountability, as defined in this paper, should not be pursued in the opioid litigation. Professors Hodge and Gostin worry of "massive damage potential" that may threaten access of opioids to "legitimate" patients.[234] They see opioid companies as playing "critical roles" in public health.[235] Rather than "bankrupt industries that could promote the public's welfare," the opioid litigation should focus on treatment, prevention, oversight of prescribing, education, and eliminating aggressive marketing.[236] The thrust: let us not negatively impact opioid manufacturers.

Under the Hodge & Gostin framing, it is challenging to hold a company accountable for a useful product. Any accountability for the producer could be conceived as a threat to the existence of that product. However, most products are useful and important, and therefore it is unclear where this principle should end. Moreover, it may be that with accountability, opioids will be better targeted toward useful purposes, and therefore more accessible to the people who need them. For example, improper use of hydroxychloroquine for treating the novel coronavirus-2019 (COVID-19) not only harmed patients, but also reduced access for people who needed the drug for approved indications, like lupus.[237] Holding pharmaceutical companies to

233. Perry, *supra* note 230, at 452.
234. Hodge & Gostin, *supra* note 15, at 432, 435.
235. *Id.* at 435.
236. *Id.* at 434–35.
237. *See* Jinoos Yazdany & Alfred H.J. Kim, *Use of Hydroxychloroquine and*

account when they foster improper use could actually improve access. Further, companies that engage in misconduct or contribute to a crisis should be expected to suffer consequences. Is that not how we would treat an analogous agency, which produced a socially useful regulation using shady process or in violation of the Administrative Procedure Act?

Even if accountability drives some opioid companies into bankruptcy, bankruptcy need not jeopardize access to products. Bankruptcy may be less harmful to a corporation's business than one might think, often functioning as a liability limitation device.[238] Companies that file for bankruptcy frequently continue selling their products during the bankruptcy and after. Consider that all of the following companies, which are still operational today, have filed for bankruptcy: Apple, General Motors, Ally Financial, Chrysler, Marvel Entertainment, Six Flags, Texaco, Hostess, Converse, Delta Airlines, and American Airlines.[239] In the opioid context, Purdue Pharma filed for bankruptcy, and it has explicitly admitted to using bankruptcy as a settlement tool[240]—implying bankruptcy is self-protective. The initial settlement plan would have refashioned Purdue into a "public benefit trust" that continues to sell opioids but whose profits become plaintiffs' property.[241] Bankruptcy, therefore, is less threatening to product existence than it might seem at first blush. Rather than tone down liability for fear of losing important products, we should embrace the societally-sanctioned process for managing companies that incur severe liabilities in excess of their assets, as some opioid companies likely have done. Even if some opioid products are removed from the market as a result of bankruptcy proceedings, accountability is a sufficiently important value—in the case of administrative agencies, democratically fundamental—that we should dispose of it only on strong and reasoned grounds. Unsupported fear of product

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Chloroquine During the COVID-19 Pandemic: What Every Clinician Should Know, ANNALS INTERNAL MED. (June 2, 2020), https://www.acpjournals.org/doi/full/10.7326/M20-1334?journalCode=aim.

238. Marcus Cole, *Limiting Liability Through Bankruptcy*, 70 U. CIN. L. REV. 1245, 1247 (2002).

239. Adam Hayes, *8 Bankrupt Companies That Came Back*, INVESTOPEDIA (June 2, 2020), https://www.investopedia.com/articles/personal-finance/051115/7-bankrupt-companies-came-back.asp; Talia Lakritz, *10 Companies That Bounced Back After Bankruptcy*, BUS. INSIDER (Jan. 31, 2020, 2:21 PM), https://www.businessinsider.com/companies-went-bankrupt-bounced-back-successful.

240. Sheila Birnbaum, *Panel Discussion from* The Opioid Epidemic *Symposium*, N.Y.U. SCH. OF L. (Sept. 26, 2019), https://www.youtube.com/watch?v=Iwbnd9EWVYc.

241. *Purdue Pharma Offers to Keep Selling Opioids But Hand Over Profits*, L.A. TIMES (Sept. 16, 2019, 6:27 PM), https://www.latimes.com/business/story/2019-09-16/purdue-pharma-oxycontin-opioid-bankruptcy.

loss is insufficient. Bankruptcy is not an existential threat to product existence. And while bankruptcy may change the distribution of funds to plaintiffs, the heavily liability associated with bankruptcy suggests that more funds would be distributed than by voluntary settlement.[242]

The Hodge & Gostin formulation also implies that companies can dodge accountability through conglomerating with other companies that sell important products. In the opioid litigation context, many defendants sell not only opioids, but opioid treatments. Johnson & Johnson supplies buprenorphine.[243] Purdue sells naloxone.[244] Mallinckrodt sells buprenorphine and naltrexone.[245] If companies that offer useful products cannot be held accountable, then given today's tendency toward conglomeration, many companies could never be held accountable. Pharmaceutical conglomerations are reminiscent of the banks that were "too big to fail" in the wake of the 2008 financial crisis.[246]

Professor Terry offers a different counterargument to accountability: he sees the true cause of the opioid crisis as the social determinants of health—i.e., the social and economic structures of society.[247] In his view, the opioid litigation, instead of addressing these social structures, dwells on the moral defects of defendants.[248] Defendants will then deflect this blame onto patients, which will stigmatize addiction and distract all of us from the social determinants of health.[249] Professor Terry does not emphasize corporate conduct as a social determinant of health, instead focusing on poverty and unhealthy environments.[250]

Under this formulation, companies should not be held accountable when they will deflect responsibility onto consumers, thus increasing

242. *See infra* Section II.B.4.b.

243. Katie Thomas & Tiffany Hsu, *Johnson & Johnson's Brand Falters Over Its Role in the Opioid Crisis*, N.Y. TIMES (Apr. 27, 2019), https://www.nytimes.com/2019/08/27/health/johnson-and-johnson-opioids-oklahoma.html (last updated Nov. 9, 2021).

244. Claire Galofaro & Kristen Gelineau, *Purdue Pharma's Foreign Affiliate Now Selling Overdose Cure*, DENVER POST (Dec. 15, 2019, 2:59 PM), https://www.denverpost.com/2019/12/15/purdue-pharma-foreign-affiliate-selling-overdose-cure.

245. *Addiction Treatment Products*, MALLINCKRODT PHARMACEUTICALS, http://www.mallinckrodt.com/products/generics/addiction-treatment-products (last visited May 17, 2022).

246. *See* Phillips, *supra* note 162.

247. *See* Terry, *supra* note 15, at 652.

248. *Id.* at 653.

249. *Id.* at 651–53.

250. *Id.* at 667.

stigma of people with opioid addiction. However, this argument has the paradoxical effect of rewarding corporations that stigmatize victims with immunity from accountability. It is unclear why corporations should be able to dodge otherwise applicable public health laws and accountability mechanisms by virtue of having large public relations resources. Assigning blame to defendants may alleviate the stigma of addiction by pointing to more fundamental causes of the epidemic than personal responsibility.

Professors Hodge, Gostin, and Terry might argue that they do, in fact, wish to hold companies accountable. However, for the purposes of this paper, accountability is not satisfied by any sanction or monetary damages. Significant accountability is obtained through significant sanction. Yet these authors believe that truly significant accountability may cause harm, as defendant corporations sell useful products and are prone to deflect blame. What corporation sells nothing and uses no public relations? The Hodge & Gostin and Terry formulations essentially foreclose accountability as a goal of tort. This cannot be right. As discussed, tort law is the main accountability mechanism for corporations.[251]

There are two other counterarguments worth addressing. First, some commentators have argued that public health is an improper consideration for private litigation.[252] This argument is thoroughly addressed in the companion article,[253] which discusses why the opioid litigation is an *agent* of public health. The opioid litigation is far more than private litigation; it has become a public vindication of a historic mass harm.[254] Almost every American is represented by plaintiffs in the litigation.[255] Public health, and therefore accountability, are relevant considerations.

Second, there is the argument that *ex ante* policy solutions would be preferable to *ex post* accountability in tort.[256] However, in the opioid context, it must be observed that a public health emergency emerged

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251. *See supra* Section II.B.1.

252. *See* Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICHMOND L. REV. 405, 457 (2020); *see also* Luther J. Strange, *A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. REV. 517, 537 (2019); Margaret A. Little, *Opioid Litigation Is Not the Cure for the Disease*, L. & LIBERTY (Feb. 26, 2020), https://lawliberty.org/opioid-litigation-is-not-the-cure-for-the-disease.

253. Aaron, *supra* note 1.

254. *Id.* at 61.

255. *Id.* at 64.

256. *See generally supra* notes 146–160 and accompanying text; Richards, *supra* note 252, at 448; Strange, *supra* note 252, at 537.

despite a "complex and pervasive regulatory framework."[257] To argue that opioids are best managed *ex ante* sounds of dissonance and irony. Now that the opioid crisis has taken more than 500,000 lives, *ex post* litigation is not only appropriate; it is needed. And, as explained by the companion paper,[258] the opioid litigation is tightly connected with public health. Therefore, the litigation must support public health, regardless of the relative value of *ex ante* regulation.[259] It is also worth noting the practical impediments to *ex ante* regulation. In the case of opioids, the conduct at issue is largely commercial speech, which has gained increasing constitutional protection over the last few decades.[260] Nor are powerful corporate actors easy to regulate, especially on an agency's "shoestring" budget compared with that of industry.[261] Therefore, a mix of regulatory tools may provide optimal social benefit,[262] and accountability is no slouch.

3. What Would Constitute Accountability?

Accountability requires sufficient sanctions (monetary or otherwise) to induce defendants and similarly situated parties to follow the desirable standard (tort law). However, what sanctions are "sufficient"? One option is to look at history. While no comparison is perfect, this Section will draw lessons from the *ex post* responses to several regulatory-market failures and determine whether accountability was obtained.

