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Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process

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SUPERBIFURCATION: MAKING ROOM FOR STATE PROSECUTION IN THE PUNITIVE DAMAGES PROCESS

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Punitive damages awards in tort cases have been a part of Anglo-American law since the eighteenth century. Debate over their propriety has raged ever since—particularly over the last two decades or so. Neither side in this debate is likely ever to convince the other. Richard Murphy argues, however, that we need not wait for them to do so before finding ways to improve the fairness of the punitive damages device. He suggests that states adopt a reform he's named "superbifurcation." This reform would leave private plaintiffs in charge of proving punitive liability but would reward them for doing so with reasonable attorney's fees rather than a chance to win punitive damages. State prosecutors would have the option of bringing one punitive damages action against a defendant found punitively liable in light of that defendant's tortious course of conduct, and the state would collect any punitive award. The reform would make the punitive damages device more fair by: (1) removing the illegitimate influence of plaintiffs' natural desires for maximum recovery from the punishment process; (2) adding another layer of control to a process which is alarmingly unconstrained in its present form; and (3) reducing the dangers of repetitive punishment in the context of mass torts.

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I. INTRODUCTION

Punitive damages are extra-compensatory awards that triers of fact—generally juries—may award in their vast discretion to plaintiffs in cases in which defendants have committed, in the colorful but controversial taxonomy of the Supreme Court of Appeals of West

Virginia, "really mean" or "really stupid" torts.[1] According to most courts, punitive damages are supposed to punish[2] and deter such serious wrongdoing.[3] They are uncommon but, on rare occasions, huge. Several juries have inflicted multi-billion-dollar punitive awards; others have imposed awards running into the many millions.[4] Although punitive damages have long been controversial,[5] the last

1. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 887-88 (W. Va. 1992) ("Generally, the cases [in which defendants were found liable for punitive damages] fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm." (footnote omitted)), *aff'd*, 509 U.S. 443 (1993) (plurality opinion). For biting criticism of the West Virginia court's rhetoric and analysis, see *TXO Prod. Corp.*, 509 U.S. at 472-73 (O'Connor, J., dissenting).

2. "Punishment" carries two different meanings in discussions of punitive damages. Sometimes, it is used in a broad sense to refer to acts taken to cause either retribution or deterrence. Sometimes it is used in a narrower sense, however, to refer to acts taken only to cause retribution, i.e., the infliction of just desserts. Courts use "punishment" in this narrower sense when they state that the purposes of punitive damages are to punish *and* deter, *see, e.g.*, *infra* note 3, as such statements necessarily imply that to deter is not to punish per se but to do something different. This punning on the word "punishment" may be a result of the fact that there is no good verb to express the practice of inflicting pain on another solely to cause retribution ("to retribute" is obviously an unhappy choice). In any event, this Article, like other discussions of punitive damages, uses "punishment" in both a broad and a narrow sense, trusting context to clarify meaning.

3. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1595 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." (citations omitted)). Although courts typically reduce the purposes of punitive damages to punishment and deterrence, scholars have identified a richer set of purposes served. *See, e.g.*, David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 373-74 (1994) (identifying education, retribution, deterrence, compensation, and law enforcement as purposes of punitive damages). One commentator has identified at least seven purposes for imposing punitive damages "gleaned from judicial opinions and the writings of commentators: (1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff's attorneys' fees." Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

4. *See* Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 866 (Tex. App. 1987) (ordering remittitur to $1 billion from $3 billion of jury's punitive damages award against Texaco for tortious interference with contract), *cert. dismissed*, 485 U.S. 994 (1988); *see also* John M. Broder, *Louisiana Case Seen As Sign of Tort System Gone Awry*, NEW YORK TIMES NEWS SERV., Sept. 10, 1997, *available in* Westlaw, 1997 WL-NYT 9725203003 (reporting jury's $3.5 billion punitive award against CSX Corporation and several other transportation companies due to railway fire); Charles B. Camp, *Exxon Must Pay, Alaska Judge Declares*, DALLAS MORNING J., Sept. 25, 1996, at 1D (reporting judge's refusal to reduce $5 billion *Exxon Valdez* punitive award during post-trial proceedings). *See generally infra* text accompanying notes 153-63 (discussing research on size of punitive awards).

5. *See, e.g.*, Fay v. Parker, 53 N.H. 342, 382 (1873) ("The idea [of punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence,

twenty years in particular have marked a whirlwind of scholarly, judicial, and legislative debate over their theoretical propriety and practical effects.[6] As a result, the law governing this odd, quasi-criminal, quasi-tort "remedy" is in flux; many states have passed reforms limiting the size of punitive awards, forcing plaintiffs to share their extra-compensatory winnings with the state, and raising burdens of proof.[7] The Supreme Court has made several recent attempts to force punitive damages to be "reasonable" by way of the Due Process Clause.[8] These reforms have not, however, changed the fundamental nature of punitive damages: They remain a means for juries to club malicious tortfeasors financially at the behest of private plaintiffs[9] who then collect some or all of the proceeds. This device, in its current form, undermines the law's legitimacy by injecting plaintiffs' economic incentives for maximum personal recovery into the punishment process; magnifies the unconstrained, "loose cannon" nature of punitive awards; and invites particularly irrational punishment of mass torts. States could ameliorate these problems by adopting the following reform: Let private plaintiffs sue to prove punitive *liability* and reward those that succeed with reasonable attorney's fees. Give to the state, however, the power to bring one punitive *damages* action to punish the tortious course of conduct of a defendant thus found punitively liable. Call this reform, to coin a term, "superbifurcation."

Criticisms of the traditional punitive damages regime are legion.[10] A few of the more notable are: (1) Compensatory damages make plaintiffs whole, and therefore a plaintiff who wins a punitive

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deforming the symmetry of the body of the law.").

6. For instance, a Westlaw search in the JLR database for titles including the phrase "punitive damages" found 255 articles published from 1990-95. Search of Westlaw, JLR Database (Nov. 1, 1997).

7. For a convenient listing of recent state reforms, see *BMW*, 116 S. Ct. at 1618-20 (appendix to dissenting opinion of Justice Ginsburg).

