A Punitive Damages Overview: Functions, Problems and Reform

David G. Owen

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Legal Remedies Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol39/iss2/3

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
A PUNITIVE DAMAGES OVERVIEW: FUNCTIONS, PROBLEMS AND REFORM

DAVID G. OWEN*

TABLE OF CONTENTS

I. NATURE AND SOURCES OF PUNITIVE DAMAGES ........ 364
   A. General Principles ..................................... 364
   B. History .................................................. 368
   C. Controversial Nature of Punitive Damages ............ 370
      1. In General .............................................. 370
      2. Tort Reform—Rhetoric and Reality .................... 371

II. FUNCTIONS OF PUNITIVE DAMAGES .................. 373
   A. General Principles ..................................... 373
   B. Specific Functions ...................................... 374
      1. Education .............................................. 374
      2. Retribution ............................................ 375
      3. Deterrence ............................................. 377
      4. Compensation .......................................... 378
      5. Law Enforcement ....................................... 380

III. THE CRITICISMS CRITIQUED ......................... 382
   A. Confusion of Tort and Criminal Law ................. 382
   B. Vagueness Generating Unprincipled Awards ............ 384
   C. Misdirection of Punishments and Rewards ............ 389
   D. Social Harm from Excessive Punishment ............... 396

IV. REFORM PROPOSALS ........................................ 400
   A. Constitutional Reform .................................. 401
   B. Legislative and Judicial Reform ......................... 407

V. CONCLUSION .................................................. 413

* James Byrnes Research Scholar & Professor of Tort Law, University of South Carolina. Gerald Boston and Michael Rustad provided valuable comments on an earlier draft, Mary McCormick lent helpful research support, and Stephanie Johnston provided meticulous editorial assistance. "Fearful that the cure [might be] worse than the disease," Phillip Massinger, The Bondman, Act I, Scene 1, I chose not to ask Pat Hubbard for his thoughts.
I. NATURE AND SOURCES OF PUNITIVE DAMAGES

A. General Principles

"PUNITIVE" or "exemplary" damages\(^1\) are money damages awarded to a plaintiff in a private civil action, in addition to and apart from compensatory damages, assessed against a defendant guilty of flagrantly violating the plaintiff's rights.\(^2\) The purposes of such damages are usually said to be (1) to punish the defendant for outrageous misconduct and (2) to deter the defendant and others from similarly misbehaving in the future.\(^3\)

A jury (or judge, if there is no jury) may, in its discretion, render such an award in cases in which the defendant is found to have injured the plaintiff intentionally or "maliciously," or in which the defendant’s conduct reflected a "conscious," "reckless," "wilful," "wanton" or "oppressive" disregard of the rights or interests of the plaintiff. PUNITIVE damages may be assessed against an employer vicariously for the misconduct of its employees, although some states restrict such awards to instances where a managing officer of the enterprise ordered, participated in or consented to the misconduct.\(^4\) The harm to the plaintiff may be physical, emotional, finan-


2. See generally RESTATMENT (SECOND) OF TORTS § 908 cmt. b (1977) (stating that punitive damages may be awarded for conduct that is outrageous, either because of defendant's evil motive or reckless indifference to rights of others).

3. "PUNITIVE damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct." Id. § 908(1). Comment a to section 908 of the Restatement (Second) of Torts further provides: "The purposes of awarding punitive damages...are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future." For a further general discussion of the purposes of punitive damage awards, see infra notes 49-77 and accompanying text.

4. The Restatement (Second) of Torts takes the narrower approach, assessing punitive damages against an employer only in cases where the employer authorized or ratified the act, was reckless in employing or retaining the agent, or the agent was in a managerial capacity and acting in the scope of employment. RESTATMENT (SECOND) OF TORTS § 909. See generally 1-2 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 24 (1994) (discussing different state approaches to punitive liability in punitive damages actions); David G. Owen, PUNITIVE DAMAGES IN PRODUCTS LIABILITY LITIGATION, 74 MICH. L. REV. 1257, 1299-1308 (1976) [hereinafter Owen, Punitive Damages] (same—products liability litigation).
cial or involve property damage or loss. The amount of the award is determined by the jury upon consideration of the seriousness of the wrong, the seriousness of the plaintiff's injury and the extent of the defendant's wealth.

Thus, punitive damages are, in a real sense "quasi-criminal," standing half-way between the civil and the criminal law. They are "awarded" as "damages" to a plaintiff against a defendant in a private lawsuit; yet the purpose of such assessments in most jurisdictions is explicitly held to be noncompensatory and in the nature of a penal fine. Because the gravamen of such damages is considered civil, the procedural safeguards of the criminal law (such as the beyond-a-reasonable-doubt burden of proof and prohibitions against double jeopardy, excessive fines and compulsory self-incrimination) generally are held not to apply. This strange mixture of criminal and civil law objectives and effects—creating a form of penal remedy inhabiting (some would say "invading") the civil-law domain—

5. Most general assertions on punitive damages doctrine have exceptions in some states. In Minnesota, for example, such damages are not available for property damage alone, at least not in products liability cases. See Independent Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728 (Minn. 1994) (finding that school district suffered only property damage). As another example, Kansas, as many states, prohibits such awards in wrongful death—but not in survival-actions. Smith v. Printup, 866 P.2d 985, 998-99 (Kan. 1993) (reviewing national status of rule). Of whatever type, the damages must have been caused in fact by the defendant's reprehensible behavior. E.g. Vaughn v. North Am. Sys., Inc., 869 S.W.2d 757 (Mo. 1994) (holding that plaintiff-consumer failed to establish minimum "but for" causation required to support punitive damages claim). Idaho permits recovery for punitive damages except in claims against government entities or in claims where punitive damages are statutorily prohibited. BLATT ET AL., supra note 1, § 8.22 (discussing scope of Idaho's punitive damage doctrine); see, e.g., IDAHO CODE §§ 5-927, 6-712, 6-918 (1990) (prohibiting punitive damages against estate of wrongdoer for libel or slander, unless retraction is not made and actual malice is shown, and against government entities, respectively). Louisiana allows punitive damages only when specifically authorized by statute. BLATT ET AL., supra note 1, § 8.28; see, e.g., LA. CIV. CODE ANN. art. 2315.3-.4 (West 1994) (authorizing punitive damages in survival actions involving transportation of hazardous or toxic substances and for injuries caused by intoxicated drivers acting with wanton or reckless disregard of safety of others). For state-by-state review of the availability of punitive damage awards, see BLATT ET AL., supra note 1, § 8.11-.60 (discussing punitive damages rules in various states).

6. Courts quite frequently order the remittitur of punitive damage verdicts deemed excessive, but the additur of such awards may improperly invade the province of the jury. See Bozeman v. Busby, 639 So. 2d 501 (Ala. 1994) (holding statute authorizing trial court to override jury verdict awarding punitive damages violated Alabama's constitution).

7. RESTATEMENT (SECOND) OF TORTS § 908(2). The Restatement provides in part: "In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to plaintiff that the defendant has caused or intended to cause and the wealth of the defendant." Id.
assures that controversy and debate follow such assessments wherever they may roam, as surely as summer follows spring.

The punitive damages doctrine is mixed as well in terms of its institutional derivation, which is partly judicial and partly legislative. While the doctrine generally is considered to be fundamentally a creature of the common law, both its historical roots and many current sources are found in statutory, and occasionally constitutional, provisions.\(^8\) Many western states,\(^9\) whose legal systems are codified to a large extent, have express legislative provisions which generally authorize punitive damages in appropriate cases involving aggravated misconduct.\(^10\) In addition, a large miscellany of statutes, both federal and state, provide expressly for punitive or multiple damages in a great variety of particular situations.\(^11\)


9. Examples of western states with express legislation authorizing punitive damages in cases involving aggravated misconduct are California, Nevada, Montana, Oklahoma, North Dakota and South Dakota. See generally BLATT ET AL., supra note 1, §§ 8.15, 8.38, 8.46, 8.44, 8.51.

10. See, e.g., CAL. CIV. CODE § 3294 (West 1970) (allowing punitive damages in non-contract claims for sake of example and to punish defendant guilty of oppression, fraud or malice); MONT. CODE ANN. § 27-1-221 (1993) (allowing punitive damages when defendant guilty of actual fraud or actual malice); NEV. REV. STAT. ANN. § 42.005 (Michie 1993) (listing situations where punitive damages are proper); N.D. CENT. CODE § 32-03-07 (1976) (authorizing punitive damages for breach of obligation in non-contract claims where party engaged in oppression, fraud or malice); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (allowing punitive damages where there is no direct evidence of fraud, malice or gross negligence but there exists such wanton disregard of rights that malice can be inferred); S.D. CODIFIED LAWS ANN. § 21-3-2 (1987) (authorizing punitive damages when defendant is guilty of oppression, fraud or malice, or in cases of wrongful injury to animals, committed intentionally or by willful conduct).

11. See, e.g., 15 U.S.C. § 15(a) (1993) (treble damages available under anti-trust law); id. § 1681(n) (actual and punitive damages available for wilful violations of consumer credit reporting law); 18 U.S.C. § 2520(b) (1993) (statutory and punitive damages available for illegal wire tapping); CAL. CIV. CODE § 3340 (West 1970) (punitive damages available for willful or grossly negligent wrongful injury to animal); IOWA CODE § 639.14 (1950) (exemplary damages available for attachment when there is evidence of actual malice); S.C. CODE ANN. § 39-5-140 (Law. Co-op. 1985) (treble damages available for knowing practice of unfair or deceptive trade practices); TEXT. REV. CIV. STAT. ANN. art. 8306, § 5 (West 1967) (punitive damages available for wrongful death of workman); UTAH CODE ANN. § 76-6-412 (Supp. 1973) (punitive damages available for injuries from knowingly receiving stolen property); VA. CODE ANN. § 8.01-40 (Michie 1992) (punitive damages available for knowing, unauthorized use of another's identity). In addition to such express statutory provisions, the courts have inferred punitive damages into a number of federal statutes. See, e.g., 42 U.S.C. § 1983 (1988) (punitive damages available for deprivations of civil rights under color of state law).
example, a Connecticut statute provides for punitive damages in appropriate products liability cases, limiting the amount of such damages to double the amount of the compensatory award.\textsuperscript{12} By contrast, many states, either statutorily or constitutionally, \textit{prohibit} punitive damages in a vast array of specific contexts, from alienation of affection and defamation\textsuperscript{13} to commercial transactions under the Uniform Commercial Code.\textsuperscript{14} More broadly, four states prohibit all awards of punitive damages unless specifically authorized by statute.\textsuperscript{15} The law and commentary on punitive damages is diverse, vast and rapidly expanding.\textsuperscript{16}


\textsuperscript{13} See, e.g., \textit{Ill. Ann. Stat.} ch. 740, Act 5 § 3 (Smith-Hurd 1993) (forbidding punitive damages in actions for loss of alienation of affection); Wheeler v. Green, 593 P.2d 777, 789 (Or. 1979) (stating that Article I § 8 of Oregon Constitution prohibits award of punitive damages in defamation cases unless another constitutional provision explicitly requires application).


B. History

Punitive damages have a deep history in the law. Their early ancestor was the doctrine of multiple damages, a form of punitive damages measured according to a predetermined scale. Such damages were provided for in Babylonian law nearly 4000 years ago in the Code of Hammurabi, the earliest known legal code. These damages were also recognized in the Hittite Laws of about 1400 B.C., the Hebrew Covenant Code of Mosaic law dating back to about 1200 B.C. and the Hindu Code of Manu of about 200 B.C. The very basis of early Roman civil law, beginning with the Twelve Tables of 450 B.C., was punitive in nature, and several provisions in classical Roman law prescribed double, treble and quadruple damages.

Perhaps the first English provision for multiple damages was enacted by Parliament in 1275: “Trespassers against religious persons shall yield double damages.” Including this first statute, Parliament enacted at least 65 separate provisions for double, treble and quadruple damages between 1275 and 1753.

“Exemplary” damages were first explicitly authorized in Eng-
land in *Huckle v. Money*, decIded in 1763. The doctrine was promptly transported to America, where such an award was allowed twenty-one years later in *Genay v. Norris*, a case involving a plaintiff who became ill after drinking a glass of wine laced with Spanish Fly added by the defendant as a practical joke. By the mid-nineteenth century, punitive damages had become an established fixture in American law. In *Day v. Woodworth*, the Supreme Court asserted, without citation (and with some exaggeration), that the doctrine was supported by "repeated judicial decisions for more than a century." By the early part of this century, all but five states provided generally for such awards upon appropriate proof. Yet, even in these few renegade states, with the possible exception of

25. 95 Eng. Rep. 768 (K.B. 1763). In a false imprisonment and trespass action by a journeyman printer against agents of the King, the judge instructed the jury that they were not bound to certain damages, and the jury returned a verdict for the plaintiff in the amount of £300. *Id.* The King's Counsel moved for the verdict to be set aside and for a new trial on the grounds that the verdict was excessive because the printer was confined only for a few hours and was treated well. *Id.* The court found the damages not to be excessive and stressed its reluctance to meddle with damage awards, characterizing the damages awarded as "exemplary damages." *Id.* at 769; *accord* Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763) (allowing such damages in a similar case in amount of £1000). From the start, English courts have employed the remedy to punish and deter the misuse of wealth and power. Rustad & Koenig, *supra* note 17, at 1289 nn.100-01.

