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MASS TORTS AND PUNITIVE DAMAGES:  
A COMMENT  

GARY T. SCHWARTZ*

When the Law Review called me in the Spring of 1993 to invite me to serve as a commentator in its punitive damages Symposium, the General Motors pickup truck case was very much in the news. General Motors had recently been found liable for $4.2 million in actual damages and $101 million in punitive damages on account of the placement of the gas tank in its 1985 model pickup. Further, the federal National Highway Traffic Safety Administration (NHTSA) had just called on the company to initiate a “voluntary” recall of all pickup trucks sold between 1973 and 1987. An earlier article of mine dealt with the Ford Pinto case, and I assumed that the new General Motors case would provide a focus for discussion at this Symposium. Surprisingly, however, that case has not been mentioned in any of the Symposium’s principal presentations.

Not long after the Law Review extended its invitation, the United States Supreme Court handed down its decision in TXO Production Corp. v. Alliance Resources Corp. At that time, I assumed that the Supreme Court’s opinion would serve as the basis for many of the presentations. Yet while previous speakers have taken note of

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5. A half-year after the Villanova conference, the jury’s verdict in this case was vacated on appeal, and the case remanded for retrial. See General Motors Corp. v. Moseley, 447 S.E.2d 302 (Ga. Ct. App. 1994). Meanwhile, General Motors had declined to recall its pickup, and NHTSA recommended that no further action be taken. Rejecting this recommendation, Secretary of Transportation Pena proposed a mandatory recall of the pickup truck. However, General Motors resisted, and the case was settled when General Motors agreed to invest $51 million in a variety of safety projects not directly related to its pickup. A full recall would have cost $1 billion. See Donald W. Nauss, U.S. to Drop Recall Probe of GM Trucks, L.A. TIMES, Dec. 3, 1994, at 1.

the result in TXO—affirming a large punitive damage award—none of them has really dwelled on that case’s holding, its reasoning or its implications.\footnote{Eight months after the Villanova conference, the Supreme Court, for the first time, found that a state’s punitive damage practices violated constitutional norms. \textit{See} Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) (prohibiting judicial review of amount of jury’s punitive damage award violates procedural due process).}

Indeed, several of the presenters, including myself, have been intrigued by \textit{Dunn v. HOVIC},\footnote{1 F.3d 1371 (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). This opinion came out in the Federal Reporter less than a week before the Symposium at Villanova on October 30, 1993.} the recent decision rendered by the United States Court of Appeals for the Third Circuit. In \textit{Dunn}, the Third Circuit considered the legality, under both federal constitutional law and the common law of the Virgin Islands, of repetitive punitive damage awards imposed on Owens-Corning Fiberglas Corporation on account of its manufacture of an asbestos product.\footnote{Id. at 1382-91.}

Although an eight-judge majority in \textit{Dunn} ruled in favor of legality,\footnote{Id. at 1391. For a more recent case reaching the same result as the \textit{Dunn} majority, see W.R. Grace & Co. v. Waters, 638 So. 2d 502 (Fla. 1994).} a dissent that disputed legality succeeded in attracting the votes of five judges.\footnote{\textit{Dunn}, 1 F.3d at 1393-1405. As I noted at the October 30 conference, 8-5 may sound more like the score of a Blue Jays-Phillies game than the vote of a federal court. However, when courts like the Third Circuit sit en banc, divisions of this sort become possible. For an earlier punitive damage case in which the “old” Fifth Circuit was divided 15-8, see Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982).} While I have previously written on a range of punitive damage issues,\footnote{See Schwartz, \textit{ supra} note 4; Gary T. Schwartz, \textit{Afterword — Browning-Ferris: The Supreme Court’s Emerging Majorities}, 40 ALA. L. REV. 1237 (1989) (analyzing Supreme Court opinions); Gary T. Schwartz, \textit{Deterrence and Punishment in the Common Law of Punitive Damages: A Comment}, 56 S. CAL. L. REV. 133 (1982) (discussing purposes of punitive damages).} until now, I have not considered the particular problem of punitive damages and mass torts. Moreover, as I now review that problem, my sense is that it contains analytic complexities that have not been adequately appreciated in prior law review commentary.\footnote{See, e.g., Dennis Neil Jones et al., \textit{Multiple Punitive Damage Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process}, 43 ALA. L. REV. 1 (1991); Richard A. Seltzer, \textit{Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control}, 52 FORDHAM L. REV. 37 (1983); Note, \textit{Class Actions for Punitive Damages}, 81 MICH. L. REV. 1787 (1983).} Accordingly, my own comments will focus on punitive damages in the mass tort context. My goal is not so much...
to solve the problem as to make clear the basic structure of the problem itself.