One of the largest disasters of the last two decades was the 2008 financial crisis, which led to the loss of at least 4 million homes through foreclosure,[263] among many other national and global

257. *See* Strange, *supra* note 252, at 537.

258. Aaron, *supra* note 1.

259. The companion paper argues *ex post* litigation is quite valuable. *See id.* at 16. For further sources, see *supra* note 17 and accompanying text.

260. Arlen W. Langvardt, *Tobacco Advertising and the First Amendment: Striking the Right Balance*, 5 W&M BUS. L. REV. 331, 359 (2014); Carl Wiersum, *No Longer Business as Usual: FDA Exceptionalism, Commercial Speech, and the First Amendment*, 73 FOOD & DRUG L.J. 486, 488 (2018).

261. Wiersum, *supra* note 260, at 487 (citing PETER BARTON HUTT, RICHARD A. MERRILL & LEWIS A. GROSSMAN, FOOD AND DRUG LAW 24 (4th ed. 2013)) (noting FDA's "shoestring" budget compared with industry).

262. Logue, *supra* note 17, at 122.

263. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 526 (2012) (quoting Editorial, *Too Many Unanswered Questions, and Too Little Relief*, N.Y. TIMES, Feb. 12, 2012, at SR10).

sequelae. Attorneys reached a $25 billion settlement among forty-nine states, the federal government, and top mortgage servicers; however, it was criticized as a "sweet deal" for banks—a "wrist slap."[264] Critics compared the severe harm to homeowners[265] with the paucity of consequences for banks and their executives.[266] Only $5 billion took the form of cash payments—the rest was credits on troubled mortgages.[267] Relief was capped at $2,000 per affected person,[268] which hardly accounts for losing one's home. Meanwhile, many executives continued to receive large bonuses and, as the media reported, spend lavishly.[269] Nor did criminal law lead to accountability: only one Wall Street executive was sentenced to prison.[270] Over time, big banks have returned to the use of creative and risky financial products.[271] As Professor Frank Partnoy has discussed, "Banks fell right back into bad behavior after the last

264. *Id.* Due to later investigations, fines, and settlements, banks paid a total of about $160 billion, but this amount has not allayed criticisms of being out of touch with the damage of the 2008 financial crisis. *See, e.g.*, Clark Mindock, *How Much Did Banks Pay for the 2008 Financial Crisis? Fines and Settlements of over $160 Billion in Past 8 Years*, I.B. TIMES (June 28, 2016, 12:00 AM), https://www.ibtimes.com/political-capital/how-much-did-banks-pay-2008-financial-crisis-fines-settlements-over-160-billion.

265. Lemos, *supra* note 263.

266. Richard McGregor & Aaron Stanley, *Banks Pay Out $100bn in US fines*, FIN. TIMES (Mar. 25, 2014), https://www.ft.com/content/802ae15c-9b50-11e3-946b-00144feab7de#axzz2x5NilbsU (noting perceptions "that bankers have got off lightly or their role in the financial crisis"); Gretchen Morgenson, *A Deal That Wouldn't Sting*, N.Y. TIMES (Oct. 29, 2011), https://www.nytimes.com/2011/10/30/business/a-foreclosure-settlement-that-wouldnt-sting.html.

267. Morgensen, *supra* note 266.

268. Lemos, *supra* note 263, at 527.

269. *See* Louise Story & Eric Dash, *Bankers Reaped Lavish Bonuses During Bailouts*, N.Y. TIMES (July 30, 2009), https://www.nytimes.com/2009/07/31/business/31pay.html; Editorial, *9 Wall Street Execs Who Cashed in on the Crisis*, MOTHER JONES (Jan. 2010), https://www.motherjones.com/politics/2010/01/wall-street-bailout-executive-compensation; Maddy Sauer, *Caught on Tape: Bank Parties On After Bailout*, ABC NEWS (Feb. 1, 2009, 10:07 PM), https://abcnews.go.com/Blotter/WallStreet/story?id=6948510&page=1.

270. William D. Cohen, *How Wall Street's Bankers Stayed Out of Jail*, ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368.

271. *See* Jeff Cox, *Big Banks Have Found a New Way to Stay in the Subprime Lending Business*, CNBC (Apr. 10, 2018, 9:43 AM), https://www.cnbc.com/2018/04/10/big-banks-have-found-a-new-way-to-stay-in-the-subprime-lending-business.html; Jesse Eisinger, *We're Replicating the Mistakes of 2008*, ATLANTIC (Apr. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/04/were-replicating-mistakes-2008/609586; Frank Partnoy, *The Looming Bank Collapse*, ATLANTIC (July 2020), https://www.theatlantic.com/magazine/archive/2020/07/coronavirus-banks-collapse/612247.

crash—taking too many risks [and] hiding debt in complex instruments and off-balance-sheet entities."[272] The low level of accountability obtained in the wake of the 2008 financial crisis was insufficient to forestall future dangerous behavior.

Asbestos is another useful example. Asbestos, which can cause several types of cancer and pulmonary illness,[273] was the subject of tens of thousands of claims.[274] More than 26,000 claims were amalgamated into an MDL in 1991.[275] However, global settlements failed—in part because litigants had varying and diverse interests,[276] and in part because the ongoing filing of claims made global settlement of current and future claims difficult.[277] In addition, many plaintiffs chose to file in state court because Judge Weiner, who presided over the MDL, was considered by some to be anti-plaintiff.[278] While a class action held the prospect of binding absent class members and offering global peace to defendants, two historic Supreme Court decisions blocked class certification.[279] Therefore, disaggregation was inevitable. Cases were generally tried and/or settled piecemeal in individual cases and small aggregations.[280] Claims continued to be filed, and between 1982 and 2004, seventy-three asbestos defendants with substantial asbestos liabilities filed for bankruptcy.[281] Viewed in its totality, the asbestos litigation offered accountability; it is doubtful a serious company would want to use the substance near human beings. From a public health perspective, the U.S. never banned asbestos, but the material stopped being used for most purposes; the remaining imports are used for manufacturing.[282] Unfortunately, about 40,000 Americans die each year from asbestos-related disease,

272. Partnoy, *supra* note 271.

273. *See* STEPHEN J. CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION 12–14 (2005).

274. Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?*, 88 TUL. L. REV. 1039, 1040 (2014).

275. *Id.*

276. CARROLL ET AL., *supra* note 273, at 47.

277. *Id.*; Vairo, *supra* note 274, at 1040.

278. CARROLL ET AL., *supra* note 273, at 61.

279. Ortiz v. Fibreboard Corp., 527 U.S. 815, 843–45 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

280. CARROLL ET AL., *supra* note 273, at 129–30.

281. *Id.* at 152–53; *see* Vairo, *supra* note 274, at 1040–41.

282. *See Eliminating Exposure to Asbestos: Policy Number 20193*, AM. PUB. HEALTH ASS'N (Nov. 5, 2019), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2020/01/10/eliminating-exposure-to-asbestos.

as much asbestos remains in buildings and there is lag time from past exposures.[283] However, the imposition of accountability virtually eliminated use of a dangerous compound, leading to a public health victory.

Finally, a more opioid-related case was the Oklahoma state trial against Johnson & Johnson, which returned a $572 million judgment, much lower than the requested $17.5 billion; in the same day, the company's stock price rose 5.4%.[284] Filmmaker Michael Moore noted in a widely disseminated Tweet that "Johnson & Johnson's stock ROSE by 5% today on the very day it was found GUILTY & fined $0.5 billion for helping create the opioid crisis."[285] Unsurprisingly, the $572 million judgment paled in comparison to the company's $81.6 billion annual revenue and $15.3 billion annual profits.[286] It appears a single settlement for a small fraction of a corporation's revenue provided insufficient accountability. As Professor John C. Coffee, Jr. has explained, corporate behavior is unlikely to change when court relief is small compared to a corporation's market capitalization or is associated with share price increases.[287]

From this small set of examples, it appears that the disaggregated asbestos litigation, while possessing some trade-offs, did create large accountability by generating financial pressure. On the other hand, relatively small monetary sums did not produce accountability. A small monetary settlement relative to corporate revenue appears to be the current track of the opioid litigation.[288] One $23 billion settlement proposal by Teva Pharmaceuticals is almost entirely composed of the opioid treatment drug buprenorphine-naloxone, but critics note the free pills will wipe out sales of competitors' opioid

283. *Id.*

284. *See* Jef Feeley & Riley Griffin, *Johnson & Johnson Shares Jump 5% After Judge Finds Company Liable in Oklahoma Opioid Outbreak*, TIME (Aug. 26, 2019, 5:14 PM), https://time.com/5662105/johnson-johnson-stock-jumps-opioid-ruling. After a mathematical error was recognized, the judgment was reduced to $465 million, causing another 3% rise in Johnson & Johnson's stock price. *See* Ganesh Setty, *Johnson & Johnson Stock Climbs as Oklahoma Judge Reduces Opioid Penalty from $572 Million to $465 Million*, CNBC (Nov. 15, 2019, 4:05 PM), https://www.cnbc.com/2019/11/15/johnson-johnson-stock-climbs-as-judge-reduces-opioid-penalty-to-465-million.html.

285. Michael Moore (@MMFlint), TWITTER (Aug. 26, 2019, 9:15 PM), https://twitter.com/MMFlint/status/1166157144284160000.

286. Data from 2018. JOHNSON & JOHNSON, ANNUAL REPORT 2018, at 41 (2018), http://www.investor.jnj.com/annual-meeting-materials/2018-annual-report.