26. 1 S.C. 3, 1 Bay 6 (1784) (awarding "vindicative damages" to plaintiff despite defense of drunken frolic).

27. *Id.* Even though defendant claimed it was a joke, it seriously injured the plaintiff. *Id.; see* Rustad & Koenig, *supra* note 17, at 1290 (discussing early American cases awarding punitive damages).

28. *Day v. Woodworth*, 54 U.S. 363, 371 (1851). The Court, discussing the damages available to a plaintiff in a trespass action, stated that:

It is a well-established principle of the common law, that in action of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.

*Id.* The Court further stated that when an injury was wanton or malicious, gross and outrageous, the jury may add to the plaintiff's compensation. *Id.*

29. *Day*, 54 U.S. at 371. This would indicate the existence of punitive damages awards twelve years prior to *Huckle*, which appears erroneous. See Owen, *Punitive Damages*, *supra* note 4, at 1263 n.19.

Nebraska, punitive damages are legislatively authorized for a variety of specific situations.

C. Controversial Nature of Punitive Damages

1. In General

Controversy has followed punitive damages throughout its history in this nation. "Punitive damages like class actions have been highly praised and roundly denounced depending on who is paying the piper." Two leading treatise writers in the nineteenth century, Sedgwick and Greenleaf, engaged in a long-standing scholarly debate over whether such damages should be allowed at all. The depth of the early philosophical disagreement in this nation is colorfully portrayed by the remarks of different state supreme court justices. In a nineteenth century New Hampshire case, the court remarked: "The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of law." In contrast, consider the observations of the Wisconsin Supreme Court shortly after the turn of the century:

The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, dis-

31. See Distinctive Printing, 443 N.W.2d at 574 (punitive damages prohibited by state constitution).

32. See, e.g., LA. CIV. CODE ANN. art. 2315.3-.4 (West 1994) (punitive damages available for reckless disregard of safety in storage, handling or transportation of hazardous waste; also for wanton or reckless drunk driving); MASS. GEN. LAWS ANN. ch. 93, § 63 (West 1993) (punitive damages available for failure to comply with consumer reporting agency statute); id. at ch. 111, § 199 (punitive damages available for failure to correct dangerous lead levels upon premises); id. at ch. 131, § 5C (punitive damages available for interference with lawful taking of fish or wildlife); WASH. REV. CODE ANN. § 9A.36.080 (West 1994) (punitive damages available for malicious harassment).

33. In re Paris Air Crash, 427 F. Supp. 701, 705 (C.D. Cal. 1977) (discussing controversy concerning punitive damages in wrongful death actions and holding California ban on punitive damages in wrongful death actions unconstitutional), rev'd, 622 F.2d 1315 (9th Cir.) (holding that punitive damage ban did not violate federal constitution), cert. denied, 449 U.S. 976 (1980).

34. Compare 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURES OF DAMAGES § 355 (9th ed. 1912) with 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 8253 (16th ed. 1899). Greenleaf adamantly opposed punitive damages, believing that they were not part of the American tradition and had no doctrinal basis. Sedgwick, on the other hand, was a staunch proponent of exemplary damages and believed they were an effective way of setting an example for the community. See Rustad & Koenig, supra note 17, at 1298-1302 (summarizing Greenleaf-Sedgwick debate).

Courages private reprisals, restrains the strong, influential and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished, by the criminal law.36

Courts critical of this form of damages often recite that punitive damages are not favored by the law.37 The frequency of such exhortations reveals the widespread objections to such awards, both generally and as applied in individual cases. Such generalized assertions of disapprobation, however, carry little legal content but reflect much more the personal ideology of the individual judge.

2. Tort Reform—Rhetoric and Reality

As the number and size of punitive damage verdicts and judgments increased in the 1970s and 1980s, particularly in products liability litigation, such awards became a central, highly politicized part of the broader "tort reform" movement.38 This movement arose out of supposed "crises" in the areas of medical malpractice and products liability—particularly in the availability and affordability of liability insurance—first in the mid-1970s and again in the mid-1980s. As has been true with tort reform in general, the debate on punitive damages has also been highly charged. Claiming that "runaway" punitive damage awards have become routine, especially in products liability cases, businesses and insurance companies have carried their message to the legislatures and the courts.39 Many courts, along with close to thirty state legislatures, have responded by adopting a variety of laws "reforming" punitive damages in various ways, expanded upon below.40

36. Luther v. Shaw, 147 N.W. 17, 20 (Wis. 1914) (allowing punitive damages in action for breach of promise to marry).
37. E.g., Lyons v. Jordan, 524 A.2d 1199, 1204 (D.C. 1987) (stating that such damages are disfavored, but allowing them on facts of case).
38. See generally Rustad, supra note 16, at 24 (discussing how punitive damage awards have increased in frequency and size); Daniels & Martin, supra note 16, at 10-14 (discussing politicization of tort reform movement).
39. Rustad, supra note 16, at 2 (recognizing concern about punitive damage awards in products liability actions and setting forth empirical data in attempt to correct mistaken beliefs which helped fuel tort reform movement).
40. See Galligan, supra note 16, at 54-35 (discussing recent state and federal legislative tort reform); Rustad, supra note 16, at 6 n.22 (noting that many state legislative reforms curb punitive damage awards); Rustad & Koenig, supra note 17, at 1278-81 (setting forth Model State Punitive Damage Act based on tort reform movement).
There is no doubt that the number of large, sometimes very large, punitive damage verdicts in products liability cases has increased substantially in recent years. Nevertheless, such jury awards are still quite uncommon and, even when awarded, they are frequently reduced or eliminated altogether by the trial judge or on appeal. The most thorough empirical study to date of punitive damages in products liability cases was recently conducted by Professors Michael Rustad and Thomas Koenig. Their study showed "that punitive damages are generally working appropriately," and they concluded as follows:

Punitive damages are rarely awarded and even more rarely collected. When they are awarded, they are generally richly deserved. In most cases, punitive damages were assessed against corporations because they had prior knowledge of a developing or known risk and failed to take remedial safety steps. The popular perception of vast wealth being awarded in the form of punitive damages to greedy or extremely careless plaintiffs contrasts sharply with the profile that emerges from our study. The typical plaintiff was permanently disabled or killed by a product known by the manufacturer to be unnecessarily hazardous.

One of their "most striking finding[s]" was that they could only locate a total of 355 punitive damage verdicts in the thousands of products liability actions over the quarter century of the survey.

41. See generally Daniels & Martin, supra note 16, at 28-62 (setting forth data on patterns of punitive damage awards by examining general damage awards and rates for different categories of cases); Owen, Problems, supra note 8, at 1-6 (discussing increase in punitive damage awards).

42. See generally Thomas Koenig & Michael Rustad, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability, 16 JUST. SYRS. J. 21 (1993) (conducting extensive empirical examination of punitive damage awards in products liability cases); Rustad, supra note 16, at 24 (concluding that data fails to support claim that punitive damages have grown in frequency and size); Rustad & Koenig, supra note 17, at 1308 (examining empirical data).


44. Id. at 14-15.

45. Id. at 16. During this period, the CCH Products Liability Reporter reported roughly 10,000 products liability judicial decisions, and many such decisions are frequently never reported. Therefore, assuming conservatively that the total number of products liability verdicts over the period was twice the number reported in CCH, the 355 punitive damage verdicts represent roughly only 2% of the total. However, it is important to note that the frequency and judicial approval
Their study confirmed the small numbers of such awards reported by other nationwide empirical investigators: "Landes and Posner found two percent of the products cases resulting in punitive damages, while the Rand study found only 1/10th of one percent in Cook County and even less in San Francisco."46

Thus, punitive damages—especially in products liability litigation—are very much on the table, so to speak. As this article goes to press, the United States Supreme Court has just decided the fourth punitive damage case considered in the last five years.47 Courts, legislatures and commentators continue to examine this strange creature of the civil law in an effort to determine whether, and if so how, it should be redefined, harnessed or perhaps relegated altogether to the history books containing ancient peculiarities of the law that guided societies in less civilized times.

II. Functions of Punitive Damages

A. General Principles

In order to evaluate the difficulties with punitive damages that render it a controversial doctrine (considered in detail in Section III),48 the functions that underlie and support the doctrine must first be examined to determine whether the game, as it were, is worth the candle. Although most courts refer only to "punishment" and "deterrence" as rationales for such damages,49 this masks the variety of specific functions that punitive damages actually serve. The functions of punitive damages can be divided and subdivided in any number of overlapping ways, but the following division

---

47. For a further discussion on recent Supreme Court developments, see infra notes 129-50 and accompanying text.
48. For a further discussion of the difficulties and controversies surrounding punitive damages, see infra notes 78-126 and accompanying text.
should prove useful for the particular points examined here: (1) education, (2) retribution, (3) deterrence, (4) compensation and (5) law enforcement.

B. Specific Functions

1. Education

Punitive damages serve a strong educative function for both the individual offender and society in general, in two significant respects. First, punitive damages certify the existence of a particular legally protected right or interest belonging to the plaintiff, on the one hand, and a correlative legal duty on the part of the defendant to respect that interest, on the other. Second, punitive damages proclaim the importance that the law attaches to the plaintiff's particular invaded right, and the corresponding condemnation that society attaches to its flagrant invasion by the kind of conduct engaged in by the defendant.

Much more than assessments of responsibility for actual damages, punitive damages assessments sensationalize the consequences of improper behavior in a manner that serves to inform and remind the defendant and society at large that a particular right-duty legal value not only exists, but is given staunch protection by the law. Society's most important rules governing how people

50. For a discussion of education as a function of punitive damages, see infra notes 55-56 and accompanying text.

51. For a discussion of retribution as a function of punitive damages, see infra notes 57-64 and accompanying text.

52. For a discussion of deterrence as a function of punitive damages, see infra notes 65-69 and accompanying text.

53. For a discussion of compensation as a function of punitive damages, see infra notes 70-71 and accompanying text.

54. For a discussion of law enforcement as a function of punitive damages, see infra notes 72-77 and accompanying text. Much of the following discussion on the functions of punitive damages is from Owen, Moral Foundations, supra note 16 and Owen, Punitive Damages, supra note 4, at 1277-99. See generally, Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 5-12 (1982) (examining seven different purposes for punitive damage awards); Kuklin, supra note 16 (thoroughly examining philosophical bases of functions).

55. For this reason, this goal may aptly be referred to as the condemnation function. See, e.g., The Law Commission (Great Britain), Aggravated, Exemplary and Restitutionary Damages—A Consultation Paper 114, 125 (Consultation Paper No. 152, 1993) [hereinafter Consultation Paper] (discussing how condemnation is legitimate goal of civil law which is served by awarding punitive damages).

56. Professor Gerald Boston informs me that the American Medical Association publicizes punitive damage verdicts against medical care products. See generally Owen, Punitive Damages, supra note 4, at 1281 n.123 (discussing how punishment serves as device which can educate offender on society's legal values).
are to live together, and the boundaries of their respective spheres of freedom to pursue their personal interests that sometimes conflict, are publicly declared and certified as fundamental by punitive damage awards. This form of judicial punishment expresses the community’s disapproval of serious misconduct such as flagrant breaches of rules governing how people are to treat one another. Furthermore, it publicly reaffirms society’s commitment to maintaining its moral and legal standards.

2. Retribution

Perhaps the most fundamental, philosophic basis for punitive damages is to provide retribution to the victim of an aggravated wrong.\(^{57}\) It may initially seem strange in a modern legal system for the law to be based on a kind of private revenge, but it is entirely appropriate for the law to allow a person injured by the wanton misconduct of another to vent his outrage by extracting from the wrongdoer a judicial fine.\(^{58}\) This form of retribution is appropriate because it protects and promotes the two most fundamental values that support the law—freedom and equality.\(^{59}\)

Because punitive damages are designed to punish conduct that is “quasi-criminal,”\(^{60}\) their justification based on a retribution theory is facilitated by examining the doctrine in terms of a metaphor based on theft. The wrongdoer (the “thief”) deserves to be punished because he has “stolen” things of value, from both the individual and society, that need to be returned in order to prevent the unjust impoverishment of the victim (and society) and the unjust enrichment of the thief. The scales of justice, thrown out of balance by the offense, can only be restored by corresponding punishment. In this respect, the offender’s punishment serves as a form of punishment.

---

57. See generally Owen, Moral Foundations, supra note 16; Owen, Punitive Damages, supra note 4, at 1279 (discussing plaintiffs’ sense of satisfaction in seeing defendant made to suffer).