As previous commentators have emphasized, \(^{14}\) Dunn affirms the legality of repetitive punitive damage awards, and, in doing so, joins an unbroken line of recent judicial opinions. \(^{15}\) Yet while this account is technically accurate, \(^{16}\) it is nevertheless incomplete. What the account leaves out is that the Dunn majority opinion fully acknowledges the existence of grave problems with punitive damage practices in mass torts. \(^{17}\) What persuaded the Dunn judges to find those practices legally acceptable was something quite separate—the judges' perception that the problems in question are beyond the ability of a single court to solve. In their view, the solution must be developed at the national level rather than the level of a single state; \(^{18}\) alternatively, the solution must come from the legislature rather than the judiciary. \(^{19}\) A dramatic earlier illustration of a judge appreciating the seriousness of the problem, yet finding himself unable to insist on a solution, is Judge Lee Sarokin. In his first opinion in Juzwin v. Amtorg Trading Corp., \(^{20}\) Judge Sarokin explicitly concluded that repeated awards of punitive damages on account of the defendant's "single course of conduct" violate the fundamental fairness requirement of the Due Process Clause. \(^{21}\) He therefore denied the plaintiff's punitive damage claim. \(^{22}\) On a motion for re-

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15. See Dunn, 1 F.3d at 1385-86 (citing the line of unbroken decisions).
17. See Dunn, 1 F.3d at 1387. The court expressed particular concern with excessive punitive damage awards in asbestos cases. Id.
18. See id. at 1386.
19. See id. at 1387. The Florida Supreme Court has taken a similar position:
We acknowledge the potential for abuse when a defendant may be subjected to repeat punitive damage awards arising out of the same conduct. Yet, like the many other courts which have addressed the problem, we are unable to devise a fair and effective solution. . . . Any realistic solution to the problems caused by the asbestos litigation in the United States must be applicable to all fifty states. It is our belief that such a uniform solution can only be effected by federal legislation.
W.R. Grace & Co. v. Waters, 638 So. 2d 502, 505 (Fla. 1994).
21. Id. at 1064. Note Judge Sarokin's reference to the defendant's "single course of conduct." Id. Elsewhere, he refers to the defendant's "same conduct." Id. at 1055.
22. Id. at 1064. More precisely, Judge Sarokin indicated that he would strike that claim as long as the defendant proved that "liability for punitive damages has
hearing, however, plaintiff's counsel forcefully brought to the judge's attention a variety of "equitable and practical concerns." In his second opinion, Judge Sarokin explicitly reaffirmed his position that "multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due Process Clause." Even so, Judge Sarokin, acknowledging the force of the practical concerns, concluded that he was "prevent[ed] ... from fashioning a fair and effective remedy." Accordingly, he ended up largely tolerating the punitive damage claim he had previously rejected, while at the same time indicating that "the need for uniform legislation is manifest."

The drama of Sarokin's self-reversal can be taken in combination with the division of the court in Dunn, including its dissenting opinion, which speaks for five judges. That dissent at various points seems to adopt each of two quite different positions. In some passages, the dissent doubts the propriety of any award of punitive damages in mass tort situations. In other passages, the dissent seems concerned with the cumulative award of punitive damages in these situations. While in the Dunn dissent these two concerns are blended together, they obviously raise different issues, and I shall therefore comment on them separately.

As is often stated, the apparent objectives of punitive damages are deterrence and punishment. Yet in considering the deterrence objective for punitive damages, it should be acknowledged that deterrence is a primary goal of ordinary tort liability and an important goal of the criminal law as well. Accordingly, to make out a persuasive case for using punitive damages as a deterrent, the analyst must identify some shortfall or inadequacy in the deterrence that is already provided by the combination of tort liability and criminal sanctions. At least in the recent academic literature, the shortfall most often cited concerns the inadequate enforcement of

24. Id.
25. Id.
26. Id.
28. See id. at 1401, 1403.
tort claims. If there is a category of torts in which only one victim in three ends up bringing a tort claim, then it might well make sense to enable that victim to recover punitive damages equal to twice the amount of compensatory damages. By trebling the overall award in the one of three cases that is actually filed, the law can require the defendant to confront—by way of liability—the full harm caused by its tortious conduct.

In fact, there may be many sectors of tort law in general—and products liability in particular—in which the underenforcement of valid claims seems to be a significant reality. But is this the case when a defendant commits a mass tort? There are at least two types of mass torts. One type results from the act of a defendant that brings about a single traumatic event, such as a hotel fire or a plane crash, which injures large numbers of victims. Such an event prompts enormous media attention and attracts large numbers of lawyers. This combination of media focus and lawyerly activity makes it extremely unlikely that tort claims will be inadequately asserted.


When, for the sake of deterrence, punitive damages are applied to corporations, the calculation of their amount must take into account the principal-agent problems that pervade corporate behavior. Yet, exactly what these problems signify for punitive damages remains unclear. For a range of views on the related problem of penalties for corporate crime, see Symposium, Sentencing of the Corporation, 71 B.U. L. REV. 189 (1991).