8. *See BMW*, 116 S. Ct. at 1604; TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993) (plurality opinion); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

9. A caveat: In some states, the state itself may seek a punitive award to punish certain kinds of conduct. *See, e.g.*, GA. CODE ANN. § 12-8-96.1 (1996) (allowing a state agency to seek punitive damages against defendants for violations of environmental laws). As the nature of its proposal makes clear, such state-brought actions are beyond the purview of this Article, which suggests a reform designed to address the problems inherent in the practice of permitting private parties to sue for and collect punitive damages.

10. For a summary of such criticisms and critiques of them, see Owen, *supra* note 3, at 382-400.

award receives an unjustified "windfall";[11] (2) On a closely related note, private parties with an interest in maximum recovery have no business arguing how harshly triers of fact should punish defendants;[12] (3) The culpable intent necessary to trigger a finding of punitive liability is notoriously vague, and therefore, juries have tremendous discretion in defining for themselves what combinations of conduct and intent merit punitive damages;[13] (4) Similarly, juries traditionally have enjoyed vast discretion in determining the size of punitive damages awards[14]—leading to such apparent embarrassments as the four million dollar BMW paint job of recent legal fame;[15] (5) Punitive damages, like criminal sentences, *punish* tortfeasors, yet defendants enjoy none of the procedural protections that form such a critical part of the criminal law;[16] and (6) In today's mass-tort world, defendants can find themselves in "super-jeopardy" nightmares in which numerous plaintiffs bring separate actions in which separate juries inflict punishment over and over for one course of conduct.[17] By far the most effective rhetorical weapon critics possess against punitive damages, however, is their charge that awards are "skyrocketing," crush industrial innovation, and are a terrible drag on the economy.[18]

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11. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981).

12. *See, e.g.*, Brief Amici Curiae of Life Ins. Co. of Ga., et al., at 11-12, BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996) (No. 94-896).

13. *See, e.g.*, Ellis, *supra* note 3, at 37-39.

14. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."); Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 988-90 (1989) (discussing the immense scope of jury discretion in fashioning punitive damage awards).

15. *See BMW*, 116 S. Ct. at 1598 (reversing the Alabama Supreme Court's decision to uphold $2 million of the jury's $4 million punitive award inflicted on BMW for failing to tell the plaintiff before he purchased his new BMW that it had been repainted due to damage from acid rain).

16. *See generally* Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 *passim* (1983) (arguing that traditional punitive damages violate due process and other constitutional protections).

17. *See, e.g.*, Dunn v. HOVIC, 1 F.3d 1371, 1402 (3d Cir.) (en banc) (Weis, J., dissenting), *modified in part*, 13 F.3d 58 (3d Cir. 1993).

18. Justice O'Connor has repeatedly stated this concern:

> Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been sustained on appeal. The threat of such enormous awards has a detrimental effect on the research and development of new products. Some

Proponents of punitive damages counter that, in fact, awards are not rising in number or size in any outlandish way.[19] Furthermore, critics' habit of breathlessly decrying isolated examples of huge awards is misleading because, thanks to judicial review, such awards often are reduced on remittitur or appeal.[20] From the point of view of proponents of the current regime, it is vital that the critics' campaign of distortion not succeed because punitive damages are a crucial check on wrongdoing—especially corporate wrongdoing.[21] Not to put too fine a point on it, but, without punitive damages, the people of America could find themselves driving repainted, exploding Ford Pintos while washing down unsafe drugs with scalding coffee.[22] As for the procedural niceties punitive damages are thought to offend, extra-compensatory damages in some form or another have been around for thousands of years.[23] Traditional common law punitive damages have been a part of Anglo-American law for at least the last 230 years or so.[24] Any remedy that old cannot be all *that* irregular.[25]

> manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (citations omitted).

19. *See, e.g.*, STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 242 (1995) [hereinafter DANIELS & MARTIN, CIVIL JURIES].

20. *See, e.g.*, Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 53-54 (1992).

21. *See, e.g.*, Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1276 (1993) ("This Article contends that the awarding of punitive damages is a necessary remedy against the abuse of power by economic elites."). An interesting internal tension exists between the stance of proponents of punitive damages that such awards are necessary to deter misconduct and their response to critics' charges of "skyrocketing" awards that they are generally rare and modest in size. To have a deterrent effect, punitive damages must be awarded with some frequency—otherwise, tortfeasors need not fear them. Determining what this frequency should be to create an optimal deterrent effect is, of course, a mind-bogglingly difficult empirical question for which the present legal system has not ascertained an answer. It is certainly logically possible for punitive damages to be both rare *and* an effective deterrent. Nonetheless, it also seems fair to say that, to the degree proponents of punitive damages minimize the frequency and size of such awards, they also tend to undermine the argument that punitive damages operate as a meaningful deterrent to bad conduct.

22. *Cf.* Rustad, *supra* note 20, at 80-82 (listing examples of safety changes manufacturers made in their products after the imposition of punitive damages due to flaws in those products).

23. *See infra* notes 37-40 and accompanying text.

24. *See infra* text accompanying notes 36-78 (discussing history of common law punitive damages).

Punitive damages raise a host of thorny questions, and some of them are virtually unanswerable. Most importantly in this regard, no one knows just how big punitive awards should be to serve their purposes best.[26] Retribution involves highly subjective judgments. As the intense debate on the propriety of punitive damages itself tends to demonstrate, no usefully precise consensus exists on how much tort should equal how much financial retribution. Scaling punitive awards optimally to deter wrongdoing also poses virtually insurmountable problems, particularly as it is essentially impossible to measure their deterrence effects in the world.[27] It therefore makes sense to greet with some skepticism both the claim that "skyrocketing" punitive awards threaten industrial ruin and the seeming stance of some proponents of the current system that any reform that tends to lessen punitive awards threatens the safety of the populace.

But one need not determine how big punitive damages must be—to make the world the best possible world it can be—before finding ways to make the process for imposing them fairer. Punitive damages arose in our legal system because judges and juries overseeing and deciding the outcomes of civil trials wanted to hurt defendants whose conduct was particularly odious.[28] Because of the civil settings involved, the only tool with which these judges and juries could hurt these defendants was damages—which plaintiffs

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25. In this vein, Justice Scalia, though not a supporter of punitive damages per se, commented in his concurrence in *Haslip*, "[s]ince jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would end the suspense [over their constitutionality under the Due Process Clause] and categorically affirm their validity." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39-40 (1991) (Scalia, J., concurring in the judgment).