58. Owen, Punitive Damages, supra note 4, at 1279 (advocating retribution as valid justification for punitive damages). Some commentators view revenge as patently inappropriate to a “civilized” legal system. Id. at 1279 n.114.


“restitution” for the theft, both to the victim and society.61

When an actor intentionally violates the rights of another person, the actor “steals” the victim’s autonomy, reflecting an assertion that the thief is more worthy than the victim. If such thefts of autonomy were not subjected to penalties in addition to the restoration of the stolen goods (compensatory damages), the rectification of the transaction would be incomplete. This is because such theft transactions contain two distinct components: (1) the transfer of goods from the victim to the thief and (2) the deliberately wrongful nature of the transfer in violation of the plaintiff’s vested rights—the illicit transfer of freedom from the victim to the thief. Punishment, through punitive damages, serves to restore the equality of the victim in relation to the thief by diminishing the extra worth and freedom held illicitly by the thief that was stolen from the victim. The law in this manner reaffirms the equal worth of all and the duty of each person to respect—to assign equal worth to—the rights of others.62

Punitive damages also serve an important retributive, restitutionary interest for society. The theft of goods and freedom diminishes the worth of all law-abiding members of society in relation to the thief. When persons in the community agree to rules establishing the boundaries of their legal rights, they each surrender in the process their freedom to violate other persons’ boundaries in pursuit of their own personal objectives. This is, of course, a reciprocal sacrifice which contemplates that all citizens share equally in this restriction upon their individual freedoms. When a thief intentionally intrudes into another person’s zone of rights, he assigns to himself more than the equal share of freedom the community assigned by law to him. In comparison to the thief, law-abiding members of society are impoverished in proportion to the gain appropriated by the law-breaker. In this respect, the thief has stolen value from society by breaking the reciprocal security pact based on equal rights.63 By punishing intentional law-breakers, society restores all its members to a position of equal worth, and reinforces the confidence of law-abiders in the basic fairness of the legal system and in the utility of their personal decisions to obey the law.64 Punitive damages,

62. Id. at 711-12.
63. For a further discussion of the notion of wrongdoer as thief, see id. at 708-13.
64. See generally Charles Fried, An Anatomy of Values 121-26 (1970); L. Fuller, Anatomy of the Law 29 (1968); H.L.A. Hart, The Concept of Law 193 (1961) (noting that sanctions serve not as normal motive for obedience, but as
thus, have an important retributive role in serving to force flagrant offenders to repay their "debts" to—and to restore the equality of—both their victims and society.

3. Deterrence

In their retributive role, punitive damages serve to rectify in a moral sense some of the negative effects of the wrongdoer's prior misconduct. Probably most courts and commentators, however, consider the predominant purpose of punishment in general, and punitive damages in particular, to be deterrence—the prevention of similar misconduct in the future.\(^{65}\) While the practical effectiveness of punishment in deterring misbehavior remains a perplexing source of study and debate,\(^{66}\) most commentators agree that punishment sometimes does achieve at least some measure of deterrence.\(^{67}\)

The effectiveness of punitive damages in deterring gross misconduct depends significantly upon two principal factors: (1) whether the law in fact regularly catches and punishes persons who flagrantly violate the rights of other persons and (2) whether potential offenders understand that the law proscribes, and that enforcers are likely to punish, their contemplated misbehavior.\(^{68}\) Because it is common knowledge that misconduct, in fact, often goes undetected and unpunished, punitive damages help to deter misconduct by serving to sensationalize, and hence to publicize, the apprehension and punishment of offenders found guilty of egregious misconduct. Such awards are thought to deter by informing potential offenders on a variety of things: (1) that certain types of conduct violating the interests of other persons are improper and subject to legal remedy, as discussed in the educative function discussion earlier;\(^{69}\) (2) that intentional and other flagrant violations of the law are further subject to punishment in amounts exceeding the return of the stolen goods and (3) that, although punishment may be un-

\(^{65}\) See generally RESTATEMENT (SECOND) OF TORTS § 908(1) (1977) (recognizing deterrence as function of punitive damages); HART, PUNISHMENT AND RESPONSIBILITY, supra note 59, at 128-29 (characterizing deterrence as utilitarian goal of punishment); Owen, Punitive Damages, supra note 4, at 1283 (stating that central purpose of most punishment is to deter similar misbehavior in future).

\(^{66}\) Owen, Punitive Damages, supra note 4, at 1283 n.130; see also Owen, Moral Foundations, supra note 16, at 714-16.

\(^{67}\) Owen, Punitive Damages, supra note 4, at 1283.

\(^{68}\) See id.

\(^{69}\) See supra notes 55-56 and accompanying text.
certain, it is likely enough (because of the monetary incentive given victims to prosecute such offenses) and may be large enough to take the apparent profitability out of contemplated thefts. In sum, the deterrence message directed at would-be thieves is that the price of getting caught, discounted by the risk thereof, exceeds the value of the booty.

This deterrence rationale is especially applicable in contexts involving repetitive profit-seeking misbehavior where the wrongfulness of an actor's conduct is not readily apparent. The manufacture and sale of thousands of consumer products across the nation involves the potential for this type of hidden misbehavior. If a manufacturer makes and sells a product it knows to be defective, many persons may be injured without their realizing that the vague and otherwise arcane rules of products liability law were violated at all, much less that they were violated in a flagrant manner. When such a manufacturer is caught and punished with a punitive damage assessment, such damages are intended to serve in part as a kind of surrogate "filler" for the compensatory damages of those persons who do not pursue claims against the manufacturer. In this way, manufacturers are informed that they may ultimately be forced to pay in full, albeit only roughly, the price of all the harm resulting from their sale of products known to be defective, and maybe more. Thus, punitive damage awards provide a signal that the law will not tolerate the generation of illicit profits through exploitation of the vagueness in the liability rules and the resulting under-enforcement of responsibility for compensatory damages. Instead, punitive assessments put manufacturers and other actors on notice that the law will force them to disgorge all such ill-gotten gains, and possibly much more.

4. Compensation

Although it is frequently said that the purpose of punitive damages is to punish the defendant and to deter misbehavior—not to compensate the plaintiff—punitive damages do indeed serve a variety of important compensatory roles.\textsuperscript{70} As seen above, such awards serve the restitutatory purpose that underlies their retributive function and their provision of "extra" money is what fuels the private prosecutor engine of the law-enforcement function, as discussed below. More directly, such awards also serve to reimburse the plaintiff for losses not ordinarily recoverable as compensatory damages.

\textsuperscript{70} See generally Owen, \textit{Punitive Damages}, supra note 4, at 1295.
damages, such as actual losses the plaintiff is unable to prove or for which the rules of damages do not provide relief, including and most importantly, the expenses of bringing suit.

Many of a plaintiff's actual losses, particularly those involving intangible harm, simply are not compensable under the ordinary rules of compensatory damage liability. For example, a severely injured person who is rendered immobile for many months may lose a number of important interpersonal relationships and will probably suffer a large variety of missed (and often unknown) opportunities. There is no practical way for the law to measure such speculative or at least non-quantifiable losses, as real as they may be. Ordinarily, therefore, in fairness to the injurer, such losses are excluded from the accident law compensation system and left to remain instead upon the plaintiff as a risk of life. Yet, when the defendant inflicts injury intentionally upon the plaintiff or pursues his private interests in a manner that he knows will put the plaintiff at substantial undue risk, the equities of the situation change considerably, and responsibility for ordinarily nonrecoverable emotional and other intangible losses properly may be placed upon the guilty party.

Although most courts and many commentators fail to include the payment of attorneys' fees and other costs of litigation as a justificatory basis for punitive damages, the plaintiff's responsibility for these substantial costs provides a compelling argument for punitive damages in appropriate cases. Because at least one-third of the plaintiff's recovery ordinarily is expended on legal fees, a verdict that does not include a sum for these expenses almost always leaves the plaintiff substantially worse off financially than he or she was before the injury. And whether or not requiring the injured plaintiff to suffer this significant detriment makes sense in the ordinary case, surely it is illogical and unjust in the type of context where punitive damages are proper. In such cases, surely it is the thief—not the victim—who should pay the costs of activating and driving the legal system to restore the stolen goods to their rightful owner. It seems self-evident that a defendant who has intentionally or wantonly injured another may fairly be required to make the plaintiff truly whole again.71

71. Owen, Punitive Damages, supra note 4, at 1297-98.
5. Law Enforcement

Punitive damages are frequently criticized for allowing "windfalls" to plaintiffs in addition to compensation for the losses that were actually sustained. Yet, this objection overlooks the important fact that it is the very existence of a prospective windfall that helps to motivate reluctant victims to press their claims and enforce the rules of law. In so energizing the law through increased enforcement, punitive damage assessments serve instrumentally to promote each of the underlying substantive objectives of punitive damages—education, retribution, deterrence and compensation. Thus, punitive damages have a vital procedural function, which may be termed "law enforcement," in providing the mechanism for achieving the other substantive objectives of the doctrine.

The law enforcement goal, therefore, is closely intertwined with each of the other functions of punitive damages, but it is most closely tied to deterrence. In a sense, law enforcement is the opposite side of the deterrence coin, and vice versa. Deterrence may be viewed as operating ex ante, in preventing prospective wrongdoers from violating the rules, whereas law enforcement may be seen as operating ex post, in catching and punishing wrongdoers who are not deterred. Yet, the law enforcement potential of such awards might also be viewed as operating ex ante, in providing a warning to persons contemplating wrongdoing of the consequences of such misconduct. If law enforcement proves successful in this respect, then the wrongdoing will have been deterred, ex post. And so the law enforcement-deterrence coin forever turns.

As is true with the deterrence function, law enforcement serves to increase compliance with the rules of law. Few, if any, legal rules are perfectly obeyed or enforced. Violations are apt to be especially prevalent when the unlawful activity is profitable for the violator, when violations are difficult to detect or to prove, when violations appear morally neutral, when the rules are vague, when enforcement of the rules is infrequent and when punishment is light. By helping to finance the detection, proof and punishment of flagrant violations of the rules, punitive damages increase the

---

72. See, e.g., Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967) (discussing problems of windfalls caused by punitive damages awards).

73. Owen, Punitive Damages, supra note 4, at 1287; see also St. Luke Evangelical Lutheran Church, Inc. v. Smith, 568 A.2d 35 (Md. 1990) (holding jury could consider attorney's fees incurred when calculating awards of punitive damages).

likelihood that wrongdoers will be identified in the first instance and adequately punished in the second. To the extent that potential wrongdoers who are acting rationally perceive this increase in the probability and size of penalties and the commensurate reduction in the profitability of their contemplated misconduct, violations of the substantive rules of law should be deterred and hence, compliance with the law should be improved.

More particularly, the law enforcement function of punitive damages operates as follows. After an injury occurs, if the victim (or his attorney) discovers that the injurer flagrantly disregarded the victim's rights, the prospect of a punitive damage recovery serves as a compensatory incentive for the victim (and his attorney) to pursue the matter against the flagrant offender. Since punitive damages are not recoverable on their own, but are dependent upon the flagrant violation of some underlying substantive right and duty, the recovery of such damages requires in the process that the victim prove and enforce the substantive rules of liability which otherwise might go unprosecuted. Thus, the prospect of punitive damages awards serve as a kind of bounty, inducing injured victims to serve as "private attorneys general," increasing the number of wrongdoers who are pursued, prosecuted and eventually "brought to justice." This assistance is important, because many serious misdeeds deserving punishment are beyond the reach of the criminal law and the public prosecutor. Thus, a limitation in the realm of criminal justice is partially remedied, and the "private prosecutor" is rewarded with a "private fine" for his "public service in bringing the wrongdoer to account."

In sum, the variety of goals served by punitive damages present a powerful case for making them generally available within a system of private law. Yet, such damages are not without some problems, and it is to those that the inquiry now will turn.


76. This limitation on the role of criminal law is often proper because of the strong reasons for preferring the civil to the criminal justice systems in marginal areas. See infra § III A(3) of the text.

III. The Criticisms Critiqued

Punitive damages are subject to a number of recurring criticisms, some with merit and some without. The criticisms have been repeated in one form or another time and time again, in every forum in which punitive damages are debated, and the doctrine cannot be fully understood without considering each of the major kinds of criticisms to which it is exposed. While certain criticisms are examined further in section IV below, in connection with reform proposals,78 it should be helpful first to examine and critique in turn each of the major forms of objection.

A. Confusion of Tort and Criminal Law

1. Because punitive damages are “punitive” rather than compensatory, they “mar” the symmetry of the law.

This argument, developed in the nineteenth century, is based on a theoretically pure, abstract model of the law in which the law of torts and the law of crimes are perfectly defined in terms that are completely exclusive of one another. The idea is that each legal domain should be entirely unique unto itself, such that there is no valid overlap of definitions or functions among the different categories of law. With the advent of legal realism in the early part of this century, this kind of focus on architectural purity and symmetry in the design of a society’s legal structure resoundingly collapsed in American legal thought. Arguments along such formalist lines today deserve little attention in debating any legal issue.79 Moreover, this type of formalist reasoning fails to recognize the historical and functional nexus between the law of torts and the law of crimes, and it ignores in particular the traditional and central role of admonition in the law of torts.