31. One can compare the situation in which a single party causes all of the relevant harms to the situation in which each harm is caused by a different party. In the first situation, over time the party ends up bearing liability equivalent to all of the harm it has caused. Liability is therefore proportionate even after-the-fact. In the second situation, any one party can end up bearing a liability that is three times the amount of the loss it has actually caused. Yet, if its liability is in this way disproportionate ex post, liability is nevertheless precisely proportionate ex ante, as the defendant considers whether to engage in tortious conduct. Moreover, there is a strong deterrence need that justifies the shift from an ex post to an ex ante perspective in applying the proportionality standard.


33. For example, in the state-court, class-action settlement that resulted from the Hyatt Regency Hotel Skywalk disaster in Kansas City, any person who could show that he was an invitee present in the hotel lobby when the Skywalk collapsed was allowed to recover $1000 for emotional distress—without introducing any evidence that he had actually experienced emotional distress. Moreover, this $1000 figure was a floor rather than a ceiling: The person remained free to argue that his emotional distress was worth more than $1000 and that he was entitled to recover for his or her distress under applicable liability rules. Telephone Interview with John Townsend, attorney for defense in Hyatt Regency Hotel Skywalk class action (May 8, 1994).
The other type of mass tort involves the defendant whose operations, conducted over a considerable period of time, produce a large number of injuries or diseases. In many of these situations, the tortious aspect of the defendant’s conduct, and the conduct’s causal connection with the victims’ harms, can be somewhat hidden. Even so, pioneering lawyers eventually secure dramatic verdicts. These verdicts encourage large numbers of other lawyers to take on clients, and often succeed; the media is also mobilized. Indeed, media interest generally becomes intense, given the media’s appreciation that mass torts of this sort are highly newsworthy. So even with this less conspicuous type of mass tort, the prospect of significant underenforcement of valid tort claims seems slight. In fact, with mass torts generally, the relevant problem is not so much the underenforcement of valid claims, but the resolution of plausible claims with what may be excessive generosity and the recruit-

34. The Dalkon shield IUD manufactured by A.H. Robins was the cause of both diseases and internal injuries. See Richard B. Sobol, Bending the Law 8-10 (1991).


36. In this regard, consider the affirmation of the award of compensatory damages by the Third Circuit in Dunn v. HOVIC, 1 F.3d 1362 (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). William Dunn had been exposed to the defendant’s asbestos product in the 1950s and 1960s. Id. at 1364. By the time of trial, this exposure had resulted in “extensive pleural thickening on the exterior of his lungs.” Id. at 1365. The majority’s opinion left open the possibility that pleural thickening itself—however nonsymptomatic—might be a compensable injury in a lawsuit against an asbestos supplier. Id. at 1365-66. In considering Dunn’s claim, the majority relied on expert testimony that Dunn was suffering from “mild asbestosis which is likely to worsen.” Id. Even so, Dunn made no claim for wage loss or medical expenses, either past or future. His entire claim was for pain and suffering. Id. at 1365. At trial, Dunn testified that because of his condition he can no longer engage in a variety of athletic activities. Id. Yet it is unclear what proof he offered in support of this claim; and the claim itself was poorly supported by the reports from Dunn’s own attending surgeon. Id. at 1371 (Weis, J., dissenting). The plaintiff’s experts indicated that there was a “greater than fifty percent chance” that Dunn would eventually die of an asbestos-related disease, such as cancer. Id. at 1366. Yet the evidence did not make clear to what extent this prospect had shortened his life expectancy.

The jury awarded Dunn $1.3 million in compensatory damages. Id. at 1364. While this award was remitted by the trial court to $500,000, the $500,000 award was affirmed as nonexcessive by the majority of the Third Circuit panel. Id. One can acknowledge that Dunn’s medical condition justified a tort claim, yet still recognize that a $500,000 recovery is quite generous. The dissent would have remitted the award further to $100,000. Id. at 1371. (Weis, J., dissenting)

For a review of the trial record in Dunn, including the defendant’s rebuttal evidence, see Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative, 13 Cardozo L. Rev. 1819, 1847-50 (1992).
ment of claims that seem quite dubious. Accordingly, in the mass tort setting, the most often cited explanation for a deterrence rationale for punitive damages is largely inapplicable.