26. *See generally infra* notes 164-75 and accompanying text (discussing problems in assessing proper size of punitive awards).

27. One scholar wryly noted in a discussion of the deterrence effects of products liability punitive awards, "[l]ike so many empirical issues in law, the question of how effectively the threat of punitive damages deters corporate misconduct is one that the side with the burden of proof will almost certainly lose." E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1060 (1989); *see also* Ellis, *supra* note 3, at 77 (observing that the dearth of empirical data prevents definitive determination of whether punitive damages promote efficient deterrence). This Article will return several times to the themes of burden of proof and our relative ignorance concerning the effects of punitive awards in the world. *See infra* text accompanying notes 164-75 (discussing problems inherent in determining the "proper" size of punitive awards); *infra* section IV.A.2. (arguing that the burden of proof should be on those who favor continuing to permit private plaintiffs with financial interests in maximum punishment to seek punitive damages).

28. *See, e.g., infra* text accompanying notes 43-68 (discussing examples of early punitive damages cases).

collect. This use of the usually compensatory tort system as a mechanism for civil punishment causes punitive damages to violate several norms that our legal system seems to hold dear in the punishment of crime. Most obviously, permitting private plaintiffs to borrow the machinery of state to punish wrongdoers and then collect the proceeds allows the desire for money to influence the punishment process in ways that we would now find intolerable for criminal punishment.[29] Second, notwithstanding recent reforms, juries still generally enjoy far more power to inflict punitive awards than they do to cause criminal punishment—an arena in which the other participants in the punishment process—the legislature, prosecutor, and judge—together have exercised considerably more authority. If one uses the divisions of power applicable to criminal punishment as the appropriate benchmarks, then punitive damages tend to violate the norm that the power to punish is so dangerous that it should be carefully divided among several actors with the ability to check each other.[30] Third, in the more limited mass tort context, the current regime's practice of allowing an unlimited number of plaintiffs to seek punitive damages virtually ensures that certain defendants will be punished repeatedly for the same conduct. Punitive damages therefore violate the norm of the criminal law—more or less enshrined in the Double Jeopardy Clause—that the state should only punish any given wrongdoing ("offense") once, not over and over.[31]

Prima facie, these norms all make great sense; no doubt most people who think about such matters would agree that, as a general rule, money ought not to influence punishment, the power to punish should be carefully divided among several independent state actors, and the state ought to have only one chance to harm a wrongdoer to balance the scales of justice. Punitive damages are, at core, state-enforced punishment. Because the present regime, however, depends on private plaintiffs to seek punitive damages, permits them to keep some or all of the proceeds, and fails to control the dangers multiple plaintiffs pose for repetitive punishment, it violates these otherwise entrenched notions of how to punish fairly. The state therefore ought to have a reason for permitting the continued existence of this practice in its present form. The argument in favor

29. *See infra* text accompanying notes 237-52 (discussing the role of the ostensibly conflict-free prosecutor in criminal punishment).

30. *See infra* text accompanying notes 261-62 (discussing the role of separation of powers in preserving liberty and preventing arbitrary punishment).

31. *See infra* notes 278-324 and accompanying text (discussing the problem of repetitive punishment of mass torts).

of the current system's thoroughgoing reliance on private plaintiffs must be some variation on the private-attorney-general rationale: Society gains by rewarding private parties for punishing wrongdoers whom the state is too ignorant, uninterested, or busy to punish itself.

Society need not choose, however, between consistent application of its norms of fair punishment on the one hand and enjoying the private-attorney-general benefits of punitive damages—such as they may be—on the other. The first step toward resolving this false dichotomy is to recognize that just because the current punitive damages regime evolved without a role for state prosecutorial officials does not mean it has to stay that way. Of course, it certainly would be unreasonable to expect prosecutors to discover, investigate, and prove liability for malicious torts in addition to all their other duties. To put solely prosecutors in charge of the *entire* punitive damages process would be to abandon it altogether. Plaintiffs have the information needed to prove liability—they, after all, are more likely than anyone else to know when they have been harmed by a tortfeasor. As a practical matter, their participation is absolutely necessary to any scheme that purports to reform rather than to abolish punitive damages. Prosecutors, however, are the states' (ostensibly conflict-of-interest-free) experts in bringing actions to punish, and, as is discussed in more detail below, excellent reasons exist for giving them the sole power to bring punitive actions of any sort—criminal or civil—where at all practical. States should restructure their punitive damages regimes to encourage plaintiffs and prosecutors to bring to bear these respective strengths to *cooperate* in the process of inflicting punitive awards against malicious tortfeasors.[32]

To reach this end, this Article proposes "superbifurcation" of

32. The qui tam provisions of the False Claims Act, though they differ in many critical respects from this Article's proposal, provide an example of a federal effort to foster such cooperation and gain information from private parties to aid law enforcement. *See* 31 U.S.C. §§ 3729-3730 (1994). A private plaintiff (the "relator") may bring an action against a defendant for making a false claim to the government. *See id.* § 3730(b). The government has the option of stepping in to take control of the lawsuit or permitting the relator to press the suit on her own. *See id.* § 3730(b)(4). If the defendant is found liable, depending on the nature of the relator's participation, the court may award the relator anywhere from zero to 30% of the damages proceeds as well as reasonable attorney's fees and costs. *See id.* § 3730(d). Notably, the key factor in determining the size of the relator's share is whether her suit was based on information the government did not already have or could not readily obtain. *See id.* In cases where the relator's action is based on specific information obtained from governmental sources or the news media, "the court may award such sums as it considers appropriate, but in no case more than 10 percent of the [damages] proceeds." *Id.*