287. COFFEE, JR., *supra* note 151, at 6.

288. Aaron, *supra* note 1.

treatments,[289] and the settlement is likely calculated using the unrebated price, which, combined with tax deductions, might cost Teva almost nothing.[290] Similarly, three drug distributors offered $18 billion over 18 years,[291] which pales compared to *annual* revenue (Table 1). For comparison, by some estimates, the opioid crisis's *annual* price tag is more than $600 billion.[292]

Company	Annual Revenue
McKesson Corporation (2020)	$231 billion
AmerisourceBergen Corp. (2019)	$179 billion
Cardinal Health, Inc. (2019)	$146 billion

Table 1: Revenue of opioid distributors.[293]

4. How to Obtain Accountability

Given the above examples of accountability (or lack thereof), it

289. Jeff Overley, *Teva's $23B Opioid Litigation Deal Faces New Wave of Attacks*, LAW360 (Sept. 4, 2020), https://www.law360.com/articles/1289946/teva-s-23b-opioid-litigation-deal-faces-new-wave-of-attacks.

290. *See* Kevin McCoy, *'Clearly a Game.' Opioid Lawsuit Settlements Appear Aimed at Giving Tax Breaks to Drug Firms, Experts Say*, USA TODAY (Sept. 12, 2019, 2:29 PM), https://www.usatoday.com/story/money/2019/09/12/pharmaceutical-companies-purdue-pharma-mckesson-teva-eye-tax-deductions-opioid-lawsuit/2215109001. To illustrate, if Teva normally sells the drug at 15% of list price, and its tax rate is 15%, then donating $23 billion of the drug and deducting the entire amount would cost nothing.

291. Tom Hals & Diane Bartz, *U.S. States Reject $18 Billion Proposal to Settle Opioid Lawsuits, Discussions Ongoing: Sources*, REUTERS (Feb. 14, 2020, 10:39 AM), https://www.reuters.com/article/us-usa-opioids-litigation-idUSKBN2081YQ.

292. *See infra* note 294 and accompanying text (discussing cost estimates of opioid crisis).

293. MCKESSON CORPORATION ANNUAL REPORT 27 (2020), https://s24.q4cdn.com/128197368/files/doc_financials/2020/ar/MCK-2020-Annual-Report.pdf; AMERICSOURCEBERGEN CORPORATION ANNUAL REPORT 24 (2019), https://s24.q4cdn.com/386340686/files/doc_financials/2019/7108ce76-d507-44ac-9a09-c0f2644a922b.pdf; CARDINAL HEALTH, INC. ANNUAL REPORT (2019), https://www.sec.gov/Archives/edgar/data/721371/000072137119000090/a19q4_10kx063019xform10-k.htm.

becomes clear that accountability can be attained through sufficient financial liabilities that render a practice unprofitable. This Section will discuss methods of reaching this threshold.

a. Unjust enrichment

The most direct way to render a practice unprofitable is to remove the benefits of engaging in that practice—removing "unjust enrichment." Unjust enrichment is a fascinating, but underutilized, area of modern law.[294] A recent series of Harvard Law Review articles seeks to revive the concept from relative obscurity.[295] Unjust enrichment provides that "[a] person who is unjustly enriched at the expense of another is subject to liability in restitution."[296] Where someone attempts to disrupt the fair and just "equilibrium of goods," an action in unjust enrichment will lie.[297] Opioid plaintiffs have been wise to bring unjust enrichment claims,[298] as precipitating a public health crisis appears to fit the notion of "unjust." Importantly, unjust enrichment claims hold the promise of accountability. By removing the incentive to engage in misconduct, unjust enrichment could provide sufficient sanction to ensure compliance. Extracting unjust enrichment would also satisfy the human desire for accountability.[299] In the angry words of Massachusetts Attorney General Maura Healey,

> [T]he Sacklers [owners of Purdue Pharmaceuticals], under law, shouldn't be able to shield themselves from liability, hide that money, essentially, that they have stolen . . . . [W]e talk about when a company or individuals do something bad, and they make a whole lot of money off of it. We call those *ill-gotten gains*. This is the very definition of an ill-

294. *See Developments in the Law: Unjust Enrichment*, 133 HARV. L. REV. 2062, 2062 (2020).

295. *Id.* at 2062–76.

296. *Id.* at 2062 (quoting RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011)).

297. *Chapter One: The Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077, 2100 (2020) (citation omitted) [hereinafter "*Chapter One*"].

298. Haffajee & Mello, *supra* note 15, at 2305 (noting government unjust enrichment claims have "intuitive appeal . . . because attorneys can point to huge pecuniary gains enjoyed while the government was saddled with vast medical and law-enforcement costs").

299. *See generally Chapter One*, *supra* note 297 (describing importance of accountability to sense of justice).

> gotten gain, and why the Sacklers need to be *held accountable* and need to pay up.[300]

Therefore, one method of obtaining accountability would be to remove ill-gotten gains using unjust enrichment claims.

Of course, it would be difficult to know exactly how much of opioid revenues are ill-gotten. Was a fraction of the increase in use of opioids attributable to patients who needed them? If a drug is prescribed due to fraudulent marketing, is the drug *distributor's* pecuniary gain ill-gotten? To avoid these and other questions, it may be simpler to pursue *enterprise liability*, or imposing the full cost of a product's harms on manufacturers and distributors according to their market share.[301] In a similar paper during the tobacco litigation, two professors argued enterprise liability could be an extremely effective application of ex post incentive-based liability.[302] Given that the opioid crisis has caused a large amount of social harm, enterprise liability could create a powerful disincentive for future similar misconduct. It would compensate meritorious victims and governments more comprehensively for the costs of the crisis than would a rapid monetary settlement, entered into voluntarily by opioid companies. Therefore, imposing the full costs of the opioid crisis may be the best option for marrying the twin goals of full compensation and potent accountability. While estimates vary, the White House Council of Economic Advisers calculates the annual cost of the opioid crisis to be $696 billion.[303] This figure could be adjusted based on the fraction of sales due to illicit marketing, recently estimated at 45–67%.[304]

How would the liability be allotted? Liability by market share would penalize most the companies that sold the most opioids.

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300. *See* William Brangham, *Mass. Attorney General on 'Outrageous' Purdue Pharma Settlement Offer*, PBS (Dec. 17, 2019, 6:35 PM), https://www.pbs.org/newshour/show/mass-attorney-general-on-outrageous-purdue-pharma-settlement-offer (emphasis added).

301. *See* Gary T. Schwartz, *The Beginning and End of the Rise of American Tort Law*, 26 GA. L. REV. 601, 634 (1992).

302. Hanson & Logue, *supra* note 18, at 1175.

303. This sum is for 2018 only. *See* German Lopez, *White House: The Opioid Epidemic Cost $2.5 trillion Over 4 Years*, VOX (Nov. 1, 2019, 12:40 PM), https://www.vox.com/policy-and-politics/2019/11/1/20943599/opioid-epidemic-cost-white-house-economic-advisers. Two caveats: The estimates vary by year. And there will likely be debates over what estimates to use, but a court, with the aid of experts, could decide on a final sum at a damages hearing.

304. *Expert Report*, *supra* note 144.

Liability by marketing expenditures would penalize companies that marketed intensely, which may be misaligned with misconduct and serve to discourage future marketing, rather than discouraging the misconduct itself. Liability strictly for misconduct leaves off the hook companies that appear less blameworthy[305] but may have profited the most from burgeoning opioid prescriptions, and therefore have substantial ill-gotten gains with which to compensate victims. *From a public health standpoint, the optimal option may be paying by market share with a modifier for the worst misconduct.*[306] This approach holds companies accountable for both sales volume and misconduct. Metrics would still have to be developed to assign responsibility for various types of misconduct. These modifications would have strong grounding in tort in that parties more at fault would experience greater liability.

However, one can quickly see that it is impossible in the opioid litigation to impose the exact amount of unjust enrichment or the precise costs of the crisis on defendants. Global settlement is a possible litigation outcome, but it would be a phantasmal world indeed where defendants agreed to pay for the cost of the opioid crisis sans court order. As to litigation, class certification of diverse plaintiffs is unlikely,[307] so plaintiffs cannot litigate their claims together to obtain the desired damages. Nor can most plaintiffs litigate, as the multidistrict litigation remains dedicated to settlement and remands have been sparse. Another method is needed to obtain a large amount of money that would deliver accountability.

b. The second-best option: mass disaggregation

Given that removing ill-gotten gains and enterprise liability are likely impossible given the legal constraints, this Section argues for a

305. In the case of opioids, Purdue likely engaged in the most misconduct, has declared bankruptcy, and controlled about 16% of the opioid market between 2006 and 2012. *See* David Armstrong & Jeff Ernsthausen, *Purdue Pharma Touts Data That Downplay Its Role in the Opioid Epidemic, New Analysis Shows*, STAT NEWS (Sept. 9, 2019), https://www.statnews.com/2019/09/09/purdue-pharma-data-downplay-its-role-in-opioid-epidemic; *see also* Grace Chai et al., *New Opioid Analgesic Approvals and Outpatient Utilization of Opioid Analgesics in the United States, 1997 through 2015*, 128 ANESTHESIOLOGY 953, 958 (2018).

306. *Cf.* COFFEE, JR., *supra* note 151, at 1538 (arguing that securities class actions should use a liability modifier based on culpability). To author's knowledge, this method has never been tried in mass tort cases, where settlement is the dominant paradigm. Aaron, *supra* note 1.

307. FED. R. CIV. P. 23(a); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011).

second-best option: mass disaggregation.[308]

The asbestos litigation was messy; it involved pursuing many cases in individual units and small aggregations; it is ongoing; it held some companies liable that had less responsibility; many plaintiffs' claims were dismissed.[309] But it also has opened the doors to justice for many injured people,[310] in part because the courts that adjudicated asbestos disputes adapted to the complex circumstances of each case,[311] rather than trying to squeeze all shapes of plaintiffs through a square hole. And the litigation arguably led to a cessation of asbestos use in most situations.[312] For public health, that is a sizeable victory. According to Professor Georgene Vairo, after the asbestos MDL failed to settle, it "took the disaggregation approach to actually push the asbestos litigation toward a real endgame."[313]

Mass disaggregation does not imply an MDL is useless. MDLs are intended for pretrial proceedings.[314] Judge Polster has overseen discovery and evaluated motions that would speed resolution of claims in other courts and improve the consistency of disaggregated actions. Further, if Judge Polster truly still wants a settlement, he and the MDL Panel could disaggregate, say, 30–50% of the cases, selected by volunteer, by lottery, or otherwise. This sizeable caseload would probably deliver quite a lot of accountability.