Commentators like Sheila Birnbaum proceed to contend that in light of the heavy liability for compensatory damages borne by the defendant who has committed a mass tort, the defendant is adequately punished by the award of compensatory damages. Therefore, she argues that punitive damages are unnecessary as a means of providing further punishment. This argument seems to me to be premature, or incomplete. Its incompleteness can be demonstrated by looking at two cases. The first case concerns the defendant whose blatant tort results in a very serious injury—one that the law values at more than $1 million. Even though this defendant bears significant liability for compensatory damages, the basic premise of punitive damage awards—a premise that Birnbaum does not dispute—is that compensatory damages do not serve the purpose of punishment, and that a punitive damage award in addition to the $1 million award for compensatory damages may therefore be appropriate. The second case involves the defendant whose blatantly tortious conduct results in mass injuries, and hence mass claims for compensatory damages. If the award of compensatory damages is irrelevant to the goal of punishment in the first case, it is not clear why compensatory damage awards should be understood as achieving punishment in the second case. Without a further explanation, one cannot agree with Birnbaum that a defendant who is required to compensate a large number of victims should be exempt from the punishment that punitive damages can inflict.

To begin the process of providing such an explanation, one must assess the coherence of the punishment rationale for punitive damages. Our system of criminal law seeks to punish blameworthy actors. But in doing so, the criminal law emphasizes a variety of institutional and procedural protections that are understood as the prerequisites for the infliction of just punishment. Punitive damage awards are conspicuous insofar as they do not comply with many of these prerequisites. Those who advocate a punishment function for punitive damages need to explain what the justification is for dispensing with those protections. Only when that expla-

37. See id. at 1826-27 (discussing unmeritorious asbestos claims).
nation has been provided can one figure out what the proper role should be for exemplary damages in the mass tort context.40

In any event, assume now that some award of punitive damages is appropriate in the event of a mass tort. Let me next consider the second complaint voiced in the Dunn dissent—that repetitive awards are inappropriate.41 This inappropriateness is seen as rooted in our legal system’s norm against double jeopardy—let alone multiple jeopardy. The Fifth Amendment of the Constitution contains the formal Double Jeopardy Clause.42 Just as Browning-Ferris Industries v. Kelco Disposal, Inc.43 holds that the Excessive Fines Clause of the Eighth Amendment does not apply in a private civil action seeking punitive damages,44 United States v. Halper45 seemingly indicates that the Double Jeopardy Clause does not pertain to private suits seeking punitive damages.46 Yet, whatever the limitations of the Ex-

40. In their recent article on punitive damages, Mark Galanter and David Luban seek to justify punitive damages largely in terms of punishment. Mark Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 AM. U. L. REV. 1393 (1993). In doing so, they focus on the limited resources of both state and federal law enforcement agencies—limited resources that prevent those agencies from even identifying the reprehensible conduct of many corporate wrongdoers. Id. at 1441. At the end of their article, they discuss why the protections afforded in criminal cases by the Bill of Rights can be withheld in punitive damage actions. Here, their explanation is based on the premise that in criminal cases the “state has enormous investigative resources” that raise the real possibility of wrongful convictions. Id. at 1459. The two parts of the authors’ argument clearly contradict each other.

Galanter and Luban also find that the special virtue of punitive damages lies in their ability to inflict real punishment on wealthy, powerful corporations. Id. at 1426, 1428. Yet, the authors seem wholly unaware of extensive literature that doubts whether the law is capable of inflicting meaningful punishment on an entity as reified as a corporation. See, e.g., Alan W. Alschuler, Comment: Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand, 71 B.U. L. REV. 307, 313 (1991) (concluding that it makes no sense to attribute “intention and blame to an artificial person” such as a corporation). Most corporate law scholars assume that when criminal sanctions are applied to corporations, the law’s real goal should be deterrence. See, e.g., John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. S86, 448 (1981).


42. “No . . . person [shall] be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.


44. Id. at 268.


46. See id. at 451 (“The protections of the Double Jeopardy Clause are not triggered by litigation between private parties.”). This dictum in Halper is out of line with that case’s more general reasoning, which calls on courts to ignore mere “labels” in order to focus on the ultimate substantive question of which sanctions “serve the goals of punishment.” Id. at 448. In Halper, the federal government,
cessive Fines Clause, when a punitive damage award becomes sufficiently excessive, it violates the substantive norms included in the Due Process Clause. (This point was raised by the Court as a possibility in Browning-Ferris,47 and was confirmed by the Supreme Court's later opinions in Pacific Mutual Life Insurance v. Haslip48 and TXO.49) Similarly, the core of the prohibition against double jeopardy is probably included in the Due Process guarantee.50

In any event, put to one side all questions of constitutionality. The state's own common law could plausibly be interpreted as failing to authorize cumulative punitive damages.51 Both the constitu-

having first subjected a law-violator to criminal punishment, then sought to subject him to ostensibly civil fines. The Court found that the civil fines counted as "punishment" and therefore violated constitutional double jeopardy. In coming up with its assessment, the Court regarded "criminal" and "civil" as mere "labels" that "are not of paramount importance." Id. at 447. The Court explicitly appreciated that "civil proceedings may advance punitive as well as remedial goals. . . ." Id. In documenting this point, the Court specifically pointed out that "punitive damages, available in civil cases, serve punitive goals." Id. at 447 n.8. In light of the Court's own analysis, the Court's later dictum—suggesting that the punishment inflicted by punitive damages is beyond the scope of the Double Jeopardy Clause—seems oddly formalistic.