2. Punitive damages are in the nature of criminal fines, yet defendants are not afforded the usual safeguards of criminal procedure, particularly the benefit of a higher burden of proof.

This argument has some merit, because punitive damages do stand somewhere between the law of torts and crimes. To the extent that the rationale for the criminal law protections apply to the punitive damages context, such protections, modified for the

78. For a discussion of reform proposals, see infra notes 128-67 and accompanying text.

text, should be adopted. Thus, a "mid-level" burden of proof, such as by "clear and convincing evidence," is not only appropriate, but plainly necessary in the interest of fairness to the "accused."\(^{80}\) The fairness problem in allowing a defendant to be punished too severely in a single adjudication, or over and over again by different private attorneys general prosecuting in separate actions what was arguably a single act—such as the design and sale of a particular type of product—are the kinds of problems that the criminal law generally addresses through prohibitions against excessive fines and double jeopardy. As addressed below in the discussion of mass torts, this very serious problem of repetitive punitive damage awards remains to date a problem without a satisfactory judicial or legislative resolution.\(^{81}\)

3. The very purpose of the criminal law is to punish and deter, whereas the purpose of tort law is to compensate injured persons for wrongfully inflicted harm, so that the purposes of punitive damages are already and better accomplished by and within criminal law.

To the extent that this general argument captures the specific arguments in criticisms (1) and (2), the replies should be the same. At a more fundamental level, however, the criticism rests uncomfortably upon a premise that is deeply flawed. The premise is that the criminal law is superior to the civil law when the two areas of law might accomplish the same objectives, and that the criminal law should therefore be expanded to deal with the law's incompleteness in remedying coverage of social misbehavior.

In any nation devoted to personal freedom in substantial measure, this premise must be rejected out of hand as dangerous and pernicious. The criminal law is far more condemnatory and intru-

---

80. The burden of proof in the civil system is "preponderance of the evidence," which is less than the "beyond a reasonable doubt" standard required by the criminal system. Daniels & Martin, supra note 16, at 8. "Other procedural safeguards inherent in criminal procedure, but not in [the] civil [system], include the right to counsel and the role and size of the jury." Id. See generally Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975, 991-99 (1988) (discussing evidentiary standards for punitive damages); Susan M. Peters, Punitive Damages in Oregon, 18 Willamette L. Rev. 369, 406-25 (1982) (examining argument that punitive damages are unconstitutional as denial of due process, as creating double jeopardy and as cruel and unusual punishment); Comment, Criminal Safeguards and the Punitive Damages Defendant, 34 U. Chi. L. Rev. 408, 425 (1967) (arguing that only limited criminal safeguards are necessary when imposing punitive damages).

81. For a discussion of the problem of repetitive punitive damage awards, see infra notes 105-16 and accompanying text.
sive to personal liberty than is the civil law, and criminal sanctions should be reserved for only the most extreme forms of misbehavior that most clearly harm the public good. Where the private law can as cheaply and successfully accomplish the same objectives, and where public condemnation in the extreme by a criminal conviction (and possibly imprisonment) is not required, the civil law should be allowed to perform its office. Not only is the punitive damages doctrine apt to perform the law-enforcement function more cheaply than the criminal law, because of its partial funding by the wrongdoer, but it also is apt to perform it better because of the personal, monetary incentives that punitive damages provide to victim-enforcers and their lawyers.

B. Vagueness Generating Unprincipled Awards

1. Because of the vagueness in the standards for determining the defendant's liability for punitive damages, juries have no legitimate basis for determining whether or not to make such awards, which invites juries to award punitive damages improperly on the basis of passion, bias and prejudice rather than on the law.

This criticism to a large extent is well founded, and it requires serious attention by the courts and perhaps the legislatures. The standards in most jurisdictions defining when punitive damages are appropriate are vague indeed, and neither juries nor judges are generally provided with meaningful "tests" of when punitive damages are proper. The first approach to this problem should be to reduce the vagueness in the prevailing verbal standards and to improve their specificity, as further discussed below. However, the nature of flagrant misconduct, like ordinary misconduct (negligence) is such that it will always remain unsusceptible to precise and particularized definition. Consequently, although the formulation of definitional standards for punitive damages often may be improved, vagueness is an inherent and necessary aspect of punitive damage standards as with most other general definitions.

The vagueness in such standards as "reckless" or "wilful and wanton" is both good and bad. The advantage to such vague stan-

---

82. The standard of liability for punitive damages is ordinarily defined in such terms as "malice," "fraud," "oppression," "outrageous behavior," "conscious or reckless indifference to the rights of others" or "wilful or wanton misbehavior." Owen, Moral Foundations, supra note 16, at 727; see also Chiardi & Kircher, supra note 4, § 5.01 (listing standards by state); Owen, Moral Foundations, supra note 16, at 727-30 (pointing out deficiency in standards and objections to vagueness of these standards); Owen, Problems, supra note 8, at 18-20 (criticizing conscious disregard of consequences standard).
dards lies in the discretion it provides to the trier of fact to apply the doctrine flexibly to achieve justice on the individual facts of particular cases. The problem, of course, is that this same flexibility can just as likely be used by a biased jury to pervert justice in any particular case. But this does not mean that the law must throw up its hands in despair and simply reject the doctrine as unworkable.

Instead, as a second-best approach to the vagueness problem, punitive damages law should contain a variety of checks to help assure that the standards, which necessarily will remain quite vague, are applied in a manner that is as fair and accurate as possible. What this requires of the trial judge is: first, that juries must be instructed fully and precisely on the nature of punitive damages, the standards for their availability and the conditions under which such damages may or may not be applicable to the facts of the particular case; second, once such a verdict is returned, that the sufficiency of the evidence for the award is carefully examined; and finally, that written reasons be provided explicitly particularizing the reasons why the award was or was not deserved in light of the legal standards, the doctrine's goals and the facts of the particular case. Just as importantly, appellate courts should similarly subject the evidence in such cases to close scrutiny, and such courts should also explain with specificity the reasons for upholding, reducing or reversing such awards.

2. Because of the nature and vagueness of the standards for determining the amount of punitive damage awards, including consideration of the defendant's wealth, juries have no legitimate basis for determining proper amounts for such awards, thereby inviting juries to render such verdicts in excessive amounts based upon their passions, biases and prejudices rather than on the law.

As with the previous criticism, there is much merit in criticisms about how amounts of punitive damages are determined by juries, trial judges and appellate courts. Most courts permit a plaintiff to prove the extent of the defendant's wealth on the punitive damages measurement issue,83 and a minority of states, most notably Califor-

83. The Restatement provides that when punitive damages are permissible, the trier of fact can consider the wealth of the defendant. Restatement (Second) of Torts § 908 (2) (1977); see id. § 908 cmt. e; see, e.g., Hollins v. Powell, 773 F.2d 191, 198 (8th Cir. 1985) (holding it appropriate to consider defendant's net worth when assessing punitive damages), cert. denied, 475 U.S. 119 (1986); State of Wis. Inv. Bd. v. Plantation Square Assoc., 761 F. Supp. 1569, 1577 (S.D. Fla. 1991) (stating that financial condition of defendant was relevant for discovery purposes where punitive damages were at issue); Strauss v. Biggs, 525 A.2d 992, 1000 (Del. 1987) (admitting evidence of defendant's wealth to enable jury to assess punitive
nia, now requires it.\textsuperscript{84} Because this type of proof may bias the jury on other issues, however, it generally should be excluded from the case at least until the underlying liability issues have been resolved, as some states require.\textsuperscript{85}

Whether evidence on wealth should be admissible at all on this issue is a perplexing question.\textsuperscript{86} Evidence of the defendant's wealth is generally thought to be an important consideration in determining the appropriate size of a punitive award on the conventional reasoning that it takes more to punish a rich person than a poor one.\textsuperscript{87} This intuitively correct assumption probably reflects the diminishing marginal utility of money; that is, a dollar is generally thought to have more marginal value to a poor person than a rich one.\textsuperscript{88} Therefore, for the law to inflict the same amount of pain upon a rich person as a poor one, the law needs to deprive the rich person of more dollars than the poor one. From this perspective, the defendant's wealth would appear relevant to the determination of appropriate amounts of punitive damage assessments, particularly with regard to retributive justice.

Many commentators, on the other hand, despair of making sense out of the notion of retribution and turn principally or completely to deterrence as the relevant goal. The marginal value of

\textsuperscript{84} Adams v. Murakami, 813 P.2d 1348, 1351 (Cal. 1991) (declaring that information on defendant's wealth is necessary for appellate review of alleged excessiveness of punitive award; instruction should direct jury to consider defendant's financial condition).

\textsuperscript{85} See, e.g., Lunsford, 746 S.W.2d at 472 (allowing evidence of defendant's wealth only for purposes of assessing punitive damages after liability issues have been resolved).


\textsuperscript{87} See, e.g., Clarence Morris, \textit{Punitive Damages in Tort Cases}, 44 HARV. L. REV. 1173, 1191 (1931) (discussing both positive and negative aspects of allowing jury to consider defendant's wealth in punitive damages cases).

money would seem to be relevant here, too, even if it is only one among a variety of relevant considerations. Yet some commentators who have advanced deterrence rationales for punitive damages generally have eschewed any role for wealth, regarding it as a perverse and irrelevant indicator that should be excluded altogether from the calculus of relevant factors, properly including such considerations as the apparent profitability of the misconduct and the likelihood of apprehension.\footnote{89} Whether wealth should have a continuing, proper role to play in the determination of punitive damage assessments is a difficult question to which much more thought needs to be devoted.

As is true with the vagueness problem in defining the \emph{basis} for punitive damages liability, there really is no entirely satisfactory answer to the vagueness problem in determining the \emph{amount} of such damages. The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages,\footnote{90} yet putting the flagrancy notion to principled use in ascertaining a proper amount of such damages is probably even more difficult than in rendering the underlying liability determination. However, similar problems of indeterminacy surround other forms of damages in private law, such as pain and suffering, mental anguish and loss of reputation. Moreover, the criminal law has always had the problem of determining proper levels of punishment for serious misconduct where the bases for decision involve a host of intangible considerations. If juries, trial judges and appellate courts earnestly seek to apply the standards of measurement (such as they may be) to the factual circumstances of the case, for the purpose of achieving the goals of punitive damages, the determination of the amount of such awards should have at least some basis in principle.

Because of the very real problems in finding a widely accepted basis for determining the proper amount of punitive awards, some legislatures and courts have adopted various arbitrary types of measurement approaches that reduce or remove discretion from the trier of fact. Perhaps the best approach along these lines is to limit such damages to, or define them by, some multiple of the plain-

\footnote{89} For a further discussion of this idea, see Abraham & Jeffries, \textit{supra} note 86, at 418-21 (concluding that wealth is irrelevant). \textit{But see} Arlen, \textit{supra} note 86, at 428 (concluding that wealth is irrelevant only if all individuals are risk neutral, but since most individuals are risk averse, deterrence is optimized by consideration of wealth).

\footnote{90} Other factors include the defendant’s wealth and the seriousness of the plaintiff’s injury. \textit{See} \textit{Restatement (Second) of Torts} \S 908(2) (1977).
tiff's actual damages—for example, by doubling or trebling the plaintiff's compensatory award.\textsuperscript{91} As an alternative or supplement to the multiple approach, the law might provide a floor for such awards and/or a cap.\textsuperscript{92}

Arbitrary rules of this type, perhaps in combination, are a partial solution to the measurement problem, if an imperfect one. It may be that such rules should contain an exception for certain cases, such as: (1) those involving particularly reprehensible misconduct, as perhaps existed in the Dalkon Shield development and sale,\textsuperscript{93} (2) those where the defendant profited or expected to profit from the misconduct in excess of what the arbitrary rules provide, as in the United States Supreme Court TXO case, (3) those where the defendant has continued the misconduct after getting caught and seems likely to continue it in the future, (4) those where the arbitrary rules provide for an amount of punishment that is clearly too harsh and undeserved or (5) those where for some other reason an application of the arbitrary rules appear clearly contrary to justice in the case.

As is true with determining liability for punitive damages and with the sentencing of criminal offenders, there is virtue as well as vice in having standards that are vague for determining the size of punitive damage assessments; the very vagueness that permits their abuse permits as well their enlightened use to achieve individualized justice tailored to the parties and the circumstances of the case. Arbitrary measurement-control rules thus should be used with caution to avoid over-mechanizing the administration of justice in cases involving flagrant misconduct.

\textsuperscript{91} For a discussion of arguments supporting the multiple approach, see Owen, \textit{Moral Foundations}, \textit{supra} note 16, at 731-38.