Importantly, mass disaggregation, unlike settlement, has a coercive element. Settlements are voluntary, and defendants are unlikely to agree to settlements that provide for substantial accountability. And while trials can make settlements *less* voluntary, Judge Polster has favored sidestepping trials.[315] "Without a threat that defendants will be held liable, there is nothing to negotiate."[316] Surely, trial could be harmful to defendants, as acknowledged by Judge Polster himself, who has stated (with basis unclear) that trying

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308. Here, mass disaggregation refers to disaggregation of federal claims. State claims remain disaggregated (although judges may coordinate or aggregate informally). *See* BURCH, *supra* note 115, at 23.

309. *See* CARROLL ET AL., *supra* note 273, at 128–30.

310. *See id.*

311. *Id.* at 130.

312. *Eliminating Exposure to Asbestos*, AM. PUB. HEALTH ASS'N (Nov. 5, 2019), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2020/01/10/eliminating-exposure-to-asbestos.

313. Vairo, *supra* note 274, at 1070.

314. 28 U.S.C. § 1407(a) (2018).

315. Michalski, *supra* note 15, at 228; Erichson, *supra* note 15, at 1290–93.

316. Erichson, *supra* note 15, at 1302–03; *see also* Aaron, *supra* note 1.

every claim would drive most defendants into bankruptcy.[317] But trials insert an important, even necessary, non-voluntariness that forces settlements to have actual accountability. Trials hold the prospect of exposing millions of documents and delivering weighty verdicts. From a public health perspective, Judge Polster and the MDL Panel would be wise to send more cases around the country for trial.

In disaggregated trials, courts can use several legal doctrines to expand the pool of available funds and obtain further accountability. For one, they have the authority to pierce the corporate veil, which could hold directors and officers to account.[318] Directors and officers may be liable in court for corporate torts that they committed or participated in.[319] However, even without participation, courts have pierced the corporate veil and held directors and officers accountable in some circumstances.[320] The extremely deleterious director and officer conduct seen in the opioid crisis might drive a court to pierce the corporate veil.[321] Punitive damages is another method of expanding the funds for plaintiffs and increasing accountability. Trials, whether or not bolstered by these doctrines, could allay concerns that recent opioid settlement proposals have been disappointingly low,[322] and could avert a "wrist slap" outcome. Neither veil piercing nor punitive damages are available in a voluntary monetary settlement on defendants' terms.

Equally, trials could boost the legal legitimacy of the proceedings by showing they are on firm legal footing.[323] Legal legitimacy helps to avoid the issue of "blackmail settlements" highlighted by *In re Rhone-*

317. Transcript of Status Conference Proceedings, *supra* note 97, at 24–25. Of course, this claim is fairly speculative.

318. *See* Martin Petrin, *The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59 AM. U. L. REV. 1661, 1671–72 (2010). Veil piercing is often discussed in the context of shareholder liability. Here, however, veil piercing is used to refer to liability beyond the strict corporate enterprise. Technically speaking, veil piercing is just one method of director and officer liability. *Id.* at 1666–74.

319. *Id.* at 1666–67.

320. *Id.* at 1672.

321. For a brief review of this conduct, see *supra* Section I.A.

322. Jan Hoffman, *Payout from a National Opioids Settlement Won't Be as Big as Hoped*, N.Y. TIMES (Feb. 17, 2020), https://www.nytimes.com/2020/02/17/health/national-opioid-settlement.html; Geoff Mulvihill, *Opioid Settlement Still Elusive as Some Lawyers Criticize It*, ABC NEWS (Feb. 22, 2020, 3:30 PM), https://abcnews.go.com/Business/wireStory/opioid-settlement-elusive-lawyers-criticize-69142614.

323. *Cf.* Erichson, *supra* note 15, at 1301–02.

Poulenc Rorer, Inc.,[324] in which the legal worth of aggregated claims is low (or indeterminate), but the number of underlying claims is large enough to be coercive.[325] It should not be controversial to say that having adversarial rulings on the merits can be a good thing.

However, some issues arise from mass disaggregation. First, there is the prospect of depleting defendants' funds through disparate actions. Plaintiffs may "race to the courthouse" and settle low and early to edge out competing plaintiffs. One solution is to perhaps take two-thirds of early settlers' funds for a common pot, or otherwise restricting settlement by statute.[326] However, this solution requires statutory intervention. Another solution is proceeding with disaggregated claims and allowing defendants to either pay the judgements or, if unable, to declare bankruptcy, which will allow for fair distribution among creditors. Therefore, the "race to the courthouse" may not be as problematic as it appears at first glance. Of course, there is the prospect that some plaintiffs obtain early settlement whereas those who litigate to obtain public health goals (such as transparency and accountability) are left fighting for bankruptcy funds. This article admits that there may be some inequality between creditors. However, if the alternative is a carefully distributed, small-to-moderate settlement sans accountability, this article argues in favor of coercive trials.

Second, given the prospect of bankruptcy for some defendants, one must ask whether bankruptcy courts deliver accountability. While this question deserves lengthy exploration, bankruptcy courts can notably interfere with accountability via the automatic stay—a broad pause on claims against a defendant—thereby centralizing litigation activity in one court.[327] Therefore, negotiations resume in a different courthouse, except this time with state court claims consolidated, too. If settlement fails, plaintiffs gain substantial control over the disposition of defendant opioid company. In theory, bankruptcy should increase the funds available to plaintiffs by reducing defendants' litigation costs and allow for a more equitable division

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324. 51 F.3d 1293 (7th Cir. 1995).

325. *Id.* at 1298.

326. Perhaps a portion of trial verdicts should be set aside as well. However, trials may produce more value for other plaintiffs, including public documents and evaluations of the legal merits. To encourage trials, drawing money from only settlement money could provide the strongest incentive.

327. Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1639–40 (2008).

process.[328] However, bankruptcy proceedings may obstruct both state-court claims and claims against directors and officers,[329] which are important for accountability. In Purdue's bankruptcy proceeding, the Committee of Unsecured Creditors issued an official statement wishing to support an injunction protecting the company, as it claimed Purdue might be "distracted" from its bankruptcy proceeding by the other actions, and letting disparate actions proceed may prejudice certain creditors over others.[330] The Court granted the injunction protecting both Purdue and the Sacklers (who are not in bankruptcy proceedings),[331] arguably favoring short-term relief over accountability. The bankruptcy proceedings led to a court settlement of around $4.5 billion, conditioned on releases of all civil claims against all the Sacklers relating in any way to Purdue.[332] Perhaps this outcome was the intent of Purdue declaring bankruptcy, as Sheila Birnbaum, counsel for Purdue, explicitly has said Purdue is using bankruptcy as a "settlement tool."[333] The bankruptcy settlement was overturned on appeal for its excessive liability protections of the Sacklers,[334] leaving the resolution of Purdue's bankruptcy uncertain and preserving some hope for accountability. Still, separate trials would have delivered more accountability and may have pierced the corporate veil to deliver more funds to plaintiffs. A thorough examination of bankruptcy courts is required to determine whether they provide accountability. In any event, they are likely to be a better option than early settlement without threat of trial, as bankruptcy proceedings may act as a public shaming tool, reduce the value of a

328. *Id.*

329. *Id.* at 1650; 28 U.S.C. § 1334(b) (granting bankruptcy courts authority to exercise jurisdiction over claims "related to" the bankruptcy).

330. Official Committee of Unsecured Creditors' Statement in Support of Debtors' Motion for a Preliminary Injunction Pursuant to 11 U.S.C. § 105(A) and Statement in Support of Complaint for Injunctive Relief at 1–4, Purdue Pharma L.P. v. Massachusetts, No. 19-23649, Adv. Pro. No. 19-08289 (S.D.N.Y. Oct. 11, 2019), ECF No. 292.

331. Second Amended Order Pursuant to 11 U.S.C. § 105(a) Granting Motion for a Preliminary Injunction at 1–2, Purdue Pharma L.P. v. Massachusetts, No. 19-23649, Adv. Pro. No. 19-08289 (S.D.N.Y. Nov. 6, 2019), ECF No. 105. The stay was quite broad, applying to at least 560 state, local, and tribal, and private actions (many of which are aggregations in state courts), and to "other actions alleging substantially similar facts or causes of action," including actions against all owners, directors, officers, employees, or similar entities. *Id.*

332. *See In re* Purdue Pharma, L.P., 635 B.R. 26, 34–41 (S.D.N.Y. 2021).

333. Sheila Birnbaum, Panel Lecture of Symposium *The Opioid Epidemic*, N.Y.U. SCH. OF L. (Sept. 26, 2019), https://www.youtube.com/watch?v=Iwbnd9EWVYc. That said, Purdue claimed to spend $2 million per week on legal fees, so there is a fair argument that dispersed litigation was depleting funds available to creditors.

334. *Purdue Pharma*, 635 B.R. at 38.

company,[335] and allow creditors—i.e., people and governments harmed by the epidemic—to recoup more funds and obtain more control over the future of defendant companies than a settlement would. Bankruptcy proceedings are coercive in a way that settlements are not.