47. Browning-Ferris Indus., 492 U.S. at 276.
50. While endorsing the doctrine that the Due Process Clause places some substantive limits on the size of punitive damage awards, the Court in Haslip and TXO nevertheless applied that doctrine leniently in affirming the particular awards before the Court. As a result, one can permissibly infer that in ordinary punitive damage cases the due process excessiveness doctrine does not amount to much. Yet, I agree with Judge Kozinski that the Court's opinions leave "[u]nresolved [the] due process questions [that] lurk . . . in multiple awards in mass tort cases." See Hon. Alex Kozinski, Remarks at the United States Law Week Constitutional Law Conference (Sept. 10-11, 1993), summarized in 62 U.S.L.W. 2277 (Nov. 2, 1993). It can be added that the Court's opinion in Honda Motor Co. deals with the excessiveness doctrine only in passing. Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2335 (1994).
51. The common law background in Dunn is certainly curious. Under the terms of the Virgin Island Code:

The rule of common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.


In pondering its common-law authority, the Dunn majority believed that the Third Circuit does not enjoy the same decision-making prerogatives that a state supreme court might enjoy. Rather, the majority believed that the Third Circuit is free to select the "best" rule only if the Restatement of Torts is unclear and if other state supreme courts are themselves divided on the issue in question. Dunn v. HOVIC, 1 F.3d 1371, 1387 (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).
tional and common law arguments against cumulative punitive
damage awards were advanced in Dunn. These are the arguments
that persuaded the Dunn dissenters. Admittedly, they were rejected
by the Dunn majority. Nevertheless, the majority’s opinion should
be read carefully when assessing its attitude towards cumulative pu-
nitive damages. The jury originally awarded Dunn $25 million in
punitive damages. The trial judge then remitted this punitive
damage award to $2 million. The Third Circuit majority reduced
the award further, to $1 million. The reason given by the majority
for this additional remittitur was that even the trial judge’s ruling
“gave insufficient consideration to the effect of successive punitive
damage awards in asbestos litigation.”

Given the combination of the position taken by the five Dunn
dissenters and even the sensitivity displayed by the Dunn majority, it
makes sense to give serious attention to the idea set forth by Judge
Sarokin in the second Juzwin—that “multiple awards of punitive
damages for a single course of conduct violate . . . fundamental
fairness . . . .” This statement certainly looks and sounds good.
Nevertheless, when the statement is carefully analyzed, it proves to
be superficial and inadequate. While the position it takes may on
balance turn out to be sound enough, one can reach a conclusion
as to its soundness only by going through a multi-step analysis.

The argument against repeated punitive damage awards typically begins with an analogy to the criminal law. What the argument suggests is that if punitive damages were a criminal penalty,

The majority then noted that the Restatement seems to contemplate cumulative punitive damage awards and that state courts, in developing the common law, have been unanimous in permitting cumulative punitive damages. Id. For exposition of the Restatement’s position, see infra note 55 and accompanying text.

52. Dunn, 1 F.3d at 1383, 1391.
53. Id. at 1373, 1391.
54. Id. at 1391.
55. Id. The Restatement, in its discussion of the amount of punitive damages, indicates that prior punitive damage awards against the same defendant should be taken into account as a mitigating factor. RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977). In considering the relationship between the Restatement’s position and the majority’s reasoning, one should note that the majority referred to the general problem of “successive punitive damage awards in asbestos litigation” rather than to the particular problem of prior awards entered against Owens-Corning. On the latter, see Dunn, 1 F.3d at 1389-90.

their repetitive award would violate constitutional double jeopardy.57 Yet, by relying on a pair of hypotheticals, one can show that this argument is unsound. The first hypothetical concerns a baker who injects poison into each of fifteen cupcakes. After the cupcakes are served at a party, fifteen party goers become seriously ill. Despite the baker's "single course of conduct," it is entirely clear that the baker can be charged with fifteen counts of assault.58 If he is found guilty, it likewise is entirely clear that the trial judge can lawfully impose on him sentences that run consecutively.59 In the second hypothetical, the baker poisons a customer's birthday cake, knowing that it will be served to all those persons attending the customer's party. Even given this change in the facts, it remains certain that the baker can be charged with fifteen counts of assault;60 and if the baker is found guilty of all counts, the judge remains free to impose consecutive sentences. In each of the hypotheticals, consecutive sentencing is undeniably acceptable. Accordingly, the analogy to criminal double jeopardy, far from condemning consecutive punitive damage awards, seems to suggest the propriety of those awards.

Having come this far, however, we should probe further and consider the likely structure of the criminal prosecutions against the malicious baker. Here, there are two relevant points to make.