state[33] procedures for determining punitive awards. A number of states already bifurcate trials involving claims for punitive damages into liability and damages phases, i.e., the plaintiff must first convince the trier of fact that the defendant is liable for punitive damages as a prerequisite to arguing how large these damages should be in a separate phase of the trial.[34] Under the proposal, private plaintiffs would continue to sue defendants to prove punitive liability. The reward for proving liability, however, would not be to win the chance for discretionary punitive damages (i.e., to play the jury lottery); rather, courts would reward plaintiffs who successfully prove such liability with reasonable attorney's fees. After the plaintiff has won a judgment including a finding of punitive *liability*, the state (not the private plaintiff—thus "super"-bifurcation) would be able to bring one punitive *damages* action against the defendant to punish it in light of all acts committed within the state as part of the defendant's tortious course of conduct and all harms flowing from such acts. The defendant would be estopped from denying the facts that gave rise to the underlying finding of punitive liability, but the prosecutor would be free to prove any other facts about that course of conduct that might justify an increased award. In no case would the trier of fact, however, be able to award greater punitive damages than the amount requested by the prosecutor. The defendant would pay any final punitive award to the state, which would first use such funds to defray the expenses the prosecutor's office incurred in bringing the punitive damages action, and then deposit any remainder in its general fund.[35]

Superbifurcation would give better expression in the punitive damages process to the three norms of fairness discussed above.

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33. This Article's proposal focuses upon traditional, common-law, discretionary punitive damages and is presented and discussed as a potential state-law reform because such damages are essentially creatures of state law. With minor adjustments, however, superbifurcation also could work as a federal reform in those contexts in which a federal cause of action authorizes discretionary punitive damages.

34. *See infra* note 91 (listing examples of bifurcation statutes).

35. For variations on the theme that plaintiffs who win punitive damages under the present regime should win only attorney's fees, see generally Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 888-908 (1988) (suggesting that the tort system abandon attempts to use damages to inflict retribution and that attorney's fees could serve as an appropriate measure for damages designed to *deter* misconduct), and Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1911-16 (1992) (suggesting that punitive damages in excess of plaintiff's attorney's fees should be payable to the state). Neither of these proposals, however, envisions putting state prosecutors—the state's punishment experts, as it were—in charge of bringing the punitive damages actions that determine how harshly to punish defendants who have committed outrageous torts.

First, it would eliminate the influence of money as the motivating factor for punishment by ending the practice of permitting private plaintiffs—and their attorneys, by way of contingency fees—to win extra-compensatory windfalls by collecting what are essentially civil penalties. A state official sworn to uphold the law in a neutral manner should be the one to argue in court how a defendant should be punished—not a plaintiff's lawyer with an inevitable and huge financial conflict-of-interest. Second, giving the prosecutor a "charging" role in the punitive damages process would have the beneficial effect of reducing the vast and troubling power juries currently enjoy over punitive damages determinations. Third, by allowing only one punitive recovery per wrongful course of conduct per enacting state, the proposal would help rationalize the punishment of mass torts—lessening the problem inherent in the present system that, in situations involving multiple plaintiffs, juries operating independently of each other may punish defendants over and over for the same, or at least overlapping, conduct.

Part II tells the tale of how punitive damages came to be, examines recent efforts by the Supreme Court and the states to reform the current regime, and finishes with observations about the frequency and size of punitive awards and how little we know about their actual effects in the world. With this background in mind, Part III explains the superbifurcation model in more detail, discusses its constitutionality, and demonstrates why it would neither overwhelm state officials nor unacceptably reduce the power of the current regime to punish and deter serious wrongdoing. Part IV then discusses the ways in which the suggested model would make the process for inflicting punitive awards fairer and more legitimate.

Stepping back to look at the larger picture, this Article does not try to answer the question of whether punitive damages are a good idea, i.e., whether they are a sensible way to punish and deter in a remotely cost-effective way. In this vein, it adopts an aggressively agnostic attitude on the issue of just how big punitive awards should be, as a substantive, empirical matter, to inflict optimal retribution and to best deter. Because we do not have such information, we should not feel too attached to the rate and size of punitive awards that the present system generates. Thus, our ignorance frees us to experiment, to alter the punitive damages process to match norms of fairness that are ingrained in the approach the criminal law takes to punishment; our ignorance frees us to adopt superbifurcation to remove the taint that plaintiffs' natural desires for maximum recovery bring to punitive awards, to reduce the alarmingly

concentrated power of juries to inflict them, and to lessen somewhat the risk of repetitive punishment.

II. THE CURRENT PUNITIVE DAMAGES REGIME

A. *Some History*[36]

Legal codes have mandated multiple damages awards—close cousins of discretionary punitive damages—for thousands of years.[37] As the name indicates, multiple damages multiply the value of the plaintiff's injury times a given number to arrive at total damages. Like discretionary punitive damages, multiple damages punish wrongdoers by making them pay a judgment higher than the harm they have caused. One can find such provisions in the laws of the Babylonians and Hittites, and in the Hindu Code of Manu.[38] The Code of Hammurabi, for example, stated that if a man stole an ox from a temple, he would be fined thirty oxen.[39] The Hebrew Bible, by contrast, required an ox-thief merely to pay five oxen to his victim per stolen ox.[40] Multiple damages first appeared in English law in 1275 in a statute that imposed double damages for trespass against religious persons.[41] The treble damages allowed in antitrust actions are an obvious modern-day American example of this practice.[42]

English courts first explicitly adopted the doctrine of punitive

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36. For summaries of the origins and development of punitive damages law from Hammurabi to the present day, see *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 24-29 (1991) (Scalia, J., concurring in the judgment), GERALD W. BOSTON, PUNITIVE DAMAGES IN TORT LAW § 1 (1993), 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 1-19 (3d ed. 1995), and Rustad & Koenig, *supra* note 21, at 1284-1304.

37. *See* BOSTON, *supra* note 36, § 1:2, at 2 (citing ancient examples of this practice).

38. *See id.* § 1:2, at 2 n.3.

39. *See id.* (citing G.R. DRIVER & JOHN C. MILES, THE BABYLONIAN LAWS 500 (1952)).

40. *See Exodus* 22:1. Apparently, it was a better idea to steal oxen in ancient Israel than in ancient Babylon.

41. *See* Owen, *supra* note 3, at 368 n.23 (citing Synopsis of Statute of Westminster I, 3 Edw., ch.1. (Eng.), *reprinted in* 24 STATUTES AT LARGE 138, (Danby Pickering ed., 1761)).