\textsuperscript{92} An example of a floor would be the greater of $10,000 or the plaintiff's attorneys' fees. A cap might be defined in terms of a fixed monetary amount, or might be related to some measure of the defendant's wealth. Except in the few states providing a right or entitlement to punitive damages, caps should not be constitutionally objectionable. Alabama is one of the entitlement states. See Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993) ($150,000 cap on punitive damage awards imposed an unconstitutional, arbitrary limit on jury awards).

\textsuperscript{93} See \textit{infra} note 109.
C. Misdirection of Punishments and Rewards

1. To the extent that liability for punitive damages is insured, the supposed punitive impact of such an award is avoided by the wrongdoer who thereby escapes his proper punishment, undercutting the supposed punitive or deterrent effect of such awards.

The punitive impact of punitive damage assessments surely is diminished, or at least diverted, if liability insurance is permitted by the law and is offered by insurers to cover such awards. At least some insurers, who formerly insured against such losses under the general liability provisions of insurance contracts, have tried to avoid the risk by contractually excluding responsibility for such losses. Thus, the insurance market itself (stung especially by responsibility for hundreds of millions of dollars in punitive damages losses in asbestos cases) is addressing this problem to some extent. Moreover, premium rates of many institutional insurers are based at least partially on the particular insured’s loss experience, which makes such insurers pay in the long-run for at least some of such “insured” losses.

The law could make the matter simple, however, by prohibiting the insurance of such damages on grounds of public policy. The law certainly would not tolerate or enforce insurance policies against the risk of a jail sentence or of a criminal fine, at least not where the crime involved moral turpitude. The cases are almost evenly split on the insurability of punitive damages, but it would


95. Statutes in at least two states provide that insurance contracts are not to be construed as covering punitive damages, as in policy clauses, for example, that provide insurance for “all sums which the Insured shall become legally obligated to pay as damages,” unless such contracts expressly so provide. See, e.g., HAW. REV. STAT. § 431-58 (1994); MONT. CODE ANN. § 33-15-317 (1993). In Texas, punitive damages coverage is prohibited in professional liability insurance contracts for medical doctors. TEX. INS. CODE ANN. art. 5.15-1, § 8 (1994). In Ohio, punitive damages are prohibited in contracts for uninsured and underinsured motorist insurance. OHIO REV. CODE ANN. § 3937.18 (Anderson 1994).

96. See generally BLATT ET AL., supra note 1, at 80-84; Giesel, supra note 94, at
appear that the better-reasoned cases favor outlawing insurance contracts for punitive damages liability, at least in the case of corporate defendants and malicious misconduct by individuals. Recognizing the absence of the principal's culpability in many instances of vicarious liability, some states which generally prohibit punitive damages insurance allow it in cases of true vicarious liability.

There is an important caveat that undercuts the desirability of a general rule prohibiting insurance against punitive damages liability. There was until very lately in this nation a trend, that appears now to have slowed or stopped, toward liberalizing awards of punitive damages and allowing them on vague standards without meaningful judicial oversight. When the law is poorly defined and poorly administered in these respects, the risk of undeserved punitive damage awards is substantial, making insurance contracts for such events much more reasonable. While insurance against properly defined and administered punitive damages awards should quite clearly be proscribed, fairness requires the allowance of insurance against punitive awards that are randomly assessed or based on personal conduct that is not truly reprehensible.

nn.136-43 (compiling cases on insurability of punitive damages). The majority approach allows directly and vicariously assessed punitive damages to be insurable. BLATT ET AL., supra note 1, at 80. However, some 18 states follow the minority approach, under which punitive damages are not insurable if assessed directly against the wrongdoer. Id. at 81. One treatise states that the trend, at present, appears to be in favor of allowing insurance of punitive damages. SCHLUETER & REDDEN, supra note 16, at 83. This conclusion appears questionable, and there would appear to be no ascertainable "trend" at this time, either way. The jurisdictions remain strongly split, and the nature of the issue has been changing recently in ways that undermine any intelligible reference to the notion of a trend.


98. See generally Giesel, supra note 94, at 357 n.11 (noting that eight jurisdictions allow insurance of vicariously imposed punitive damages).

99. In recognition of this problem, a number of states which generally prohibit punitive damages insurance allow it in the absence of truly reprehensible behavior. See generally Widiss, supra note 94. Moreover, the recent Supreme Court jurisprudence on punitive damages, discussed infra § IV A, has already inspired many courts to tighten the administration of such awards.
Liability insurance, vicarious liability and governmental liability all result in the punitive effect of punitive damage awards being transferred to innocent third parties—other insureds, shareholders and taxpayers—who themselves did not participate in the misconduct and so are free from blame, and who consequently are made to suffer illogically and unfairly by such awards.

This is the other half of the previous criticism which argued that wrongdoers are not sufficiently made to suffer by punitive damages which are shifted to an insurer. In complementary fashion, the present criticism argues that the suffering that does result from punitive damages may come to rest unfairly on innocent persons who themselves are not wrongdoers. Surely it is true that the punitive effects of such awards should not be placed upon parties who are truly “innocent,” and the law must strive to assure that this does not happen. Taxpayers are virtually always completely innocent, and it makes little sense for the people through their laws to inflict quasi-criminal punishment upon themselves for the misconduct of governmental employees. The statutes and judicial rulings in most states prohibiting the imposition of punitive damages against governmental entities therefore seem entirely proper.100

The situation is otherwise with respect to punitive damages imposed vicariously upon a private corporation, and indirectly upon the shareholders, for the gross misconduct of its servants in the scope of their employment.101 Punitive damages are proper in such cases, especially if the misconduct is approved by the enterprise, even if only tacitly. It would seem unwise to allow an institution to take the benefits of “thefts” from other persons by its employees, accomplished for the benefit of the enterprise. Institutions may act, of course, only through their employees. Such persons may be encouraged to pursue the enterprise’s business with excessive zeal, in knowing violation of the rights of others, if they are aware that


101. See Blatt et al., supra note 1, at 85 (discussing trends in vicariously assessed punitive damages); see also Ghiardi & Kircher, supra note 4, § 24 (discussing “conservative” and “liberal” view regarding vicarious liability for punitive damages); Giesel, supra note 94, at n.139 (noting that eight jurisdictions allow insurance of vicariously-assessed punitive damages); Comment, Insurance for Punitive Damages, supra note 94, at 459 (discussing insurance for vicariously assessed punitive damages).
the enterprise will be shielded from full accountability for the harmful consequences of such illicit decisions.\textsuperscript{102}

Principles of restitution argue for a firm’s vicarious responsibility for punitive assessments. To the extent that an employee’s misconduct in pursuit of corporate profit flagrantly violates the rights of others, the profits “earned” by the activity may be seen as tainted, and hence as not properly belonging to the enterprise. “Innocent” shareholders thus have no fair claim to such “illicit profits”—which may be seen as a form of unjust enrichment not belonging to them at all. Although close measurement of such profits will no doubt be highly problematic, punitive damages in such cases serve roughly to recoup from the corporation’s coffers the unjust rewards of its employee’s misdeeds and to return the booty to the victim, its rightful owner. Nor will the market allow such enterprises to slough off such resulting “losses” upon its innocent customers, whether of goods or services, because the pricing policies of the enterprise’s law-abiding competitors will remain unaffected.

3. Since punitive damages are noncompensatory, they provide the plaintiff with an undeserved “windfall,” and the public—whose interests are supposedly vindicated by such assessments—is left without any monetary benefit from the penal fine.

The “windfall” argument is largely answered above in terms of the important instrumental effect of such “windfalls” in achieving the educative, retributive (or restitutary), deterrent, compensatory and law enforcement functions of punitive damages. However, where a plaintiff recovers an enormous verdict, far in excess of what is needed to serve these five functions,\textsuperscript{103} then it seems appropriate

\textsuperscript{102} See generally Comment, Insurance for Punitive Damages, supra note 94, at 466 (discussing consequences of permitting punitive damages insurance in vicarious liability context).

\textsuperscript{103} Ordinarily, once a plaintiff’s compensatory damages are doubled or trebled (or perhaps quadrupled) by the punitive award, any additional amount of punitive damages is likely to be an “excess” award, representing the wrong done to the public, which should go to the state. The absolute size of the compensatory and punitive awards are important in determining the proper multiple, assuming that the judge or jury has discretion on this issue. Thus, if compensatory damages are of a relatively low amount in absolute terms—say, $10,000—then a punitive award of two or even three times this amount may just cover the plaintiff’s attorneys’ fees and litigation expenses in a complex suit against a major corporation. Such cases might well require a larger punitive award to assure the plaintiff some measure of a retributive, restitutionary component to the award over and above the underlying compensatory component. By contrast, if a plaintiff recovers compensatory damages of millions of dollars in a serious injury case, punitive damages greater than one or two times the compensatory award might often fairly be regarded as an “excess” award subject to recoupment by the state. However, the
for the "excess" portion to be handed over to the public's representative, perhaps to finance public law enforcement in the future, or for some other public good, preferably to help ameliorate the type of social problem attributable to the type of misconduct engaged in by the defendant.\textsuperscript{104}

4. In mass disaster cases, allowing punitive damages to early plaintiffs may bankrupt defendants and so deprive later plaintiffs of funds to cover their actual damages, to say nothing of over-punishing the defendants.

This is a real and serious problem in the worst mass disaster cases, where hundreds or thousands of persons are maimed or killed because of the flagrant misconduct of an enterprise.\textsuperscript{105} The clearest present example involves the litigation against the asbestos industry for selling an insidiously dangerous product over many decades without warning of its dangers.\textsuperscript{106} As a result, tens of thousands of persons have died already, and many thousands more will die from mesothelioma and become disabled from asbestosis, a serious lung disorder, for decades to come.\textsuperscript{107} Compensatory damages alone will amount to many billions of dollars, and courts have assessed hundreds of millions of dollars in punitive damages against a number of companies in the industry for failing to warn of a danger they knew existed. More than a dozen manufacturers (most administrative difficulties and potential for abuse in fine tuning multiples begins to undercut their principal advantage of substituting measurement standards that are certain for those that are vague and subject to the resulting vagaries of unbridled discretion.

\textsuperscript{104} For a review of the statutes mandating a division of punitive damage awards between the plaintiff and the state, see GHIARDI & Kircher, supra note 4, § 21.16 (compiling list of states that require percentage of punitive damages award to be assigned to state or public entity); Amelia J. Toy, Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective, 40 Emory L.J. 303 (1991).


\textsuperscript{106} See Joseph A. Page, Asbestos and the Dalkon Shield: Corporate America on Trial, 85 Mich. L. Rev. 1324 (1987); Saks & Blanck, supra note 105, at 816.

\textsuperscript{107} See authorities collected infra note 111.
notably Johns-Manville, or Manville) have gone into bankruptcy, in part because of liability for punitive damages on top of a crushing liability for the actual losses of so many plaintiffs.\textsuperscript{108}

What to do with punitive damages in such situations\textsuperscript{109} is a problem of enormous complexity which requires much analysis and ingenuity. There are a host of problems with punitive damages in this context, examined at length by commentators\textsuperscript{110} and courts,\textsuperscript{111} and only a couple of issues can be briefly touched on here. One proposal that is quite clearly unsatisfactory as a general approach is a single, aggregate punitive award for division among the entire

\textsuperscript{108} See generally Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.) (en banc), \textit{cert. denied}, 478 U.S. 1022 (1986); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 656 (E.D. Tex. 1990). Although punitive damage payouts in the asbestos cases are proportionately very small, the potential threat of such assessments remains a significant factor in the litigation and settlement calculus.

\textsuperscript{109} Another situation which demonstrates such mass awards of punitive damages is the litigation surrounding the Dalkon Shield, an intrauterine device that injured thousands of women, bankrupting its manufacturer, the A. H. Robins Company. See \textit{In re A.H. Robins Co.}, 880 F.2d 769, 776 (4th Cir. 1989) (discussing personal injury trust fund created to process claims of parties injured by debtor’s Dalkon Shields); Page, supra note 106; Seltzer, supra note 105, at 72 (discussing Dalkon Shield class actions).

\textsuperscript{110} See, e.g., Bernstein, supra note 105; Owen, \textit{Punitive Damages}, supra note 4, at 1322-25; Seltzer, supra note 105.