57. See, e.g., Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1055 (D.N.J. 1989) (stating that "defendants can be held liable [for punitive damages] over and over again for the same conduct, a result which would be barred by virtue of the right against double jeopardy in a criminal matter").

58. He can also be charged with 15 counts of food poisoning.

59. That is, the baker can be consecutively sentenced for each of the 15 assault counts. Can there be consecutive sentences for both assault and food poisoning? For the complicated California answer to this question, see People v. Latimer, 858 P.2d 611 (Cal. 1993).

60. Whether the baker can be charged with 15 counts of food poisoning would depend on the language of the state's food poisoning statute. A California appellate decision dealt with a California statute that made it a crime to "administer... to another... any poison." People v. Gaither, 343 P.2d 799, 801 (Cal. Ct. App. 1959). cert. denied sub nom. Gaither v. California, 362 U.S. 991 (1960). The defendant sent to a family a box of candy each piece of which he had poisoned. Id. at 666. Four members of the family ate pieces of the candy and became ill. Id. The court held (in part) that four consecutive sentences are legally appropriate. Id. at 668-69. A current California statute states that "every person who willfully minglest any poison... with any food, ... where the person knows or should have known that the same would be taken by any human being to his or her injury, is guilty of a felony..." CAL. PENAL CODE § 347(a) (West 1988). The statute in Gaither focused on the defendant's intent to poison a person. The current statute focuses more on the defendant's act in deliberately poisoning food. That latter statute could plausibly be read as authorizing only a single-count prosecution. For discussion of somewhat related examples, see Michael S. Moore, ACT AND CRIME 359-65 (1993).
First, while in those criminal prosecutions in which the issue of guilt or innocence is decided by the jury, the decision on sentencing is rendered by the judge. Despite our legal system’s intense commitment to jury trials in criminal cases, we regard it as entirely acceptable that the punishment in those cases is imposed by the judge. In tort law, by comparison, trial-by-jury is understood as conferring on the jury the right to determine not only the issue of liability but also the measure of damages. If judges, rather than juries, were the source of punitive damage awards, there would be opportunities for judicial control of punitive damages litigation; such control is currently lacking.

The second point is as follows. Given the operation of the criminal process, the various charges against the malicious baker will almost certainly be brought in a single criminal proceeding. At the end of such a proceeding, the jury will render all of its findings of guilt. With those findings in, the judge can consider what sentence to impose. Certainly, the judge has the authority to order the sentences to run consecutively; but he or she also has the authority to decide on concurrent sentences. In making up his or her mind whether these sentences should run consecutively or concurrently, the judge is able to consider such issues as the ability of the defendant to bear punishment. If, for example, the malicious baker is thirty-five years old and has a life expectancy of only about forty-five years, the judge might not see much advantage in sentencing him to fifteen consecutive ten-year terms of imprisonment. By contrast, in a series of punitive claims against the same defendant, there is no obvious way in which any one judge or jury can limit the defendant’s liability to take into account the defendant’s ability to absorb the aggregate of liability. More importantly, the judge, in deciding what sentence is appropriate, will almost certainly consider the defendant’s entire course of conduct, including all of the harm it has caused. That is, while the Double Jeopardy Clause of the Fifth

61. While the United States inherited trial by jury from the English legal system, England has moved away from trial by jury in tort cases since World War II. A large part of the reason for this was the English sense that jury damage awards were lacking in consistency and regularity. See Gary T. Schwartz, Product Liability and Medical Malpractice in Comparative Context, in The Liability Maze 28, 73-74 (Peter W. Huber & Robert E. Litan eds., 1989).

62. In his dissent in Dunn, Judge Weis relied, in part, on the due process rights of the defendant. However, he also relied on the interests of subsequent plaintiffs, whose opportunities to recover compensatory damages might be undermined if multiple punitive damage awards would force a defendant into bankruptcy. Dunn v. HOVIC, 1 F.3d 1371, 1395-96 (3d Cir.) (Weis, J., dissenting), modified in part, 13 F.3d 58 (3d Cir.), cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn, 114 S. Ct. 650 (1993).
Amendment permits the judge to impose a separate consecutive sentence for each of the defendant's victims, the procedures typically utilized by the criminal law effectively invite the judge to develop a single sentence that focuses primarily on the defendant's overall culpability.