42. *See* 15 U.S.C. § 15(a) (1994). This statute provides that

> [a]ny person who shall be injured in his business or property by . . . reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id.

damages in its current form, i.e., that juries have the discretionary power to fashion tort awards to punish and deter, in 1763 in the fascinating cases of *Wilkes v. Wood*[43] and *Huckle v. Money*.[44] Many of the core issues discussed in these cases remain central to the punitive damages debate today—indicating that, although judges and scholars have poured rivers of ink into the subject, perhaps our understanding of this device has not advanced so very far in the last two hundred years. Both cases arose out of the suppression of *The North Briton*, Number 45, a pamphlet that allegedly libeled King George II. John Wilkes, a member of Parliament, was the publisher and author.[45] The Secretary of State, Lord Halifax, issued a general warrant authorizing a search of Wilkes's house.[46] Acting under the authority of this warrant, Wood and several King's messengers and a constable entered Wilkes's house, broke his locks and seized his papers.[47] In his subsequent suit for trespass, Wilkes sought £5000 in damages, arguing that "trifling damages would put no stop at all" to such horrible misconduct and that "large and exemplary damages" were necessary.[48]

The Solicitor-General responded with an argument that has been made time and again over the last two hundred years—that punishment is the province of the criminal law. Marveling at the size of the damages claim, he remarked:

> Is Mr. Wilkes, at any event, entitled to tenfold damages? This was the first time he ever knew a private action represented as the cause of all the good people of England. If the constitution has, in any instance, been violated, the Crown must be the prosecutor, as it is in all criminal cases.[49]

In another rhetorical move that no doubt has been made by countless defense attorneys arguing against punitive awards, the Solicitor-General "then made a general observation to the jury, that it was their duty to hear the cause coolly and dispassionately, without any bias to one side or the other."[50]

Perhaps the Solicitor-General's plea that punishment should be left to the Crown would have had more force if the man ultimately

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43. 98 Eng. Rep. 489 (C.P. 1763).
44. 95 Eng. Rep. 768 (C.P. 1763).
45. *Wilkes*, 98 Eng. Rep. at 490.
46. *See id.*
47. *See id.*
48. *See id.*
49. *Id.* at 493.
50. *Id.*

responsible for the search of Wilkes's home and the seizure of his papers had not been one of the King's most powerful ministers. In any event, Lord Chief Justice Pratt's instructions to the jury could not have made the defense happy. He began by stressing the enormous evils of general warrants:

> His Lordship then went upon the warrant, which he declared was a point of the greatest consequence he had ever met with in his whole practice. The defendants claimed a right, under precedents, to force person houses; break open escrutores, seize their papers, &c. [sic] upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders[']names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.[51]

He then turned to the jury's power to remedy such abuses:

> And as for the precedents, will that be esteemed law in a Secretary of State which is not law in any other magistrate of this kingdom? If they should be found to be legal, they are certainly of the most dangerous consequences; if not legal, must aggravate damages. Notwithstanding what Mr. Solicitor-General has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a *punishment* to the guilty, to *deter* from any such proceeding for the future, and as a *proof of the detestation of the jury to the action itself.*[52]

Thus, according to the Court, in addition to compensating plaintiffs, damages may punish, deter, and express community outrage. The jury accepted this invitation to use civil damages as a means to club the defendants and awarded £1000.[53]

Lord Halifax's general warrant also gave rise to the related case of *Huckle v. Money*,[54] which emphasized the important point that courts should refuse to interfere with jury determinations of the

51. *Id.* at 498.
52. *Id.* at 498-99 (emphasis added).
53. *See id.* at 499.
54. 95 Eng. Rep. 768 (C.P. 1763).

proper size of punitive awards in all but the most extreme cases.[55] The authorities suspected that Huckle, a journeyman printer, had helped print *The North Briton*, Number 45.[56] They arrested and held him for six hours—during which time they fed him steaks and beer.[57] He sued for trespass, assault, and imprisonment.[58] The defense sought a new trial on the ground that the jury had imposed excessive damages when it awarded the plaintiff £300.[59]

The Lord Chief Justice was not sympathetic to the defense's plight. He began with an observation that is as true now as it was two hundred years ago—the measure of damages for tort "is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances ... [because] torts or injuries which may be done by one man to another are infinite."[60] He opined that, given the authorities' good treatment of Huckle, the maximum value of his actual personal damages was perhaps £20. Nonetheless, the court approved the £300 verdict, and, in the course of doing so, stressed the need for judicial review of tort awards to remain extremely deferential, remarking, "that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, *and which all mankind at first blush must think so*, to induce a Court to grant a new trial for excessive damages."[61]

Punitive damages soon made their way to America. *Wilkes* and *Huckle* arose out of a massive breach of the public's trust by the Secretary of State—a sort of 1760s Watergate. By contrast, some of the first known American cases to invoke explicitly the doctrine of punitive damages involved breaches of private or professional trust. For instance, in the 1784 South Carolina case of *Genay v. Norris*,[62] the plaintiff accused the defendant-physician of poisoning him.[63] While drunk, the two had decided to duel.[64] The defendant thought better of this plan and suggested that he and the plaintiff have another drink

55. *See id.* at 769.
56. *See id.* at 768.
57. *See id.*
58. *See id.*
59. *See id.*
60. *Id.*
61. *Id.* at 769 (emphasis added). Of course, these observations in *Huckle* remain true to this day. The measure of damages for torts is still often vague and uncertain—especially in the context of punitive damages.
62. 1 S.C.L. (1 Bay) 6 (1784).
63. *See id.* at 6.
64. *See id.*

instead.[65] Unbeknownst to the plaintiff, the defendant laced the drink with a dose of cantharides (Spanish Fly), which caused the plaintiff horrible pain.[66] The court did not accept the defendant's excuse that he was only joking and charged the jury that this injury entitled the plaintiff to "very exemplary damages, especially from a professional character, who could not plead ignorance of the operation and powerful effects of this medicine."[67] The jury responded to the court's instruction by awarding £400.[68]

Wilkes and *Huckle* involved great issues of abuse of state power; *Genay* arose out of a sick joke. Still, the underlying judicial impulse behind all three is obvious: The defendants in each case had done something the court and jury considered terrible—something downright criminal. Forcing the defendants to pay only compensation to the victorious plaintiffs did not seem suitably severe, so the judges and juries in these civil, private actions—unburdened by formalist concerns about the proper provinces of criminal and tort law[69]—did not hesitate to use the power at their disposal to order payment of damages to make the defendants feel pain.[70]

This practice became entrenched in American law. In 1851, the Supreme Court in *Day v. Woodworth*[71] stated that

> [i]t is a well-established principle of the common law that, in actions 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.[72]

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65. *See id.*

66. *See id.*

67. *Id.* at 7.