Third, associated with the issue of bankruptcy is the problem of corporate structure. Even if a corporate entity is held accountable in trial, bankruptcy proceedings, or otherwise, there is the separate question of whether owners, directors, and officers will also be held accountable. Much of the 2008 financial crisis was caused by agency costs between corporate executives making short-term profits while their companies sank.[336] So, too, might opioid executives draw great wealth from the opioid epidemic while their companies are held accountable. Methods of applying accountability both to corporate entities and their decisionmakers ought to be developed.[337] One option is corporate criminal liability, which has been fairly light in the opioid crisis.[338] Another option is officer and executive liability. However, in the case of Purdue, the bankruptcy court stay on proceedings against officers and executives and the potential liability protections in the settlement act as a shield for harmful activity.[339] Nonetheless, direct trials would probably provide more officer accountability than a global settlement, which probably would encompass, and therefore end, claims against directors and officers.

Fourth, accountability may damage industries that serve important functions. For example, three drug wholesalers who are

335. For example, the share price of Mallinckrodt dropped by 45% after news that it had hired a bankruptcy law firm. *See* Eliza Ronalds-Hannon, et al., *Mallinckrodt Mulls Restructuring as a Major Opioid Trial Nears*, BLOOMBERG (Sept. 4, 2019), https://www.bloomberg.com/news/articles/2019-09-04/opioid-maker-mallinckrodt-taps-restructuring-firms-as-suits-loom.

336. *See* Sanjai Bhagat & Brian Bolton, *Financial Crisis and Bank Executive Incentive Compensation*, 25 J. CORP. FIN. 313, 335 (2014); Sheila Bair, *Lessons of the Financial Crisis: The Dangers of Short-Termism*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 4, 2011), https://corpgov.law.harvard.edu/2011/07/04/lessons-of-the-financial-crisis-the-dangers-of-short-termism; Opinion, *Crashing Banks and Golden Parachutes*, N.Y. TIMES (Sept. 19, 2008), https://www.nytimes.com/2008/09/19/opinion/19iht-edbankers.1.16308239.html.

337. This goal will likely be the subject of a future paper.

338. COFFEE, JR., *supra* note 151, at 5.

339. *See supra* note 125 and accompanying text; Haffajee, *supra* note 15, at 286. Recently, several plaintiffs successfully challenged a bankruptcy shield the Sacklers would have received as part of a global settlement. *See* Decision and Order on Appeal at 4–7, *In re* Purdue Pharma, No. 21-cv-7532 (S.D.N.Y. Dec. 16, 2021), ECF No. 280.

opioid defendants control 85–90% of drug distribution in the United States.[340] Numerous opioid manufacturers are named as defendants, as well. This issue has been addressed.[341] In short, most businesses provide useful functions, but accountability can incentivize them to do so consistent with public health.

Fifth, mass remand may be disfavored by MDL actors such as judges and the MDL panel. Whether these actors, who have favored settlement,[342] would remand a large number of cases is uncertain. They may continue to wait for a settlement, which would delay justice for plaintiffs in the event that settlement could not be reached. Given the low settlement pressure, it may be necessary to remand at least a significant fraction of the claims if settlement is desired. In addition, it is unclear whether the federal courts can handle more than two thousand claims. However, if the claims are aggregated into small chunks, they can likely be litigated or settled across the country, as asbestos claims often were. But MDL judges cannot remand on their own,[343] and therefore the MDL panel's consent would be needed for a remand approach.

Sixth, plaintiffs' attorneys have spent more than $50 million, obtained millions of documents through discovery, and taken hundreds of depositions.[344] It is unclear how they would be compensated if all claims are disaggregated. Pursuing individual claims would not compensate attorneys that worked for the benefit of all the claims in the MDL. Judge Polster may have some authority to find a pot of money to compensate lead attorneys given the historical flexibility of MDL procedure.[345] Alternatively, if some claims remain

340. Lenny Bernstein et al., *High-Profile Talks to Avert Landmark Opioid Trial Break Down*, WASH. POST (Oct. 18, 2019), https://www.washingtonpost.com/health/high-profile-opioid-settlement-talks-hit-snags/2019/10/18/79709c3e-f1ae-11e9-8693-f487e46784aa_story.html.

341. *See supra* Section II.B.2 (reviewing counterarguments to accountability).

342. Aaron, *supra* note 1.

343. FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 20.132–33 (2004); Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

344. Rich Lord, *Shapiro: Meeting Thursday Will 'Dot i's' on Opioid Settlement Process*, PITTSBURGH POST-GAZETTE (Nov. 13, 2019), https://www.post-gazette.com/news/crime-courts/2019/11/13/Attorney-General-Josh-Shapiro-opioid-settlement-Purdue-McKesson-Teva-Cardinal-AmeriSourceBergen-Johnson/stories/201911130146.

345. *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PENN. L. REV. 1669, 1669 (2017); Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 5 GA. L. REV. 1245, 1247 (2019) (explaining

aggregated and are settled, these claims would provide compensation to lead attorneys.

Seventh, some commentators are eager to distribute litigation funds to victims of the opioid crisis through a variety of innovative and helpful programs.[346] The tradeoff between accountability and fast money is a challenging one. Long term, this paper argues that accountability is important for the rule of law and for social cooperation. One certainly would not sacrifice accountability in the agency context in order to obtain useful regulations.

c. Beyond the opioid litigation

Future reforms would allow the MDL system to better seek accountability. The first step is to recognize that accountability is an important goal of tort litigation. With this recognition, the near obsession of most MDL participants with global settlement[347] would be seen for what it is: a devolution in the standard of conduct of corporations. Accountability offers the possibility of a better world, in which companies that sell dangerous products are held to the rule of law and to human ethics.

To achieve accountability, MDL reformers should insert a coercive element into the proceedings by mandating and facilitating public trials. Without trials, MDLs are prone to settle without producing accountability for defendants. Such an outcome is better than nothing, but it could be vastly improved.

Coercive trials can be achieved by granting the MDL judge some authority to remand cases. Currently, MDL judges are largely stuck with their assigned dockets, and claims they oversee from outside their jurisdiction can only be settled. A remand option would allow judges to pursue avenues of relief other than global settlement. Should there be remand, MDL courts need a clear method for compensating lead plaintiffs' attorneys. In parallel, Congress could revive the class action, which is increasingly obstructed by procedural barriers.[348] Class actions provide the opportunity to take cases to trial

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that some scholars believe the concise statutory language surrounding MDLs implies a broad grant of power).

346. *See, e.g.*, Brief of Amici Curiae in Support of Settlement with Favorable Public Health Outcomes at 5, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, No. 1:17-CV-2804 (N.D. Ohio May 3, 2019), ECF No. 1626; ADDICTION SOLUTIONS CAMPAIGN, *supra* note 15.

347. Aaron, *supra* note 1.

348. *Id.*

in bulk should defendants negotiate in bad faith or hold out with disappointingly low offers.[349] Lastly, accountability could be statutorily mandated in MDLs, although operationalizing such a statute would be difficult indeed. Given the current constraints of MDL procedure, however, Judge Polster could best achieve accountability through mass remand, in coordination with the MDL Panel.

5. Reprise: The Importance of Accountability

A discussion of opioid accountability must be situated in a history of multiple opioid crises, and overlapping crises of other addicting products. Most recently, the U.S. has faced a youth e-cigarette epidemic involving more than 20% of all high schoolers.[350] To repeat, over a fifth of all high schoolers in the United States began vaping e-cigarettes. This new epidemic largely stemmed from corporate misconduct including tobacco marketing in schools and on youth programs (e.g., Nickelodeon), the sale of youth-appealing flavors,[351] and tobacco companies' increasing the nicotine content in their products to boost their addictiveness.[352] E-cigarettes are not harmless: They have numerous negative health effects on the cardiac and pulmonary systems.[353] One must ask whether the recent youth e-cigarette epidemic would have begun had opioid companies been timely held accountable. Similarly, traditional cigarettes continue to kill nearly half a million Americans each year,[354] and *ex post* incentive-based liability was largely an afterthought.[355]

The rising levels of addiction and overdose in the United States are often referred to as the "opioid crisis." But this label implicitly forgets the similar addiction crises that affected our forebears. "The

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349. *See supra* note 322 and accompanying text.

350. Teresa W. Wang et al., *E-cigarette Use Among Middle and High School Students—United States, 2020*, 69 MORBIDITY & MORTALITY WEEKLY REP. 1310, 1310 (2020).

351. *See* Daniel G. Aaron, TOBACCO REBORN: THE RISE OF E-CIGARETTES AND REGULATORY APPROACHES, 25 LEWIS & CLARK L. REV 827, 886 (2021).

352. Robert K. Jackler & Divya Ramamurthi, *Nicotine Arms Race: JUUL and the High-Nicotine Product Market*, 28 TOBACCO CONTROL 623, 623 (2019).

353. *See, e.g.*, Susan C. Walley et al., *A Public Health Crisis: Electronic Cigarettes, Vape, and JUUL*, PEDIATRICS, June 2019, at 5, e20182741; Jeffrey E. Gotts et al., *What Are the Respiratory Effects of E-Cigarettes?*, BRITISH MED. J. 1 (2019).

354. *Tobacco-Related Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 28, 2020), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm.

355. *See supra* notes 173–85 and accompanying text.

current opioid addiction crisis is, in many ways, a replay of history."[356] Quite possibly, this opioid crisis may be distinct for being the worst on a per capita level.[357] But those who do not learn from history are doomed to repeat it, and the similarities warrant examination. The best analogy to today's crisis is the opioid crisis in the early twentieth century, largely driven by Bayer's aggressive marketing of heroin, as well as the sellers of morphine and its paraphernalia.[358] The author of this article could find no evidence that these companies were held accountable; instead, the federal government responded with *ex ante* regulation, including prohibiting heroin manufacturing and establishing the Food and Drug Administration.[359] But while regulations and their enforcement come and go, the incentive to sell addicting products is ever-present, at least without accountability.[360]

If this story sounds similar to the current opioid epidemic, then it advises us to change the way society responds to the sale of addicting products. A public health-maximizing approach would hold key actors accountable in order to discourage future similar conduct.[361] Effective *ex post* sanctions alter the *ex ante* incentive to sell products in a way that causes epidemics. Allowing profiteering off harmful activity will only ensure the cycle continues.