It is appropriate to consider here the source of these procedures. In most jurisdictions, the law allows the prosecution to join all charges that are "based on the same act or transaction or on two or more acts or transactions connected [by] a common scheme or plan." Moreover, under federal law and the law of many states, the prosecution can join counts that allege "offenses of the same or similar character." Furthermore, in almost all instances, the prosecution takes advantage of the joinder option. Joinder benefits the prosecution by enabling it to economize on the expenses of litigation, by increasing the likelihood that the accused will end up serving significant time, and by eliminating the possibility that later charges might be blocked by collateral estoppel should an earlier prosecution result in an acquittal. Joinder, then, is a right enjoyed by the prosecution that the prosecution exercises for reasons of its own. Yet, joinder can provide the accused with important advantages as well. At any rate, the prosecution's routine exercise of that right means that the consolidation of claims has become standard operating procedure within the criminal justice system. For that matter, in the minority of cases in which the prosecution might prefer to avoid joinder, it is possible that the defendant has a res judicata-like right to insist on joinder. Justices Brennan and Marshall once endorsed the position that the Double Jeopardy Clause requires the prosecution to consolidate all claims arising out of the "same occurrence, episode, or transaction." While the Supreme Court majority has never approved this position, it is endorsed by the Model Penal Code and is accepted as the law in several jurisdictions.


64. Fed. R. Crim. P. 8(a). For a useful discussion of federal law, see LAFAVE & ISRAEL, supra note 63, at 354.


66. See id. at 166-69 & n.8. To be sure, the Court has never explicitly rejected this position either. At the federal level, the Department of Justice has announced its "general policy" of joining all charges resulting from the same transaction in a single prosecution. See Petite v. United States, 361 U.S. 529, 530-31 (1960). The Department's adherence to this policy has rendered moot possible challenges to successive prosecutions. See id. at 530.

67. MODEL PENAL CODE § 1.07(2) (1962).
states. 68

Return now to the criminal judge who at least has the ability to regard the poisoning of a cupcake as a separate crime warranting separate punishment. Ponder the tort actions for compensatory and punitive damages that might be brought by each of the fifteen victims. Fifteen punitive damage awards could be appropriate so long as the fact-finder, in considering the appropriate punishment, focuses only on the defendant's act in placing poison in the particular cupcake. Turn next to the case in which the baker poisons a birthday cake intended for a party of fifteen. Assume further that the jury, in considering the punitive damage claim brought by the first victim, takes into account the dreadfulness of the baker's conduct, including the likely number of that conduct's victims. If the punitive damage award does thus serve as the jury's response to the baker's full misconduct, then any later punitive damage awards against that baker can indeed be properly analyzed as double punishment (or jeopardy).

Consider now a hypothetical tort case in which the defendant manufacturer—in order to save itself $10 million in design costs—approves a design for its product that the law regards as defective; assume also that this defective design brings about 100 serious consumer injuries. 69 The first of these victims then brings a case against the manufacturer for punitive as well as compensatory damages. In this case, the jury might decide that punitive damages are appropriate; and as the jury looks at the manufacturer's conduct, it might conclude that $10 million—the manufacturer's illicit profit—is the appropriate amount for punitive damages. Yet if the jury reasons in this way, its evaluation of the manufacturer's conduct will have assessed that conduct insofar as it is the cause of all the consumers' injuries. Any later punitive damage awards granted to other consumers would indeed classify as double punishment. In TXO, the Supreme Court found that the plaintiff's injury could easily have been as great as $8 million. 70 The Court then relied on this finding in concluding that punitive damages of $10 million were not constitutionally excessive. In reaching this conclusion, the Court consid-

68. See LaFave & Israel, supra note 63, at 394.

69. My hypothetical resembles the public understanding of the Ford Pinto case. As it happens, that understanding entails a large measure of misunderstanding. See generally Schwartz, supra note 4. Still, for my purposes here, the "myth" of the case remains useful.

70. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2722 (1993). In TXO, the plaintiff's actual injury was only $19,000, but as the Court analyzed the defendant's misconduct, the Court concluded that the small size of this actual injury was fortuitous. Id. at 2720-22.
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ereed that "the scheme employed [by the defendant] in this case was part of a larger pattern of fraud," a "pattern of behavior" that could easily result in harms suffered by "other victims." Assume that subsequent to the Court's affirmance of the jury's punitive damage award in TXO, one of those other victims brings a tort claim seeking punitive damages. Here, the prospects for what analytically can be deemed to be multiple punishment become obvious.

In Dunn itself, from what one can tell from the Third Circuit's opinion, there was no actual evidence at trial of the total number of victims suffering diseases on account of the defendant's asbestos product. Yet according to Judge Sarokin, statistical evidence of this sort is frequently introduced in asbestos cases by the plaintiff to support claims for punitive damages. As the judge indicates, it would be "totally unrealistic to suggest that [the particular jury] award is predicted solely on the conduct of the defendant as it relates solely to the plaintiff on trial." In Dunn, the evidence considered by the jury and the Third Circuit concerned Owens-Corning's marketing of its product from the early 1940s through at least the end of 1966. This seems in essence a review of the defendant's entire conduct insofar as that conduct had the capacity of producing many instances of harm. Evidently, the jury's punitive damage

71. Id. at 2722. The plaintiff, in supporting its punitive damage claim, introduced evidence of similar bad conduct engaged in by the defendant elsewhere in the country. Id. at 2722 n.28.