68. *See Genay*, 1 S.C.L. (1 Bay) at 7. Another very early punitive damages case, *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791), also could be characterized as involving a form of breach of a private trust in that the plaintiff sued the defendant for breach of a promise to marry. *See id.* at 77. The court instructed the jury "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake." *Id.*

69. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424-25 (1982) (describing the attempts of legal thinkers to divide the law sharply into public and private realms as a peculiarly nineteenth-century phenomenon).

70. In his seminal 1931 article, *Punitive Damages in Tort Cases*, Professor Clarence Morris put the matter this way: "The punitive damage doctrine is evidence of an age-old feeling that the admonitory function [of tort law] is sometimes entitled to more emphasis than it receives when judgments in tort actions are limited to compensation." Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1206 (1931).

71. 54 U.S. (13 How.) 363 (1851)

72. *Id.* at 371. *But cf.* Owen, *supra* note 3, at 369 & n.29 (questioning the Court's legal scholarship in *Day* and suggesting that punitive damages were not actually a settled

Punitive damages remained controversial, however. In 1872, Justice Foster of New Hampshire wrote what must be scholars' favorite quote on the subject: "The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law."[73] Justice Timlin of the Supreme Court of Wisconsin felt rather differently:

> 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, discourages private reprisals, restrains the strong, influential and unscrupulous, vindicates the rights 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.[74]

Eminent scholars, too, clashed over the propriety of punitive damages.[75] For instance, Professor Simon Greenleaf of Harvard, author of a major treatise on evidence, had a formalist bent, and argued that extra-compensatory damages had no place in tort law—which was supposed to compensate plaintiffs, not punish defendants.[76] By contrast, Theodore Sedgewick, author of an important treatise on damages, favored them as a practical means to control misconduct.[77] Justice Foster's and Professor Greenleaf's feelings notwithstanding, the doctrine that juries had discretion to award punitive damages for outrageously tortious behavior became law in almost every state.[78]

One must be careful, however, when making generalizations about the states' varying punitive damages regimes.[79] Particularly

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part of American jurisprudence in 1851).

73. Fay v. Parker, 53 N.H. 342, 382 (1872). Justice Foster had a way with words; he continued, "[N]ot reluctantly should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim,—'I have no need of thee.' " *Id.* at 397.

74. Luther v. Shaw, 147 N.W. 17, 20 (Wis. 1914).

75. For a discussion of such disputes, see Rustad & Koenig, *supra* note 21, at 1298-1301.

76. *See* 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253 (16th ed. 1899).

77. *See* 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 354 (9th ed. 1920).

78. *See* Owen, *supra* note 3, at 369 (citing CHARLES T. MCCORMICK, LAW OF DAMAGES 278-79 (1935)).

79. For instance, although most states historically have allowed common law punitive damages, a few do not: Louisiana, Massachusetts, New Hampshire, and Washington permit them only as authorized by statute. *See* Owen, *supra* note 3, at 369 n.30.

since the advent of the current wave of reform, they have become somewhat idiosyncratic.[80] Nonetheless, one can give a general description of the law of punitive damages applicable in most places.[81] Before awarding punitive damages, the trier of fact (the jury, as a practical matter) must find that the defendant acted with "malice"—some level of culpable intent worse than mere negligence.[82] The jury then determines how large an award is necessary to inflict sufficient retribution on the defendant and to deter future misconduct.[83] The vague nature of this task necessarily gives juries truly vast discretion in determining how harsh an award to inflict.[84]

Judicial review of punitive awards somewhat lessens this vast power: A defendant whom a jury has found liable for punitive

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Nebraska goes even further; its courts have interpreted their state constitution to forbid punitive damages. *See* Distinctive Printing and Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989).

Exceptions also exist to the general tendency of states to justify punitive damages as a means to punish and deter wrongdoing. Connecticut and Michigan instead permit punitive damages as augmented compensation to capture plaintiffs' attorney's fees and other uncompensated losses. *See* Triangle Sheet Metal Works, Inc. v. Silver, 222 A.2d 220, 225 (Conn. 1966); Peisner v. Detroit Free Press, 242 N.W.2d 775, 780 (Mich. 1976). *See generally* Ellis, *supra* note 3, at 3-12 (discussing the various purposes ascribed to punitive damages); Owen, *supra* note 3, at 373-81 (same).

80. *See infra* notes 91-96 and accompanying text (citing examples of recent statutory reforms in various states).

81. *See, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991) (discussing the "traditional common-law approach").

82. *See, e.g.*, ALA. CODE § 6-11-20(a) (1993) (requiring a showing that defendant "consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff"); CAL. CIV. CODE § 3294(a) (West Supp. 1997) (requiring plaintiff to show the defendant engaged in "oppression, fraud, or malice"); IDAHO CODE § 6-1604(1) (1990) (requiring that plaintiff show that defendant's conduct was "oppressive, fraudulent, wanton, malicious, or outrageous"); MINN. STAT. ANN. § 549.20.1(a) (West Supp. 1997) (requiring that plaintiff show the defendant showed "deliberate disregard for the rights or safety of others"); RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."). For commentary on the lawyerly habit of pretending these words mean much, see Dobbs, *supra* note 35, at 840-41 (condemning as pointless the use of "abstract conclusory words" to define the standard of conduct for punitive damages and concluding "[w]e probably cannot go beyond saying the conduct must be seriously wrong ... and that it must be accompanied by a bad state of mind").

83. *See Haslip*, 499 U.S. at 15 ("Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct.").

84. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring) (characterizing a Vermont state court's instruction that a jury should "take into account the character of the defendants, their financial standing, and the nature of their acts" as "an admonition [to the jurors] to do what they think is best" when determining punitive awards).

damages may request that the trial court review the amount of the award for excessiveness.[85] This review is not de novo in the sense that the judge is not free to substitute his or her own notion of an ideal award for what the jury actually imposed. Rather, as a general rule, the judge is supposed to take steps to modify a punitive award only if "the verdict was based upon prejudice, bias, or passion, was based upon a mistake of law or fact, was lacking in evidentiary support, or was shocking to the judicial conscience."[86] If a judge concludes that the award is too high, a not infrequent event, then he or she can order remittitur—i.e., give the plaintiff the choice between accepting a lesser award or enduring a new trial.[87] If the defendant is unhappy with the results of the trial court's review, the defendant may, of course, appeal, but the appellate court will review the trial court's

85. *See* Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 421-26 (1994) (discussing the English and American history of deferential review of jury awards for excessiveness).

86. BOSTON, *supra* note 36, § 30:41, at 49-50 & nn.51-54 (collecting cases). The view that judges should exercise great deference when reviewing the amounts of punitive awards is no longer universal, however. In federal court, Federal Rule of Civil Procedure 59 provides the standards governing whether the district court may order remittitur. *See* FED. R. CIV. P. 59; *Browning-Ferris*, 492 U.S. at 279. This standard has generally been understood to be quite deferential; however, the Fourth Circuit recently took a different view. *See* Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 594 (4th Cir. 1996). In *Atlas*, the court noted that Rule 59 permits judicial interference with a jury verdict that is against the weight of the evidence, is based on false evidence, or will result in a "*miscarriage of justice*." *Id.* (emphasis added). Where a verdict is rooted in the jury's view of the facts, the court should exercise considerable deference. *See id.* According to the Fourth Circuit, however, determining the amount of a punitive award does not involve a factual determination. Rather, these awards are rooted in jury policy determinations; they require the sort of judgment that judges exercise when imposing criminal sentence. *See id.* The court went on to observe that "a jury, which is called upon to make that 'sentencing' type of judgment only in the single case before it, is relatively ill-equipped to do so." *Id.* Judges, by contrast, "are required frequently to impose penalties for punishment and deterrence in a wide array of circumstances, both in civil and in criminal contexts." *Id.* Judicial institutional competence therefore requires judges to take an active role in reviewing punitive awards to determine whether they violate the "miscarriage of justice" standard of Rule 59. *See id.* In this vein, the court concluded that "punitive damages determinations involve a partnership between a jury and trial judge . . . in which the judge inevitably enjoys the final word." *Id.* at 595.

87. *See, e.g.*, Dunn v. HOVIC, 1 F.3d 1371, 1373 (3d Cir.) (en banc) (reducing to $1 million a $25 million jury punitive award that had already been reduced by the district court to $2 million), *modified in part*, 13 F.3d 58 (3d Cir. 1993); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 391 (Ct. App. 1981) (affirming trial court's decision to reduce $125 million punitive award to $3.5 million); Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 866 (Tex. App. 1987) (reducing $3 billion punitive award to $1 billion). *See generally* MARK PETERSON ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 27-29 (1987) (estimating that, due to post-trial review, defendants actually pay approximately 50% of punitive damages awarded in the first instance by juries).

actions only for abuse of discretion.[88]

B. Recent Reforms

Whatever the merits of the current punitive damages debate, it certainly has had a dramatic effect on the legal landscape. State legislatures have enacted and state courts have decreed a panoply of reforms.[89] The Supreme Court, for its part, has tried to rein in punitive awards by constitutionalizing a rough "reasonableness" requirement, holding, in essence, that "grossly excessive" awards violate due process.[90] For present purposes, however, the most important point to make about reform efforts of the last decade or so is that they have not altered the fundamental nature of the current regime. In nearly all states, punitive damages remain a chance to play a jury lottery that entices financially interested parties to try to punish malicious torts.

1. Reform in the States

Over the last ten to twenty years or so, most states have taken significant steps designed to make the punitive damages process fairer to defendants. For instance, many states now bifurcate trials so that punitive liability and the amount of the punitive award are determined in separate trial phases.[91] At least one of the goals of this

88. *See Browning-Ferris*, 492 U.S. at 279; BOSTON, *supra* note 36, § 30:43, at 52.

89. *See generally* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1618 app. (1996) (Ginsburg, J., dissenting) (appendix listing state reforms).

90. *See, e.g., id.* at 1592 ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." (citing TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993))). Congress, too, has attempted to reform the law of punitive damages. *See, e.g.*, Common Sense Legal Standards Reform Act of 1995, H.R. 956, 104th Cong. § 201(f) (1995), *reprinted in* 141 Cong. Rec. H2941-48 (daily ed. Mar. 9, 1995). The bill was vetoed by President Clinton on May 2, 1996. *See* Message on Returning Without Approval to the House of Representatives the Common Sense Legal Reform Act of 1995, 32 WKLY. COMP. PRES. DOC. 780, 780-81 (May 6, 1996).

91. *See, e.g.*, CAL. CIV. CODE § 3295(d) (West Supp. 1997) (allowing defendant to apply for bifurcation of liability and damages phases; admitting evidence of defendant wealth only in damages phase); GA. CODE ANN. § 51-12-5.1(d) (Supp. 1996) (requiring that liability for punitive damages and amount of such damages be decided in separate phases of trial); KAN. STAT. ANN. § 60-3702(a) (1994) (requiring trier of fact to determine punitive damages liability and the court then to determine amount of such damages in subsequent proceeding); MONT. CODE ANN. § 27-1-221(7) (1995) (requiring jury first to decide liability for punitive damages, then to decide amount in separate proceeding); MO. REV. STAT. § 510.263(1)-(3) (Supp. 1992) (allowing any party to apply for bifurcation of liability and damages phases, with evidence of defendant's wealth admissible only in damages phase); UTAH CODE ANN. § 78-18-1(2) (1996) (requiring jury to find defendant liable for punitive damages as prerequisite to admissibility of

reform is to prevent evidence of a tortfeasor's wealth, which, in many states, may be considered in determining the appropriate size of punishment, from tainting determinations of liability. Also, many states have raised the evidentiary burden of proof for plaintiffs, making them prove punitive liability by clear and convincing evidence rather than by a mere preponderance.[92] The rationale for this reform, of course, is to reduce the risk that juries will incorrectly find "malice," i.e., punitive liability, where none "exists." More radically, a few states have tried to address the problem of controlling juries by granting to judges the power to determine the amount of punitive awards.[93]

In addition to making these and other procedural reforms, roughly one-half of the states have limited the size of some categories of punitive awards, either in absolute terms (a plaintiff can win no more than $X) or as a multiple of any underlying compensatory award (a plaintiff can win no more than *Y* times compensation).[94]

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tortfeasor's wealth).