\textsuperscript{111} See, e.g., Dunn v. HOVIC, 1 F.3d 1371, 1385-86 (3d Cir.), \textit{modified in part}, 13 F.3d 58 (3d Cir.), \textit{cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn}, 114 S. Ct. 650 (1993) (collecting state and federal cases); Wammock v. Celotex Corp., 826 F.2d 990, 995 (11th Cir. 1987) (asbestos litigation), \textit{opinion withdrawn}, 835 F.2d 818 (11th Cir. 1988); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (2d Cir. 1967) (Friendly, J.) (MER/29, cholesterol-lowering drug litigation); Jackson v. Johns-Manville Sales Corp. ("Jackson III"), 781 F.2d 394, 396 (5th Cir. 1986) (asbestos litigation; terminating earlier debates in "Jackson II," 750 F.2d 1314 (5th Cir. 1985) (8-1-5 decision), and "Jackson I," 727 F.2d 506 (5th Cir. 1984) (3-0 decision), \textit{cert. denied}, 478 U.S. 1022 (1986)); Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865 (Iowa 1994) (asbestos litigation; noting that "[t]he vast majority of state and federal courts ‘that have addressed the issue have declined to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct.’"); Fischer v. Johns-Manville Corp., 512 A.2d 466, 481 (N.J. 1986) (asbestos litigation). \textit{See generally} Nadel, supra note 105 (collecting cases on propriety of multiple assessments of punitive damages from common occurrence).

Although the nature of the underlying policy discussion has remained essentially unchanged over the years, the framework for the debate has shifted in the last several years from the common law to the Constitution. As discussed below, the Supreme Court has ruled that repetitive punitive damage assessments for a single course of behavior are not generally proscribed by the prohibitions against double jeopardy or excessive fines, at least if none of the "penal fine" goes to the state. Although the Court has indicated that the Due Process Clause places some constraints on such awards, it has to date avoided ruling on whether due process in some manner restrains repetitive assessments of this type. For a discussion of the Supreme Court’s recent punitive damages jurisprudence, see infra notes 129-54 and accompanying text.
class of victims.\textsuperscript{112} Alluring at first glance, this approach is fraught with far too many problems of theory and administration to be helpful in cases involving recurring claims, and it has been rejected by almost every court that has considered it.\textsuperscript{113} One thing that is certain is that judges in such cases must closely monitor the solvency of defendants to insure that available assets are not prematurely consumed by excessive early punitive awards to the detriment of subsequent plaintiffs.\textsuperscript{114}

An interesting approach applied recently in at least a couple of aggregated asbestos cases has been the assignment by the jury of a punitive multiplier, from zero to two or three, to the compensatory awards assessed to each defendant.\textsuperscript{115} This type of mass multiplier approach has the very decided advantage of being administratively convenient, and hence efficient, as well as assuring the equal treatment of each of the aggregated plaintiffs in regard to one another and in regard to each defendant. By its nature, however, it exposes to particular risk future plaintiffs who may end up with nothing left in the corporate tills even for their actual damages. Thus, courts must be cautious in assigning or allowing multipliers when the aggregate payouts might bankrupt the defendants. Such courts must also maintain especially close supervision of such litigation as it progresses. Whether or not such multipliers are allowed, courts should be prepared to reduce punitive damages assessments—and possibly to eliminate them altogether—when a mass disaster defendant's fi-


\textsuperscript{113} \textit{See generally} Nadel, \textit{supra} note 105.

\textsuperscript{114} Yet, early plaintiffs need and deserve extra compensatory incentives and rewards for forging what are often long and difficult trails of discovery and proof to the first couple of punitive awards. Subsequent plaintiffs, in a very real sense, ride to favorable settlements and verdicts—for compensatory as well as punitive damages — on the coattails of the firstcomers. However, it usually will only be the first few plaintiffs (and their lawyers) who deserve such extra punitive awards. Thereafter, the interests of subsequent plaintiffs should probably be considered equal, with regard to the division of the punitive spoils, without regard to the time of arrival at the courthouse. \textit{See Owen, Punitive Damages, supra} note 4, at 1319-25.

\textsuperscript{115} \textit{See} Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 657-58 (E.D. Tex. 1990) (allowing jury to assess punitive damages multiplier, ranging from 1.5 to 3.0 depending on defendant, for each dollar of actual damages). \textit{See generally} Glen O. Robinson & Kenneth S. Abraham, \textit{Collective Justice in Tort Law}, 78 VA. L. REV. 1481, 1490-96 (1992) (discussing the \textit{Cimino} approach as one alternative to traditional method of valuation in class action claims); Saks & Blanck, \textit{supra} note 105, at 821 (discussing aggregating method and statistical approach used in \textit{Cimino}).
nancial viability becomes truly threatened by the litigation and the payouts.\footnote{116}

D. Social Harm from Excessive Punishment

1. Because of the unpredictability of punitive damage awards, and the possibility of multi-million dollar "bonanzas," plaintiffs and their lawyers are encouraged to bring nonmeritorious lawsuits and are discouraged from settling lawsuits that include claims for punitive damages.

Sometimes referred to as the "eager-plaintiff" problem, this criticism has little merit. First, it should be remembered that rendering the plaintiff "eager" is precisely what fuels the law-enforcement engine of punitive damages, as discussed above.\footnote{117} Second, it is unlikely that many plaintiffs or their attorneys will risk the cost, time and trouble of instigating a nonmeritorious lawsuit simply because they think that for some reason (other than merit) they will win the lawsuit, and will go on to win a punitive damages award to boot.

Much more likely than the initiation of wholly nonmeritorious suits is the temptation for plaintiffs' lawyers to routinely add what are usually nonmeritorious claims for punitive damages to meritorious compensatory damages actions. This very real problem raises serious ethical considerations for lawyers who program their computers to include boilerplate punitive damage claims as standard items in complaints.\footnote{118} In such cases, courts have available effective remedies in the form of sanctions and the assessment of costs that they should use to assure that the law is not abused by routine assertions of nonmeritorious claims. Moreover, a number of legislatures have reasonably resolved the matter by precluding such claims until a prima facie showing of their appropriateness is made to the court.\footnote{119}

\footnotetext{116}{Thus, multipliers should perhaps be made conditional, and subject to being opened for reconsideration upon a change in circumstances—such as a substantial deterioration in the firm's financial condition or, possibly, a substantial increase in future claims.}

\footnotetext{117}{For a discussion of the law enforcement function of punitive damages in encouraging plaintiffs to bring claims, see supra notes 72-77 and accompanying text.}

\footnotetext{118}{It is not the programming of computers that may be unethical, of course, but allowing such claims to be included regularly in complaints without sufficient investigation to form a reasonable belief that they are supported by the facts of the particular case.}

\footnotetext{119}{For a further discussion of this practice, see infra note 158 and accompanying text.}
As far as discouraging settlement, the possibility of recovering a substantial punitive award may indeed make a plaintiff reluctant to settle a meritorious suit for an amount reflecting the settlement value of the action based solely upon the probability of success and the amount of compensatory damages the plaintiff is likely to recover. Presumably, this will be the case where the plaintiff believes two things: first, that he is entitled to recover compensatory damages under the principles of tort law (or other substantive basis of recovery) and compensatory damages law; and second, that he will be able to prove at trial that the defendant was flagrantly at fault in committing the tort or other violation of legal right—or at least make out a plausible claim to this effect. Yet, once again, this basically is the purpose of punitive damages. Accordingly, it is no wonder that defendants would wish to settle such cases merely at their compensatory settlement value—just as a thief discovered by the police would wish to "settle" his legal difficulty by returning the stolen property to the victim.120

2. In part because of the unpredictability of punitive damage awards, whether and to what extent they really do effect deterrence is problematical, and in fact, such damages may result in excessive deterrence which may discourage entrepreneurs and others from engaging in socially beneficial activities.

This "excessive deterrence" argument is fundamentally empirical and speculative, because it is difficult to ascertain how effective the threat of punitive damage awards really is in altering the behavior of persons and institutions contemplating conduct of various types.121 Assuming that punitive damages really do have a substantial deterrent impact on the decisions of potential actors,122 the ac-

120. The computation of the "true" settlement value of cases involving a substantial possibility of punitive damages will involve much more in the way of art than of science, and the settlement of such cases may well be more difficult as a result. Yet, defendants in such cases are likely to be particularly anxious to settle without a trial in order not only to avoid the financial risk in the particular case at bar, but also to avoid the risk of adverse publicity over revelation of their misconduct, which, by hypothesis, is flagrant and extreme.

121. For a discussion of the threat and consequences of excessive awards, see generally Ghiardi & Kircher, supra note 4, § 18.

122. As a general proposition, this may well be a dubious assumption. See E. Donald Elliott, Why Punitive Damages Don't Deter Corporate Misconduct Effectively, 40 Ala. L. Rev. 1053, 1060 (1989) (noting little evidence that punitive damages either do or do not deter corporate misconduct); Owen, Foreword, supra note 16, at 313-14 (arguing that other aspects of being involved in litigation already deter such conduct, thereby making punitive damages an ineffective deterrent in many cases).
tors who are risk-averse will indeed be excessively deterred. Accordingly, such actors will engage in types and levels of behavior that is "suboptimal," to coin an expression that may sound suspiciously like economic jargon. In such cases, actors will suffer an unfortunate loss of personal autonomy or freedom, and society will suffer waste.

The excessive-deterrence criticism is thus, in part, well-founded, and to this extent the punitive damage doctrine is undesirable. Yet, the analysis on this point so far is incomplete. To complete the analysis, one must also consider the doctrine's positive effects on both personal freedom and social utility (and economic efficiency). That is, the availability of punitive damages is designed to force actors to respect the legal rights of potential victims from highly untoward invasion, which serves to increase the freedom of potential victims and, commensurately, to decrease the ability of potential malefactors to obtain the freedom owned by others by stealth and theft.\(^{125}\)

Social utility and economic efficiency should be improved by proper awards of punitive damages, as economic theorists often contend.\(^{124}\) By counterbalancing the enforcement costs confronting victims, punitive damages deter rational profit-maximizing enterprises from seeking illicit profits that otherwise would appear likely to be worth the risk and cost of getting caught. In this way, punitive damages tend to move economic actors back toward the point of optimal behavior, around which the substantive rules of law generally are roughly centered.

It is impossible to know with confidence whether on balance punitive damages will generate too much or too little deterrence of good or bad behavior—or hence to know whether the doctrine on balance generates a net gain or loss for society—because the matter is almost entirely conjectural.\(^{125}\) One may take some comfort, perhaps with reason, in assuming that properly-designed and administered rules should, by hypothesis, expand the realm of personal freedom and promote the greater economic and other social good. However, coupled with such bold assumptions must be a commitment to define, frame, confine and administer such rules of law—

---

123. This point is further developed in Owen, Moral Foundations, supra note 16, at 708-13.


125. In addition, the resolution of the question involves the comparison of incommensurable values.
that are by their very nature vague and easily subject to abuse—in a manner that vigilantly protects potential defendants and the public from unnecessary loss of freedom and social waste.

3. Because of the uncertainty and increased costs of defending and paying punitive damage claims, the costs of products and services are increased, commercial planning is destabilized and the nation's industry is competitively disadvantaged in the world economy.

It is probably true that the costs of defending punitive damages claims and the resulting increase in insurance costs do raise the cost of goods and services somewhat in this nation. Yet, the amount of such "excess" costs that responsible firms in most industries incur is probably quite small, and such costs appear to be substantially counterbalanced by the variety of beneficial effects attributable to the punitive damages doctrine discussed above.126

As for whether such damages cause commercial instability, the answer must be that to some extent they do. Manufacturers, banks, investment houses, insurance companies and other enterprises will not be able to predict with certainty precisely what type of misbehavior will be judged, often long after the event, as flagrantly improper and deserving of significant legal sanction. This situation is unfortunate for responsible enterprises that try to obey the law. Nevertheless, in a properly administered system of punitive damages, firms that do respect the rights of others will be largely immune from such assessments, even if occasionally they do face such claims.

The risk of such assessments will be much greater for companies that care little whether their activities improperly cause harm to the rights of their customers, other persons or other enterprises. Punitive damages are designed to change such attitudes, or at least to provide such companies with a monetary disincentive for violating the rights of others. Finally, the availability and proper use of punitive damages should serve to completely destabilize the commercial plans of flagrantly dishonest enterprises that prey upon the public in deliberate disregard for the rights of others. Punitive damages should help assure that enterprises operated in such a manner are destabilized permanently for the public good.

The argument that punitive damages put American industry at a competitive disadvantage in the world economy is difficult to un-

126. See supra notes 48-77 and accompanying text.
nderstand. It is probable that the competitive pricing structure of most markets precludes irresponsible firms from passing along punitive damage assessments to customers in the form of higher prices. Thus, malefacting enterprises will indeed be competitively disadvantaged by punitive damages assessments, when such damages do their job in removing profit from the illicit behavior and add a true penalty to boot. This is as it should be and is unrelated to where the competition comes from, whether domestically or from foreign lands. Furthermore, to the extent that the punitive damages system requires responsible domestic manufacturers frequently to defend and pay unmerited assessments of this type, the system also requires the same of companies who do business in this nation. The international competition argument, therefore, is singularly unpersuasive.

In sum, the punitive damages doctrine has a number of troubling characteristics, at least a couple of which are quite serious indeed. Yet, most of the doctrine's true problems can be satisfactorily controlled, to a large extent, and many other supposed problems vanish like the proverbial bat confronted with the light. Nonetheless, responsible management of the punitive damages doctrine requires that the law reform itself as much as possible to minimize the doctrine's many costs.