73. Id.


75. Indeed, in asbestos cases it would make no sense to say that the manufacturer uniquely failed to warn the particular plaintiff; all the evidence establishing the manufacturer's tortious failure to warn necessarily concerns the manufacturer's conduct (or inaction) over a considerable period of time. In Dunn, the Third Circuit majority, in supporting its conclusion that Owens-Corning's behavior warrants a punitive damage award, relied on the factual assessments of the Virginia Supreme Court in an earlier case brought by another victim of the Owens-Corning asbestos product. Id. at 1376 (approving finding in Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 642 (Va. 1992), that "[Owens-Corning] actively concealed [the] danger [of lung disease in humans], and it did not warn insulators of this hazard").

In April 1994, a New York jury awarded $54 million in punitive damages against Owens-Corning in a case on behalf of three victims. That amount is 41% of the company's net income for 1993. In coming up with this figure, the jury took into account that $54 million adds up to $18 million per victim—and that the number 18 is a symbol for "life" under a mystical numerology system affiliated with
award was intended to punish the defendant for its entire course of harm-causing conduct. Given, then, a realistic appraisal of the basis of the jury's punitive damage award in a case like Dunn, additional punitive damage awards on account of the defendant's course of conduct should analytically be classified as multiple punishments. 76

CONCLUSION

In the context of mass torts, there is no apparent need for tort law to rely on punitive damages in order to achieve its goal of appropriate deterrence. Insofar as the goal of punitive damages is appropriate punishment, tort law should certainly seek to avoid the result of inflicting inappropriate multiple punishments. The problem here lies in defining what punishments courts can properly classify as multiple. It is commonly suggested that if the defendant responsible for a mass tort were being criminally prosecuted, multiple criminal penalties would be prohibited by the Double Jeopardy Clause. Yet, this suggestion is analytically wrong: The criminal law would clearly tolerate the prosecution of separate counts and the imposition of consecutive sentences. To be sure, the criminal law would typically channel all counts into a single criminal prosecution. As a matter of legal fact, joinder usually takes place because it is a right possessed and exercised by the prosecution. Even so, in some cases joinder may be a right of the defendant as well. In any event, joinder has become the standard operating procedure within the criminal justice system. And what joinder means is that the sentence determined by the judge at the end of trial embodies the judge's response to the entire course of the defendant's criminal conduct. In this way, the norms provided by the criminal law highlight the inadequacy of current punitive damage practices. A further understanding of those practices can be gained by reviewing how tort juries measure the amount of punitive damages. This review illustrates that the jury often determines this amount by assessing the wrongfulness of the defendant's overall conduct, including its capacity to cause many injuries. Given this common jury process the Hebrew alphabet. See Wade Lambert, Jurors Calculate Punitive Damages in Unusual Manner, WALL ST. J., Apr. 14, 1994, at B12.

76. My evaluation here somewhat resembles Judge Sarokin's analysis in Juzwin I. In his retreat in Juzwin II, Judge Sarokin suggested that a finding of a due process violation would be permissible only if the first jury had been explicitly instructed that its award would serve as the full punishment for the defendant. See Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1235 (D.N.J. 1989). The Second Circuit has agreed with this suggestion. See Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 280-81 (2d Cir. 1990).
of assessment, consecutive awards of punitive damages can properly be evaluated as inflicting normatively inappropriate multiple punishments.

The problem, then, is more subtle and complex than has been commonly supposed. Even so, there is a problem, and it appears to be serious. The best solution for this problem is a separate topic, which this Article has not addressed. Judge Sarokin77 and the Dunn majority78 have both suggested that the solution must be decided at the national level. This suggestion is accurate as far as it goes: No single state—let alone a single state court—can develop and carry out a meaningful solution. Yet, the recommendation that the national government take action is incomplete because such a recommendation is conspicuous in failing to specify what action Congress in fact ought to take. One can imagine a national class action in which all victims seek to recover all damages, compensatory as well as punitive. However, class actions for compensatory damages are inherently problematic, given all the relevant requirements of individuation. Moreover, to insist on a comprehensive class action as a solution to the particular problem of punitive damages would allow the punitive damage tail to wag the entire dog of tort liability. Recent commentary has recommended a national class action exclusively for punitive damages79—a class action that would be kept separate from the normal regime of individual claims for actual damages. But this recommendation, by calling for a single national punitive damage proceeding divorced from the underlying actions for actual damages, makes punitive damages look all the more “public.” Hence, it raises anew the question of why the criminal law is not the appropriate instrument for imposing whatever punishment society deems proper. Moreover, this is the question that the proponents of punitive damages have so far failed adequately to answer.

77. See supra text accompanying note 26.
78. See supra text accompanying notes 18-19.
79. See Note, supra note 13, at 1806-07.