Sans accountability, the opioid epidemic will continue, and epidemics of addiction will recur. In the words of Dr. Andrew Kolodny,

> The aim of primary prevention is to reduce the incidence of a disease or condition. Opioid addiction is typically chronic, life-long, difficult to treat, and associated with high rates of morbidity and mortality. Thus, bringing the opioid addiction epidemic under control requires effort to prevent new cases from developing.[362]

It is time not just to treat, but to prevent. Accountability is prevention.

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356. Kolodny, *supra* note 45, at 561.

357. *See supra* Section I.A.

358. *See supra* Section I.A.

359. *See supra* Section I.A.

360. *Cf.* Hanson & Logue, *supra* note 18, at 1281 (arguing that *ex post* tort-based regulation changes manufacturer incentives while *ex ante* regulation may not).

361. *See* Rosenberg, *supra* note 108, at 840 ("[*E*]*x ante*, the individual would rationally prefer a legal system that allocates enforcement resources to prevent unreasonable risk rather than merely to compensate it.").

362. Kolodny, *supra* note 45, at 565.

C. Using the Money

Many scholars have opined not only on how to spend the money from the opioid litigation, but also how to allocate it in special ways that protect against waste, ensure its use for public health, and maximize utility.[363] This Section will aim to add several insights to this discussion from the vantage point of public health.

Money should not be the end-goal of the opioid litigation; it ought to be *one* goal. The idea of the "negotiation class" invented by Professors McGovern and Rubenstein,[364] in which all cities in the United States were certified into a 23(b)(3) "class" for settlement negotiation purposes, was innovative. However, the process was designed to allow cities to agree or disagree with a proposed settlement strictly on monetary terms.[365] Therefore, the process was constructed to rank money above other important public health goals, such as accountability or transparency. Still, money is important, and devising a system for using settlement or judgment funds is useful.

As discussed in the companion article, public health approaches require consideration of populations beyond those currently addicted to opioids.[366] This could be a narrow expansion, such as support for families and communities, or a broader expansion, including treatment for all people suffering from addiction, whether to opioids, stimulants, or otherwise.[367] Further, while some litigation returns could fund addiction and related support services (a frequently advocated use[368]), funding is also needed for research, advocacy, and even lobbying for legal reforms that make these services effective. For example, while some settlements offer large amounts of the addiction treatment drug buprenorphine,[369] it is unclear how useful these drugs will be without changing federal limits on buprenorphine

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363. *See* Carr et al., *supra* note 15, at 209–10; Haffajee & Abrams, *supra* note 12, at 726–31; Haffajee & Mello, *supra* note 15, at 2305; Healton et al., *supra* note 12, at 2072; Purcell, *supra* note 15, at 173–75. *See generally* ADDICTION SOLUTIONS CAMPAIGN, *supra* note 15; Berman, *supra* note 15; Gluck et al., *supra* note 15; Hodge & Gostin, *supra* note 15.

364. *See generally* McGovern & Rubenstein, *supra* note 99 (discussing the idea of a "negotiation class").

365. Aaron, *supra* note 1, at 27.

366. *See generally id.* (highlighting public health approaches to the opioid crisis).

367. *See generally id.* (discussing the different public health approaches to the opioid crisis).

368. *See* Berman, *supra* note 15, at 1058–59; Haffajee & Abrams, *supra* note 12, at 726–27; Haffajee & Mello, *supra* note 15, at 2305.

369 *See* Christine Vestal, *In Opioid Settlements, Suboxone Plays a Leading Role*, PEW: STATELINE (Oct. 23, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/23/in-opioid-settlements-suboxone-plays-a-leading-role.

prescribing[370] and ensuring that patients with addiction will be able to obtain the drug without co-payment or other cost-sharing. Faltering health care access from rising underinsurance[371] and ongoing efforts to undermine the Affordable Care Act and Medicaid[372] threaten health care solutions to the opioid crisis.[373] Lastly, funding is needed to study the root causes of the opioid crisis, and to drive policy and legal changes that benefit public health into the future. These efforts, which are preventive in nature, are distinct from funding medical and social services for those with addiction, which operate *ex post*.

Directing money to important causes is not easy, however. This Section will discuss how to stipulate the use of litigation relief, while avoiding harmful incentives characteristic of past tort settlements.

1. Opioid Litigation Returns Should Be Properly Limited Toward Public Health Uses

Although one might think spending litigation proceeds on public health seems obvious, the history of the tobacco litigation says otherwise, as scholars[374] and the media[375] have discussed. In the

370. *See Buprenorphine Waiver Management*, AM. SOC'Y OF ADDICTION MED. (2020), https://www.asam.org/advocacy/practice-resources/buprenorphine-waiver-management.

371. *See* COMMONWEALTH FUND, *U.S. Health Insurance Coverage in 2020: A Looming Crisis in Affordability: Findings from the Commonwealth Fund Biennial Health Insurance Survey, 2020* (Aug. 19, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/aug/looming-crisis-health-coverage-2020-biennial (finding that 43% of US adults between 19 and 64 are inadequately insured).

372. Recent examples include a challenge to the Affordable Care Act in its entirety, which failed on standing grounds, California v. Texas, 141 S. Ct. 2104 (2021), and efforts to turn Medicaid into a block grant program, *see* Dan Diamond & Rachel Roubein, *'Block grants' no more: Trump's Medicaid overhaul has new name, same goals*, POLITICO (Jan. 29, 2020, 12:00 P.M.), https://www.politico.com/news/2020/01/29/trump-medicaid-overhaul-block-grants-108882.

373. *See* Steffie Woolhandler & David U. Himmelstein, Opinion, *Intersecting U.S. Epidemics: COVID-19 and Lack of Health Insurance*, ANNALS OF INTERNAL MED., Apr. 7, 2020, at 1; Adrianna McIntyre & Zirui Song, Editorial, *The US Affordable Care Act: Reflections and directions at the close of a decade*, PLOS MED., Feb. 26, 2019, at 2 (describing efforts to undermine the Affordable Care Act); Robert Greenwald & Judith Solomon, *Medicaid Program Under Siege*, HEALTH AFFAIRS BLOG (Jan. 18, 2018), https://www.healthaffairs.org/do/10.1377/hblog20180110.887587/full.

374. *E.g.*, Berman, *supra* note 15, at 1031; Haffajee & Abrams, *supra* note 12, at 712; Healton, Pack & Galea, *supra* note 12, at 2072.

375. *See* Paul Demko, *Opioid Court Fights Risk Repeating Tobacco's Failures*,

tobacco litigation of the late 1990s, states settled with tobacco companies for payments of more than $200 billion over 25 years.[376] However, this so-called Master Settlement Agreement (MSA) was mostly used to replenish state coffers, leading to a "growing consensus that 'the public lost a golden opportunity to improve its health.'"[377]

In toto, states spent only 2.6% of their tobacco-related proceeds on public health efforts.[378] Tobacco companies spend around twelve times that amount each year on marketing.[379] Some states, such as North Carolina, spent large fractions of their monies supporting tobacco farmers, as opposed to spending on diversification away from tobacco or on public health (Table 2).[380]

Spending Area	Amount
Tobacco Diversification	$17 million
Public Health	$131 million
Supporting Tobacco Farmers	$713 million

Table 2: North Carolina's spending of MSA funds, 2000–2004.[381]

Tobacco diversification refers to programs that assist tobacco farmers in switching to other enterprises.[382] "Supporting Tobacco Farmers" refers

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POLITICO (May 24, 2018, 5:06 AM), https://www.politico.com/story/2018/05/24/opioids-epidemic-tobacco-607119; Jim Estes, Opinion, *How the Big Tobacco Deal Went Bad*, N.Y. TIMES (Oct. 6, 2014), https://www.nytimes.com/2014/10/07/opinion/how-the-big-tobacco-deal-went-bad.html.

376. *See* Jones & Silvestri, *supra* note 178, at 698.

377. *Id.* at 697 (quoting Renee Twombly, *Tobacco Settlement Seen as Opportunity Lost to Curb Cigarette Use*, 96 J. NAT'L CANCER INST. 730, 730 (2004)); *see* Hodge & Gostin, *supra* note 15, at 435.

378. Berman, *supra* note 15, at 1030–31 (citing Matthew L. Myers, *On the 20th Anniversary of the State Tobacco Settlement (The MSA), It's Time for Bold Action to Finish the Fight Against Tobacco*, CAMPAIGN FOR TOBACCO-FREE KIDS (Nov. 26, 2018), https://www.tobaccofreekids.org/press-releases/2018_11_26_msa20 [https://perma.cc/9G6T-H275]).

379. *See A State-by-State Look at the 1998 Tobacco Settlement 19 Years Later*, CAMPAIGN FOR TOBACCO-FREE KIDS (Dec. 31, 2017), https://www.tobaccofreekids.org/what-we-do/us/statereport.

380. *See* Alison Snow Jones et al., *Funding of North Carolina Tobacco Control Programs Through the Master Settlement Agreement*, 97 AM. J. PUB. HEALTH 36, 40 (2007) (using approximate numbers).

381. *See id.*

382. *See id.* at 38.