IV. Reform Proposals

As noted throughout this Article, there are a variety of "reform" proposals afoot, all designed to improve the fairness of the theory or administration of punitive damages law. Perhaps the most important point to note at the outset is that there is very little agitation for the general repeal of the punitive damages doctrine. It generally is perceived in this nation\(^\text{127}\) as an important doctrine that helpfully checks and rectifies extreme misconduct. As seen above, however, such damages hold substantial potential for abuse and can be used improperly to cause enormous harm. Thus, there is much room in the doctrine for beneficial reform. The following sketch of reforms in punitive damages law is intended merely as a survey, and one must turn to the reform literature for comprehensive discussions of particular reforms.\(^\text{128}\)

\(^{127}\) Although other nations generally do not have a general doctrine of punitive damages, a preliminary report of the British Law Commission recently recommended widening their use in that nation. See Consultation Paper, supra note 55, at 173-78 (detailing recommendations for expanding use of punitive damages in England).

\(^{128}\) See, e.g., Ghiardi & Kircher, supra note 4, § 21 (discussing various pro-
A PUNITIVE DAMAGES OVERVIEW

A. Constitutional Reform

Because of the increase in multi-million dollar awards of punitive damages and the widespread perception that the doctrine contains some basic fairness problems, the United States Supreme Court in four recent cases has examined the constitutionality of such awards.129 In none of the four cases decided so far has the Court concluded that the Constitution requires any particular type of rules for the assessment of such damages.

In the first case, Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.,130 the Court rejected an Excessive Fines Clause challenge to a six million dollar punitive damages award, holding that the Eighth Amendment does not apply to such assessments in civil cases where the state does not share in the recovery.131 As legislatures increasingly enact reform statutes requiring payment of a portion of punitive damage awards to the state, the latter condition of the Browning-Ferris holding suggests that the excessive fines issue may be alive and well in such jurisdictions.

In the next and most important case to date, Pacific Mutual Life Insurance Co. v. Haslip,132 the Court considered the applicability of the Due Process Clause to punitive damages, concluding that: (1) the imposition of punitive damages on a vicarious liability basis is


131. Id. at 260.

not fundamentally unfair,

(2) the common-law method for determining punitive damages is not per se unconstitutional

and (3) the punitive damages award in the case, about four times larger than the compensatory damages verdict, was not so disproportionately large as to violate due process.

The Court did indicate, however, that due process does require that a system of punitive damages law and administration may not give juries unbridled discretion. Further, the liability rules for such damages, on which juries are instructed, and the rules for judicial review must both provide meaningful standards reflecting the objectives of such assessments.

Haslip thus establishes a due process structural cabin within which both juries and courts must operate in order to accord punitive damages the caution warranted by a doctrine of quasi-criminal assessments.

In the third case, TXO Production Corp. v. Alliance Resources Co., the Court backtracked substantially from the well-reasoned and balanced position it had outlined two years earlier in Haslip. On evidence that the defendant had tried to cheat the plaintiff out of millions of dollars, the Court in TXO upheld, against a charge of constitutional excessiveness, a $10 million punitive damage verdict—some 526 times greater than the compensatory award of $19,000. The case was a strange one, and its constitutional significance is quite unclear. We now know that the present nine justices are all on record as holding that there are certain procedural due process limitations on assessments of punitive damages. In addition, it would seem that seven justices, those other than Justices

133. Id. at 14-15 (upholding Alabama common law doctrine of respondeat superior as rationally advancing state goal of minimizing fraud by imposing incentives for principals to oversee actions of their agents).

134. Id. at 17 (noting that not only was this method in use before Fourteenth Amendment was enacted, but courts have consistently upheld it against constitutional attack).

135. Id. at 23-24 (justifying disparity between this punitive damages award and fines imposed for insurance fraud because, under state statute for insurance fraud, imprisonment may supplement any monetary fine).

136. Id. at 18-22. The vagueness in the traditional review standards, conditioning reversal of a punitive damages awards on a “shock the conscience of the court” standard, or on a determination that the jury was motivated by “passion or prejudice,” does not affront due process if the reviewing court makes particularized Haslip-type findings in addition to applying the traditional standards of review. Robertson Oil Co. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993) (en banc).


139. Id. at 2722-23.
Scalia and Thomas,140 hold there to be certain (perhaps "substan-
tive") limits to such awards, based on principles of "reasonableness"
and/or the underlying goals of punitive damages law—punish-
ment, deterrence and (in a few states) compensation.141 Yet none
of the justices, it would appear, finds that a "reasonable relation-
ship" rule between punitive and compensatory damages in and of
itself inheres in the Constitution.142

Finally, and most unfortunately, it now appears quite clear143
that due process does not require trial courts to explain their deci-
sions on post-trial motions to uphold punitive damage assessments,
even $10 million ones.144 However, without such an explicit appli-
cation of the law to the evidence by the judge who presided at the
trial, it is not clear how the Supreme Court expects appellate courts,
as required under Haslip, to determine if a particular defendant
subjected to a large punitive damages assessment was in fact highly
culpable and hence deserving of such a penalty.145

140. Id. at 2727 (contending that procedural due process requires judicial re-
view of punitive damages for reasonableness, but that there is no constitutional
right to a substantially correct determination of reasonableness).

141. Presumably, the "punishment" goal includes the goals of retribution, ed-
ucation (and possibly compensation); the "deterrence" goal includes the goal of
law enforcement; and the "compensation" goal includes both actual (but otherwise
noncompensable) damages and attorneys' fees (and other litigation expenses).

142. Hence, the Constitution quite clearly does not require a measurement
rule based on a multiple of compensatory damages. By the same token, however,
the Constitution would appear to provide no impediment to a multiple approach,
which surely represents a practical and fair—and, accordingly, perhaps the (sec-
ond) best—accommodation of the conflicting considerations. See Owen, Moral
Foundations, supra note 16, at 731-38 (discussing merits of multiple damages
approach).

143. To me, but not to Gerald Boston who informs me that he thinks that the
post-Haslip, pre-TXO requirement of some appellate courts, requiring trial courts
to provide a basis in the record for altering or refusing to alter a jury's award of
punitive damages, may survive TXO. See, e.g., Morgan v. Woessner, 997 F.2d 1244
(9th Cir. 1993) (remanding punitive damage award so that district court could
analyze its ruling in light of appellate court's opinion and provide reasons for ulti-
mate conclusion).

144. Largely as a result of Haslip, at least eight states recently have adopted a
requirement that trial courts explain their refusal to disturb jury awards of punitive
damages, as have several federal courts of appeals. See Transportation Ins. Co. v.
Moriel, 879 S.W.2d 10 (1994) (refusing to impose this requirement on already
over-burdened Texas trial courts, but imposing it on state's intermediate appellate
courts).

Supreme Court in Haslip noted that courts must consider the following factors
when determining whether a punitive damage award is excessive:
(a) whether there is a reasonable relationship between the punitive dam-
ages award and the harm likely to result from the defendant's conduct as
well as the harm that actually has occurred; (b) the degree of reprehensi-
bility of the defendant's conduct, the duration of that conduct, the de-
pellite courts now will have to decide (or, more precisely, may constitutionally decide) such cases solely from the transcript and appellate argument without the benefit of the trial court's insights, as the Supreme Court did in TXO.146

However, future defendants often will be less deserving than the TXO defendant of penalties assessed against them. Yet appellate courts remote from the trial courtrooms will most probably be reluctant to second guess the decisions of juries (and silent trial courts) in such cases. Thus they probably will be inclined—indeed, in a real sense will be forced—to give presumptive validity to such awards. This was the unfortunate situation that prevailed before Haslip, when there was little true judicial review of punitive damage awards in most jurisdictions—which appeared to be a major part of the problem that most of the Justices in Haslip properly sought to rectify. In removing this important explanatory tooth from Haslip, TXO may have the unfortunate effect of weakening more systemically the procedural structure established by Haslip that was beginning to assure that punitive damage judgments were based on proper considerations. After TXO, it looked as if both trial and appellate courts could comfortably regress to their pre-Haslip habit of abdicating all but a semblance of judicial control over punitive damages decisionmaking to the (properly instructed) jury.

In the fourth and final case to date, Honda Motor Co. v. Oberg,147 the Court ruled that procedural due process requires that judicial review be available for defendants to challenge punitive damage awards on grounds of excessiveness. Oberg was a products liability design defect case involving a three-wheeled all-terrain vehicle that overturned, severely injuring the plaintiff, in which the jury awarded the plaintiff $5 million in punitive damages in addition to somewhat in excess of $900,000 in compensatory damages, the latter reduced by 20% on account of the plaintiff’s contributory negligence. A unique state constitutional provision in Oregon

fendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 21-22.

146. Except, of course, in those jurisdictions otherwise requiring trial courts to specify reasons for their rulings on punitive assessments. See supra note 143.
effectively precluded judicial review of the amount of punitive damage assessments. On this authority, and notwithstanding Haslip's emphasis on the importance of judicial review, the Oregon appellate courts in Oberg refused to review the defendant's claim that the punitive damage award was excessive and affirmed the award. The United States Supreme Court reversed:

The common law practice, the procedures applied in every other State, the strong presumption favoring judicial review that we have applied in other areas of law, and elementary considerations of justice, all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury.⁴⁴⁸

On its face, Oberg is a trivial case. Why the Supreme Court squandered its limited resources hearing the case and preparing a full opinion on a clear and narrow punitive damages judicial review issue—one that was plainly and strongly implicit in Haslip and applicable only to a single state—is difficult to understand. A brief per curiam reversal on the basis of Haslip would seem to have been the far more sensible course. Yet, Oberg does have some real value for lawyers and lower courts, a value which lies in the tone of the opinion rather than in its holding. In justifying the reversal of the award, Justice Stevens for the majority⁴⁴⁹ underscored once again the potential dangers of unchecked punitive damages verdicts and the availability of the Due Process Clause to remedy arbitrary awards. "Punitive damages pose an acute danger of arbitrary deprivation of property, since jury instructions typically leave the jury with wide discretion in choosing amounts and since evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses."⁴⁵⁰ In sum, Oberg realigns the Court's focus back to the Haslip Court's concerns about: (1) the risk that punitive damages may be assessed against defendants for the wrong reasons and otherwise unfairly, and (2) the responsibility of the courts under the Due Process Clause to remedy such arbitrary and improper awards. Significantly, the effect of the Court's resuscitation of Haslip in this manner is to color TXO, sandwiched in between, as a perhaps unfortunate aberration

---

⁴⁴⁸ Id. at 2342.
⁴⁴⁹ Justice Scalia concurred and Justice Ginsburg dissented in an opinion in which the Chief Justice joined.
⁴⁵⁰ Id. at 2340.
in the developing Supreme Court jurisprudence on the constitutional limits of punitive damages law.

Additional due process (and other constitutional) questions remain unanswered that the Supreme Court may one day choose to answer; and one may hope that the Court will continue to take Haslip, rather than TXO, as the model for its analysis. Surely the most momentous question as yet unresolved by the Court is whether the Constitution imposes any restraints on the repetitive imposition of punitive damages in mass disaster litigation, such as the litigation that has confronted the asbestos industry for many years. Other than its workload, together with the inherent difficulty of the issue, it is difficult to understand why the Court quite recently failed to review this most important matter when presented with what appeared to be the perfect opportunity. Many other fairness ques-

---

151. For a further discussion of these issues, see supra notes 106-16 and accompanying text.

152. See generally Dunn v. HOVIC, 1 F.3d 58, 1385-86 (3d Cir.), modified in part, 13 F.3d 58 (3d Cir.), cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn, 114 S. Ct. 650 (1993). In the absence of Supreme Court guidance, lower courts continue to struggle with the problem as best they can. See Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994). The Spaur court stated:

"We have examined the authorities cited by OCF in support of its position that multiple claims for punitive damages should not be allowed in cases such as this. We do not disagree that the problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one. . . . [M]any "powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts." In re Sch. Asbestos Litig., 789 F.2d 996, 1005 (3d Cir. 1986), cert. denied, 479 U.S. 852, and cert. denied, 479 U.S. 915 (1986).

Nevertheless, the vast majority of state and federal courts "that have addressed the issue have declined to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct." Dunn v. HOVIC, 1 F.3d 1371, 1385-86 (3d Cir. 1993), cert. denied, ___ U.S. ___ (1993), 114 S. Ct. 650, 126 L. Ed. 2d 608 (1993) (collecting state and federal cases). . . .

The United States Supreme Court has not yet ruled on the issue of whether the Due Process Clause of the federal Constitution places a limit on repetitive awards of punitive damages in mass tort litigation. . . .

Thus, OCF seeks to have us take the lead and strike the punitive damages award because the point of "overkill" has been reached. We question whether such a remedy would be fair and effective. We believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damage awards in mass tort litigation.

Other courts have reached this same conclusion.

In concluding that multiple punitive damage awards are not inconsistent with the due process clause or substantive tort law principles, both state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products.

Dunn, 1 F.3d at 1386.
tions discussed throughout this Article may (or may not) have due process implications, such as the propriety of basing punitive assessments upon the defendant's wealth, whether the burden of proof for punitive damages may properly be set at only a preponderance of the evidence,\textsuperscript{155} and many others. Only time will tell which of the many fairness issues involved in the administration of the punitive damages doctrine the Court will ultimately find to be of constitutional dimension.

B. Legislative and Judicial Reform

Recently, the legislatures of more than half the states, and a number of courts, have made a variety of changes in punitive damages law in an attempt to cure some of the doctrine's perceived problems. Most of these changes have been procedural, and relatively minor, yet several hold at least the potential for improving the fairness of how punitive damages are assessed in certain cases. The various reform proposals have been discussed by others elsewhere at length,\textsuperscript{154} and so they only need be lightly sketched out here.

1. Redefining the Standards: Both the definitions of the proscribed misconduct and the standards for determining the amounts of such awards may be improved.

This is an excellent reform that is needed in most states. The basis of liability in most jurisdictions should be carefully redefined, in part to reflect the flagrancy and extremity of the type of misconduct deserving punishment.\textsuperscript{155} The standards of both liability and measurement should be directly and expressly related to the goals of punitive damages.

2. Burden of Proof: The burden of proof may be raised from a "preponderance of the evidence" standard, ordinarily used in civil law litigation, to proof that is "clear and convincing" or something similar.

This is an important and positive change that many legislatures

\textit{Spaur}, 510 N.W.2d at 865-66; accord W.R. Grace & Co. v. Waters, 638 So. 2d 502 (Fla. 1994) (noting the problems of successive awards in mass tort litigation, but refusing to limit their imposition).

\textsuperscript{153} Haslip suggests that such a higher standard of proof may not be constitutionally required. Pacific Mut. Life Ins. Co. v. Haslip, 449 U.S. 1, 23 n.11 (1991).

154. See, e.g., GHIARDI & KIRCHER, supra note 4, § 21; Schwartz & Behrens, supra note 128; Toy, supra note 104.

155. See Owen, Civil Punishment, supra note 16, at 114-17; Owen, Moral Foundations, supra note 16, at 708-22; Owen, Punitive Damages, supra note 4, at 1299-1371.
and a few courts have made in recent years.\textsuperscript{156} This reform should serve to focus the decision-maker on the importance of careful deliberation on the merits of the case, and it should provide courts with both the authority and obligation to review carefully the sufficiency of the evidence for such awards.

3. **Prima Facie Proof:** The plaintiff may be required to prove a prima facie case for punitive damages before such damages may be pleaded, or before evidence may be introduced or argument made with respect thereto.

If the plaintiff is precluded from claiming punitive damages in his original complaint, one beneficial effect will be to prevent the practice of some plaintiffs' lawyers of routinely asking for them in every case. This latter result nicely resolves the knotty ethical problem discussed above and should decrease the cost of litigation overall.\textsuperscript{157} Another beneficial aspect of this reform is that it keeps inflammatory rhetoric and evidence of the defendant's wealth out of the case, and away from the jury, until the judge determines that there is a legitimate punitive damages issue in the case.

4. **Bifurcation:** The bifurcation of trials may be permitted, or required.

When juries hear a case involving punitive damages, the trial may be bifurcated, to permit the defendant's underlying liability for compensatory damages to be tried first, without contaminating the jury's deliberation thereon with evidence and argument on punitive damages.\textsuperscript{158} In the abstract, this is a logical and fair reform and

\textsuperscript{156} Ghiardi & Kircher, supra note 4, § 21.13. Several states, including Alabama, Alaska, Florida, Indiana, Kentucky, Montana, Ohio, Oregon and South Carolina have adopted statutes requiring a stricter standard of proof before a court may enter a punitive damages award. \textit{Id.} The statutes and cases are collected in \textit{Transportation Insurance Co. v. Moriel.} 879 S.W.2d 10 (1994) (refusing to adopt this reform which had been considered and rejected by the Texas legislature).

\textsuperscript{157} Procedural changes along these lines are most important in cases tried before juries, but such changes should decrease litigation costs in non-jury cases as well. Although this type of change will increase litigation costs in those few cases where a prima facie claim is ultimately established (by a hearing and perhaps briefing on this issue), such costs should be substantially outweighed by the decreased costs from avoiding having to litigate a phantom issue in the great majority of cases where quasi-criminal punishment simply has no place.

\textsuperscript{158} See, e.g., W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 (Fla. 1994) (holding that trial court, on motion, should bifurcate punitive damages from remaining issues). See generally Ghiardi & Kircher, supra note 4, § 12.01 (noting danger that evidence regarding defendant's reckless or malicious conduct and financial status may prejudice the jury's determination of liability for compensatory damages); Seltzer, supra note 105, at 90 (maintaining that bifurcated trial would
therefore should probably be adopted, although it may materially increase the cost of litigation. This approach is procedurally awkward, however, and it presents defendants with strategic problems that may be greater than any countervailing advantages.\textsuperscript{159} Because the principal purpose of bifurcation is to provide fairness to the defendant, it thus should not be a requirement but rather should be an option, exclusively for the defendant to decide.

5. \textit{Caps and Multipliers: Some form of cap—a multiple of the plaintiff's actual damages, a percentage of net worth, or an absolute monetary amount—may be used to limit, determine, or guide the amount of punitive damage awards.}

Such arbitrary methods of measurement for punitive damage awards reduce the risk of extreme, "runaway" awards, on the one hand, and unduly low assessments on the other.\textsuperscript{160} However, such approaches by their very nature simultaneously deprive the decision-maker of the flexibility of achieving optimal justice in particular cases by tailoring the punishment to fit the particular wrongdoer and the particular crime.\textsuperscript{161} As discussed above, a crea-
tive use of some combination of multiples, floors and caps, perhaps with appropriate exceptions to permit at least some flexibility in extreme cases, may be the best solution. Yet, flexibility leads to abuse as well as justice, and the great advantage of predetermined measurement approaches lies in their control of extremes and in their administrative simplicity.

It may well be that the only practical (hence, second-best) solution is to legislate a combination of these arbitrary measurement devices that appear best for the greatest number of ordinary cases and to banish adjudicative discretion altogether from the measurement decision. This would leave as the “only” question in punitive damage cases the liability question of yea or nay, and the measurement of such awards would be left to formulaic determination. I think that such an approach would be well worth exploring, by both legislators and commentators, but its development is beyond the scope of the present Article.

6. Splitting Awards with the State: Some percentage of punitive damage awards may be devoted to some public purpose.

Whether this reform is desirable depends to a large extent on the absolute sizes of the compensatory and punitive awards, as discussed above.\textsuperscript{162} While requiring that such awards be split between the plaintiff and the state may serve somewhat to reduce the plaintiff’s incentive to pursue such claims, it otherwise makes sense in cases involving very large punitive assessments.\textsuperscript{163} Awards of punitive damages, being “quasi-criminal,” are by their nature “quasi-public;” therefore, the public logically should share in very large awards. But the first and foremost office of punitive damages should be to achieve justice between the parties in the “private” lawsuit, such that the victim ought to be truly fully compensated—both in terms of actual losses and retribution — before the public should have a claim at all.\textsuperscript{164} Thus, in cases where the amount of

the various functions of such awards, and it does not seem practicably convertible to a pluralistic approach promoting in some manner each of the goals examined earlier that properly support and define the punitive damages doctrine.

\textsuperscript{162} See supra note 103.


\textsuperscript{164} If a jurisdiction chooses to allocate some portion of punitive damage awards to the state, the public-law nature of such awards is strengthened. In this event, such awards may become subject to constitutional inquiry under the Excessive Fines Clause. See supra notes 150-31 and accompanying text.
such damages is relatively modest, the plaintiff should have a prior, exclusive claim to the total award.

7. **Single Award:** Punitive damages may be limited to a single assessment against an actor for a single act of misconduct resulting in a multiplicity of harms.

Although this reform may superficially appear both logical and fair, it would work poorly in mass tort cases in which claims mount over time, as discussed above. Assuming that a proper aggregate amount for the single punitive damages award could rationally be determined, which ordinarily would be highly unlikely, the “single shot” approach denies the importance of the functions of compensation and restitutio
dinary retribution. The single award approach should therefore be rejected in mass tort ongoing-claim situations, on grounds of both principle and practicality. Yet, the single-shot approach appears desirable in single-event disasters, such as airplane or train crashes and hotel fires, where a defendant’s aggregate liability is reasonably determinable within a finite period of time, especially if it is determinable in a single proceeding. In such a context, the adjudication of a single judgment for punitive damages would be administratively feasible and efficient, and the court could practically assure that each victim received a fair share of the aggregate award.

8. **Judge v. Jury:** Responsibility for determining the amount of such awards may be transferred to the judge.

This procedural change is designed to reduce the risk of biased juries rendering run-away punitive damage awards. In some ways this reform appears to make good sense, for such determina-

---

165. This approach was adopted by the Georgia legislature. See Ga. Code Ann. § 51-12-5.1(e)(1) (1987) (providing that only one punitive damage award may be recovered from defendant in products liability action, regardless of number of suits brought). This provision was held unconstitutional in McBride v. General Motors Corp., 737 F. Supp. 1563, 1579-80 (M.D. Ga. 1990). The court determined that limiting punitive damages to one award is both arbitrary and unreasonable. McBride, 737 F. Supp. at 1576. It was subsequently upheld, however, by the Georgia Supreme Court in Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993).

166. See supra notes 105-16 and accompanying text.

167. The multiplier approach, perhaps determined once and for all in an aggregate claims proceeding, appears to be a preferrable approach in such ongoing mass tort situations. See supra notes 105-16 and accompanying text.

168. See Owen, Punitive Damages, supra note 4, at 1320-22 (advocating shifting measurement function from jury to judge). This approach also appears to be constitutional. See Smith v. Printup, 866 P.2d 985 (Kan. 1993) (no violation of rights to equal protection, trial by jury or due process).
nations are in the nature of quasi-criminal sentencing. Judges are
generally more qualified than jurors—in training, temperament
and experience—to fix the amounts of such sanctions. Yet, even
judges may be biased and ideologically committed, one way or the
other, and the institution of the jury at least requires a compromise
among extremes. Once again, the most practical, second-best solu-
tion to the measurement problem may lie in formulating a com-
bination of arbitrary measurement devices, as considered above.

9. Compliance with Law: The defendant's compliance with perti-
nent regulatory or other legal provisions may serve as an absolute
defense or it may give rise to a presumption against such
damages.

The basic concept of a compliance with law defense appears to
make good sense, for ordinarily an actor is far from acting quasi-
criminally in doing what the government permitted or required.169
However, because legislatures and regulatory bodies often have
much less information than manufacturers and other enterprises
on specific problems, and because such public institutions move
much more slowly and with far less flexibility, the presumptive ap-
proach is certainly preferable to an absolute defense.170

10. Written Explanations: Trial and appellate courts may be re-
quired to justify their decisions on punitive damage awards.

As discussed in the constitutional reform context above,171
many punitive damages problems may be minimized if both trial
and appellate courts are required to provide detailed justifica-
tions—in the record or by opinion—for affirming, upsetting or re-
mitting punitive damage assessments. Such justifications, tying the
evidence to the facts, the law and the purposes of punitive damages,
should assure that the courts work through the smoke of rhetoric
and emotion at the trial to determine if such damages truly are de-
served on the evidence, and, if they are, if the amounts of such
awards are truly warranted. A number of states have adopted this
salutary reform in recent years, and it would seem to be a necessary
procedural bedrock for substantive fairness in the administration of
the law of punitive damages.

169. See generally Owen, Problems, supra note 8, at 41-42; Teresa Moran
[hereinafter Moran Schwartz]; Schwartz & Behrens, supra note 128, at 1383-84.
170. See generally Moran Schwartz, supra note 169 (arguing against compliance
defense).
171. See supra notes 143-46 and accompanying text.
V. Conclusion

Punitive damages have an ancient history, and they provide a flexible tool to straddle the tort and criminal law, helping achieve the goals of both. Such assessments generate a large variety of problems, both substantive and procedural, some imagined, others trivial, but some involving serious questions of fairness in how the doctrine is applied. Yet, most of the more serious problems with such damages have workable solutions, and the remaining problems appear on balance to be outweighed, quite heavily, by the benefits that the proper use of this civil-law doctrine achieves far more satisfactorily in a free nation than would the law of crimes. The punitive damages doctrine must be defined carefully, and safeguards must be provided to prevent its untoward abuse. Yet, in cases involving flagrant violations of the law, the doctrine holds great potential for enhancing private freedoms, promoting equality, improving the administration of justice between private litigants and advancing overall the welfare of the public.