> to money provided to tobacco farmers in an unrestricted manner, or to assist them in continued growing of tobacco.[383]

Of course, if the goal is public health promotion, subsidizing tobacco farmers without restricting their growing of tobacco is counterproductive. Furthermore, due to financial pressures, nine states, such as New York, California, and Michigan, as well as Washington, D.C., Puerto Rico, and Guam, securitized their future settlement payments by issuing bonds, which yielded "pennies on the dollar."[384] In total, these twelve governments issued $22.6 billion in bonds in exchange for $573.2 million in immediate cash, and delayed all payments for up to 50 years; they will have to repay a total of $67.1 billion.[385] In perhaps the worst case, Michigan will have to pay back more than 1800 times what it borrowed.[386] The history of securitizing MSA payments is well articulated by Jones et al.:

> [I]n 2000, the economy began to go into recession as the "dot.com" bubble burst, and stock markets indices dropped rapidly. On September 11, 2001, after the terrorist attacks on New York City and Washington, DC, the economy was further dampened by declines in tourism and air travel. The economy began to pull out of the recession in 2003, but states that had cut taxes a few years earlier found that they did not have revenues adequate to meet major needs across all programs. Increasing taxes as a response would be politically dangerous for politicians who had gained or held office through the promise of reduced taxes. Inevitably, the temptation to treat MSA revenues as a "cookie jar" to be tapped for budget shortfalls was irresistible.[387]

The MSA was not intended to be a base on which to create risky financial products, but it became that, and it threatens the future financial solvency of several U.S. state and territorial governments.[388]

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383. *See id.* at 40.
384. Estes, *supra* note 375.
385. *See id.*
386. *See id.*
387. Jones & Silvestri, *supra* note 178, at 694–95.
388. *See* Estes, *supra* note 375.

This is not to say the MSA was a total failure; in fact, the settlement operated similarly to a tax by increasing the prices of tobacco products.[389] Increasing the price of tobacco products is an evidence-based method of discouraging smoking,[390] and, given that youth have less money, the rise in prices triggered by the agreement particularly benefitted youth smoking rates.[391] Further, the MSA created the Truth Initiative (initially called the American Legacy Foundation), whose "truth®" counter-marketing campaign was praised for having a large impact on youth smoking.[392] But these achievements would have been many-fold more effective with dedicated financial support from the MSA.

Although the MSA would have been far more successful with effective public health spending requirements, finding legal options for such requirements, and pursuing them in the face of pressure from governments that are starved for funds, is a challenge. Professor Micah Berman has suggested allocating some funds to a non-profit foundation given the success of the Truth Initiative.[393] However, there may be beneficial uses other than supporting a non-profit foundation.

Professor Berman also suggests requiring states to pass laws allocating funds to public health as a precondition of obtaining their

389. *See* Jones & Silvestri, *supra* note 178, at 697; U.S. NAT'L CANCER INST. & WORLD HEALTH ORG., THE ECON. OF TOBACCO AND TOBACCO CONTROL 139 (2016).

390. The U.S. National Cancer Institute and World Health Organization published a joint report finding:

> An extensive and increasingly sophisticated body of research clearly demonstrates that higher tobacco product taxes and prices lead to reductions in tobacco use by motivating current users to quit, preventing young people from taking up tobacco use, and reducing the frequency and intensity of consumption among those who continue to use tobacco.

U.S. NAT'L CANCER INST. & WORLD HEALTH ORG., THE ECONOMICS OF TOBACCO AND TOBACCO CONTROL 150 (2016); *see* Chun-Yuan Yeh et al., *The Effects of a Rise in Cigarette Price on Cigarette Consumption, Tobacco Taxation Revenues, and of Smoking-Related Deaths in 28 EU Countries—Applying Threshold Regression Modelling*, BMC PUBLIC HEALTH, 2017, at 1; Sakthivel Selvaraj et al., *Price Elasticity of Tobacco Products Among Economic Classes in India, 2011–2012*, BMJ OPEN, 2015, at 1.

391. *See* Frank A. Sloan & Justin G. Trogdon, *The Impact of the Master Settlement Agreement on Cigarette Consumption*, 23 J. POL'Y ANALYSIS & MGM'T 843, 843–844 (2004).

392. *See* Berman, *supra* note 15, at 1050–51.

393. *See id.* at 1051–52.

share of a global settlement.[394] Meanwhile, funds could be held in escrow or elsewhere. However, it is unclear who would validate that the state law was sufficiently public health-minded as to warrant the transfer of money. Further, once money is out of escrow, it is unclear whether the state would be bound by its own law with respect to disbursed monies. That is, state legislatures are unable to sign away the right to create new laws; under existing Supreme Court precedent, a state would likely be able to change its assignments of money on behalf of public health or the general welfare.[395]

One way to structure the agreement to avoid state authority to repurpose funds is to structure payments over time and shut off escrow payments for noncompliance. A state which redirected funds would stop receiving payments until it spent the expected amount on public health. More directly, a settlement agreement could allocate funds to specific public health uses. However, such provisions might violate state law surrounding the separation of powers.[396] Moreover, contractual provisions of a settlement agreement might be unenforceable: in the event a state violates spending restrictions, residents would likely have no recourse given state sovereign

394. *See id.* at 1053; *see also* Healton et al., *supra* note 12, at 2072 ("Settlements should be structured such that funds are released by the settlement overseers only once irrevocably allocated by legislative units.").

395. The Supreme Court in *Stone v. Mississippi* determined that:

> No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.

101 U.S. 814, 819 (1880). Likewise, in *New Orleans Gas Co. v. Louisiana Light Co.*, the Court held:

> A state cannot, by contract, limit the exercise of those powers to the prejudice of the general welfare. They are the public health and the public morals. The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.

115 U.S. 650, 668 (1885) (internal quotations omitted).

396. *See* Berman, *supra* note 15, at 1053.

immunity protecting states from lawsuits not consented to.[397] Even if a state has consented to suit, residents are not parties to the contract and probably unable to sue for breach.[398] And from a policy perspective, states and localities may legitimately desire some limited discretion as to how to spend the money and adapt to changing circumstances, rather than be fixed by rigid lawmaking pre-disbursement.

A new solution for allowing states to have some monetary control, while providing recourse to the public for misused funds, is the doctrine of the third-party beneficiary in contract law. Provided the litigation ends in settlement, attorneys general can designate the public or part thereof as a third-party beneficiary of the settlement, and then richly detail the legal rights of the public to sue the state for misuse of funds.[399] This is a form of "bonding," in which the principal-agent problem is altered, in this case by an explicit contractual provision, to increase the odds of faithful execution.[400] Should the state shirk its contractual duty to spend funds on public health, an explicit contractual term could allow residents to sue on the grounds they are owed a duty by the state. Third-party-beneficiary law would likely be helpful in any contractual settlement to allow the public to enforce public health spending requirements, regardless of how the settlement is structured. One problem, however, is that states will possess sovereign immunity from suit. Given that states can consent to suit,[401] there arises the legal question of whether a state attorney general can waive sovereign immunity. The answer is probably *yes*. An attorney general is designated as the chief legal officer of almost every state.[402] Waiver is usually done by statute, but an attorney general could likely consent to suit under limited terms.[403] A waiver

397. *See* U.S. CONST. amend. XI; *Ex parte* Young, 209 U.S. 123, 150 (1908); Hans v. Louisiana, 134 U.S. 1, 20–21 (1890).

398. *See* Davis M. Summers, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880, 881 (1982) (noting relief under contract law is traditionally reserved for parties to the contract).

399. To author's knowledge, such a structure has never been tried.

400. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 15–16 (1991).

401. *Hans*, 134 U.S at 17.

402. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2452 (2006); Rory Green, *The Louisiana Attorney General: Still Generally an Attorney?*, LA. L. REV. (Nov. 17, 2014), https://lawreview.law.lsu.edu/2014/11/17/the-louisiana-attorney-general-still-generally-an-attorney.

403. Interestingly, should the state be sued by a third-party beneficiary, it would

would likely be valid so long as it permits only suits related to the use of settlement funds, which raises fewer separation-of-powers concerns. While some may argue circumventing the legislature is anti-democratic, attorneys general are usually elected,[404] and they are authorized and expected to handle a state's litigation and settlements,[405] often with substantial independence from the rest of the executive branch.[406] Settlements that create quasi-legislative rules, critiqued for separation-of-powers concerns, have rebuffed legal challenges.[407] Vesting legal rights in the public is a legal innovation that could protect the interests of public health in spending money derived from the opioid litigation.

Using third-party-beneficiary law to protect public health raises several questions. It would have to be decided what constitutes a right of action to sue a state for misuse of funds. The right of action should lie against states which spend money on non-public health purposes or securitize their proceeds. In addition, the efficacy of this approach would depend on each state's law around third-party beneficiaries and attorney general authority. Settlement agreements would have to be individually tailored. Finally, the approach is only viable for settlement awards. Litigation awards could be allocated to public health programs by judges, as was done in the Oklahoma verdict against Johnson & Johnson.[408]

This discussion was motivated by the history of the tobacco litigation, in which politicians raided public health funds. A similar

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be the attorney general defending the state. Therefore, the attorney general may have to recuse themselves from the litigation.

404. *See* Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 232 (2014) (noting forty-three states have popularly elected attorneys general).

405. *See id.* at 262 (noting broad discretion of state executive branch to settle cases); Lainie Rutkow & Stephen Teret, *The Potential for State Attorneys General to Promote the Public's Health: Theory, Evidence, and Practice*, 30 ST. LOUIS U. PUB. L. REV. 267, 269, 279–82 (2011) (emphasizing broad authority of state attorneys general and describing their litigation and settlement of tobacco cases in the 1990s).

406. *See* Feeney v. Commonwealth, 373 Mass. 359, 365 (1977) (holding Massachusetts Attorney General has authority to file appeal contrary to wishes of executive officers). *But see* Riley v. Cornerstone Cmty. Outreach, Inc., 57 So. 3d 704, 706–07 (Ala. 2010); Marshall, *supra* note 402, at 2455–56 (noting majority of states vest attorneys general with independent authority).

407. *See* Berman, *supra* note 15, at 1053–54.

408. *See* State *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *44–63 (Okla. Dist. Aug. 26, 2019), *rev'd sub nom.* State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021).

outcome is not out of the question for opioids. Over the last few years, the federal government began a process of cutting important benefits to vulnerable people through imposing work requirements for Medicaid and food stamps.[409] Protecting litigation returns through enforcement by third-party beneficiaries of settlements could help ensure litigation monies are spent on public health.

2. Incentive Structuring

One of the largest problems with the MSA was its incentive structures, in which a tobacco company's payments to states decreased as that company's market share and total cigarette purchases declined in that state.[410] Intuitively this makes sense—a company paying for ongoing violations should pay less money as the harms decrease. However, in practice, this incentivized states, which are perennially in need of cash,[411] to protect the market share of these manufacturers and therefore avoid spending money on public health. In one case, "state attorneys general helped Phillip Morris fight a court judgment with the potential to bankrupt the company in part to ensure that the MSA payments would continue."[412] Therefore, although restrictions on spending could promote public health, leaving this incentive structure in place might encourage states to circumvent the restrictions in order to retain a useful source of funding.

One might reflexively think that the reverse incentive is best. That is, imagine tobacco companies pay states more as smoking rates (or opioid overdose rates) decline. States are then encouraged to lower smoking rates (great). However, tobacco companies would be incentivized to keep tobacco smoking high, and marketing may grow more aggressive. Essentially, tobacco companies would be "subsidized" to keep smoking rates high.

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409. *See* Bryce Covert, *Trump Is Banking on Work Requirements to Cut Spending on Medicaid and Food Stamps*, NATION (Feb. 28, 2020), https://www.thenation.com/article/politics/trump-budget-work-requirements.

410. *See* Ryan D. Dreveskracht, *Forfeiting Federalism: The Faustian Pact with Big Tobacco*, 18 RICHMOND PUB. INT. L. REV. 291, 313 (2015).

411. *See* Mayra Rodriguez Valladares, *Forty States in The U.S. Do Not Have Enough Money To Pay Their Bills*, FORBES (Sept. 24, 2019), https://www.forbes.com/sites/mayrarodriguezvalladares/2019/09/24/forty-states-in-the-u-s-do-not-have-enough-money-to-pay-their-bills/#62acdcde7bff; Robert Ward Shaw, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195, 1195–96 (2004) (noting state budget shortfalls are compounded by court decisions increasing state vis-à-vis federal responsibilities and by balanced budget requirements in state constitutions and statutes).

412. Carr et al., *supra* note 15, at 209.

It is clear from the above examples that if payments are correlated to sales in any direction, then at least one party is incentivized to maintain smoking rates. This is the "incentive see-saw." An optimal incentive structure would reward both parties for declines in smoking rates. To achieve this incentive structure, payments must flow through a third-party; this could be named an "incentive account." For a moment, imagine opioid company X. X pays money into the incentive account for opioid liabilities. Further, X is rewarded through smaller payments if the overdose rate related to its products declines. To obtain money from the incentive account, states must reduce deaths beyond certain benchmarks each year in order to receive the next year's funds. Likely, this arrangement would lead states to spend most of their funds on public health and would trigger a vigorous response in favor of social welfare. However, to the author's knowledge, this set-up has never been tried.

The allocation of litigation returns can create incentive problems that deserve more attention. An "incentive account" could promote all litigation parties to reduce societal health harms that brought the parties to court in the first instance.

D. Substantive Provisions

Substantive provisions have been well discussed in the context of an opioid settlement, in particular with respect to transparency.[413] However, this Section will also discuss provisions affecting future liability and opioid marketing, which have received less attention.

Transparency is important because the release of documents can improve policymaking,[414] fuel the development of new knowledge,[415]

413. *See* Brief of Amici Curiae in Support of a Settlement Agreement Including Broad Transparency Provisions in the Interest of Future Research, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, No. 1:17-MD-2804 (N.D. Ohio Sept. 12, 2019), ECF No. 2593-1; Carr et al., *supra* note 15, at 209; Michalski, *supra* note 15, at 230–31; Oliva, *supra* note 15; Terry, *supra* note 13, at 659.

414. *See* Carr et al., *supra* note 15, at 209.

415. *See, e.g.*, *Bibliography—Publications Based on Truth Tobacco Industry Documents*, UNIV. OF CAL. S.F. LIBR.: TRUTH TOBACCO INDUS. DOCUMENTS, https://www.industrydocumentslibrary.ucsf.edu/tobacco/biblio (last visited Mar. 25, 2022) (listing 1033 citations).

assist regulators[416] and lawmakers,[417] and help understand the targeting of harmful products to minority populations.[418] Equally, it is challenging to hold parties accountable without transparency: in the words of former President Barack Obama, "a democracy requires accountability, and accountability requires transparency."[419] Unfortunately, critics have noted that Judge Polster was slow to conduct discovery and has been secretive about information that was gleaned.[420] For example, Professor Meredith Rosenthal created an elaborate report connecting opioid marketing with the crisis, but much of the report is redacted:

> As can be seen in the figure below sales grew steadily until 2011 when sales peaked at more than [redacted] extended units and [redacted] MMEs per month. Since then sales in both extended units and MMEs have fallen steadily. Notably, the growth in opioid sales starts slowly in 1993 (with an average growth of [redacted] extended units per year) but accelerates substantially as it climbs towards its peak (the average increase in extended units between 2000 and 2011 was [redacted] per year). Opioid sales fell by an average of [redacted] extended units per year after 2011.[421]

The report presents the following figure, Timeline of Key Events.

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416. *See, e.g.*, Tobacco Product Standard for Nicotine Level of Combusted Cigarettes, 83 Fed. Reg. 11818-01, 11831-32 (Mar. 16, 2018) (using industry documents to inform regulatory decision).

417. *See, e.g.*, Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 75 Fed. Reg. 13225-03, 13229 (Mar. 19, 2010) (noting Congress's use of industry documents).

418. Brief of Amici Curiae in Support of Settlement with Favorable Public Health Outcomes at 14, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, No. 1:17-CV-2804 (N.D. Ohio May 3, 2019), ECF No. 1626.

419. Ronald J. Krotoszynski Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance*, 65 U. MIA. L. REV. 449, 461 (2011) (quoting Freedom of Information Act: Memorandum for the Heads of Exec. Dep'ts and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009)).

420. *See* Michalski, *supra* note 15, at 230–31; Oliva, *supra* note 15, at 699.

421. *Expert Report*, *supra* note 144, at 36.

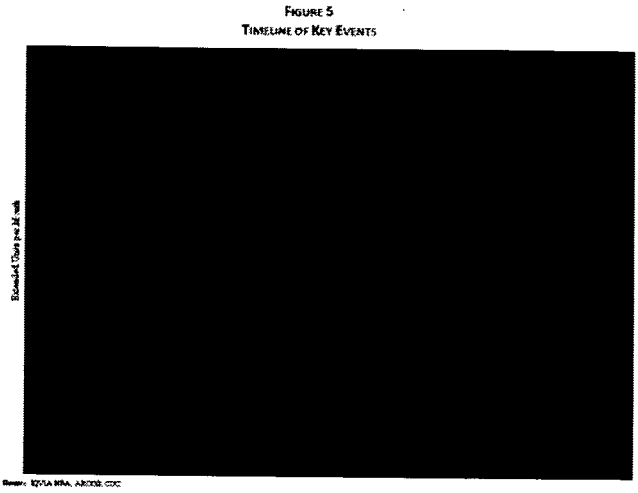

Figure 1: Timeline of Key Events, taken from Professor Meredith Rosenthal's expert report.[422]

These black boxes, which conceal important public health data, are common throughout the report. While some figures may be proprietary, redacting essential components of what is ostensibly a public record disserves public health.

Behavior changes, locked in by marketing restrictions and other provisions, could benefit public health.[423] Opioid companies that marketed irresponsibly could be barred from future marketing. This bar would serve an accountability purpose as well by suggesting that other pharmaceutical companies which market irresponsibly will suffer marketing restrictions. These marketing restrictions could be limited to opioids, or they could be extended to other pharmaceutical products to increase the potency of the *ex ante* incentive not to engage in misleading marketing. However, this paper does not emphasize restrictions on defendants' conduct, instead opting for an incentive-based approach through strong *ex post* accountability, which would encourage companies to ensure their products are marketed and used safely.[424]

Finally, companies could consent to future liability by contract, e.g., via liquidated damages. If such a clause is included in a

422. *Id.* at 42.
423. *See* Hodge & Gostin, *supra* note 15, at 435.
424. *See supra* Section I.B.

settlement, companies could be more easily held liable should they contribute further to the epidemic or engage in irresponsible marketing. A liquidated damages provision would discourage future misconduct and incentivize companies to police themselves to avoid triggering the clause.

CONCLUSION

The companion article to this one argued that the opioid litigation is fundamentally tied to public health. This paper takes the next step, asking what concrete actions should be taken to maximize public health.

With regard to maximizing the public health outcomes of the litigation, this article was the first to offer a case for accountability. Accountability centers on sanctions for past misconduct to achieve future compliance with essential public health regulations. Accountability encourages companies to police themselves. Although some scholars have disparaged accountability as retributive and driven by anger, accountability is fundamentally linked to the rule of law and to incentive-based liability. Preventing public health harms through tort incentive should be on the forefront of litigants' minds. Accountability can tell a tale: one that will fly in the ear of future executives deciding how aggressively to market their products; into the ear of the worried general counsel who would like to avoid the incursion of substantial liability. True accountability in the opioid litigation is challenging to achieve given process limitations, but it should be sought. And the Ohio court can achieve it directly through large-scale disaggregation of consolidated opioid claims. Future discussions of accountability, and how to achieve it, are encouraged.

This article also touched on how to structure litigation payments to maximize public health benefits and minimize incentive problems. It briefly reviewed other substantive litigation outcomes that would benefit the public health, including transparency, marketing restrictions, and consent to future liability.

As is oft acknowledged in public health, prevention is the best medicine. Surely we would be better off as a society without any opioid crises. How we end this opioid crisis affects whether we will have another. Accountability matters. Judge Polster, it is time to remand.