92. *See, e.g.*, ALA. CODE § 6-11-20(a) (1993); CAL. CIV. CODE § 3294(a); GA. CODE ANN. § 51-12-5.1(b) (Supp. 1997); IND. CODE ANN. § 34-4-34-2 (Michie 1986); MINN. STAT. ANN. § 549.20.1(a) (West Supp. 1997); MONT. CODE ANN. § 27-1-221(5); UTAH CODE ANN. § 78-18-1(1)(a).

93. *See* KAN. STAT. ANN. § 60-3702(a); OHIO REV. CODE ANN. §§ 2315.18, 2315.21(C)(2) (Anderson 1995) (amended 1996); *see also* CONN. GEN. STAT. ANN. § 52-240b (West 1991) (delegating to judges the power to determine the size of punitive awards in products liability actions). Plaintiffs have attacked both the Kansas and the Ohio measures as infringing the right to jury trial guaranteed by their respective constitutions. The Kansas measure survived this state constitutional challenge. *See* Smith v. Printup, 866 P.2d 985, 998 (Kan. 1993). The Ohio measure did not. *See* Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 401 (Ohio 1994).

94. *See, e.g.*, COLO. REV. STAT. § 13-21-102(1)(a)(3) (1987) (limiting punitive damages generally to the amount of actual damages); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (requiring that punitive damages in product liability actions not exceed twice the compensatory award); FLA. STAT. ANN. § 768.73(1)(a)-(b) (West 1997) (requiring that punitive damages generally be limited to three times the compensatory damages); KAN. STAT. ANN. § 60-3702(e) (1994) (requiring that punitive damages generally be limited to the lesser of defendant's highest gross annual income in the preceding five years or $5 million); NEV. REV. STAT. § 42.005(1) (Michie 1986) (capping punitive damages for most categories of torts at three times the compensatory award where that award is $100,000 or more and at $300,000 where the compensatory award is less than $100,000); N.D. CENT. CODE § 32-03.2-11(4) (1996) (limiting punitive damages to the greater of twice compensatory damages or $250,000); VA. CODE ANN. § 8.01-38.1 (Michie 1992) ("In no event shall the total amount of punitive damages [against all liable defendants] exceed $350,000.").

Had President Clinton signed it, the Common Sense Legal Standards Reform Act of 1995, H.R. 956, 104th Cong. (1995), would have capped products liability punitive awards at the greater of twice compensatory damages or $250,000 in actions against defendant companies worth more than $500,000. For an analysis indicating that such a cap—if applicable to all punitive awards—would affect only about ten percent of them, see Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD.

This capping of awards no doubt reassures defendants worried by multi-million dollar awards that at least *some* limits exist to their exposure to punitive damages. To people who believe that juries routinely hand out excessive awards, this is no doubt a good thing.[95]

A significant number of the states have addressed the windfall problem by passing "allocation" measures that require a victorious plaintiff to split any punitive award with the state.[96] This reform is an interesting half-measure. It somewhat lessens the embarrassment that private plaintiffs and their attorneys can win enormous windfalls from punitive awards over and above compensatory damages. Nonetheless, forcing plaintiffs to split punitive awards with the state still leaves them with windfalls—albeit smaller ones. Allocation measures seem tacitly to recognize that plaintiffs really ought not to keep such "winnings," but let them keep some fraction anyway.

In sum, states have passed reforms designed to strengthen

623, 655-56 (1997).

95. On a conceptual level, however, it is interesting to note (and some have) that caps arguably are inconsistent with the avowed purpose of punitive awards—to punish and deter. Punitive damages can be assessed for all sorts of different kinds of behavior and against all kinds of defendants. Presumably, the size of an award needed to punish and deter depends on the facts of the wrongdoing and the circumstances (including the wealth) of the defendant. In other words, the size of the award should depend on the facts of the case. Caps are arbitrary numbers that bear no relation to particularized inquiry into punishment and deterrence. Professor Morris made this point nearly 70 years ago with the following frequently cited example. Suppose a man recklessly shoots into a crowd but, by a stroke of luck, causes only $10 of damage to someone's eyeglasses. If the punitive award is limited to, for instance, three times compensatory damages, then the maximum punitive award would be $30, a sum that bears no obvious relation to the need to punish or deter the reckless shooter. *See* Morris, *supra* note 70, at 1181; *see also* Amelia J. Toy, Comment, *Statutory Punitive Damages Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 304, 330 (1991) (noting that caps may deprive courts of the ability to fit punitive awards to the facts of the given case). For a defense of caps from this charge, see *infra* text following note 268 (discussing this problem from a perspective informed by separation of powers).

96. *See, e.g.*, COLO. REV. STAT. § 13-21-102(4) (1987) (repealed 1995) (allocating one-third of punitive award to the state) (struck down as authorizing unconstitutional takings in *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 272-73 (Colo. 1991)); FLA. STAT. ANN. § 768.73(2)(a)-(b) (West 1997) (allocating 35% of punitive awards to the state) (upheld against a due process challenge by *Gordon v. State*, 585 So. 2d 1033, 1035-38 (Fla. Dist. Ct. App. 1991), *aff'd*, 608 So. 2d 800 (Fla. 1992)); GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1997) (allocating 75% of awards of punitive damages to the state, "less a proportionate part of the cost of litigation, including reasonable attorneys fees") (upheld as constitutional in *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 637-39 (Ga. 1993)); 735 ILL. COMP. STAT. 5/2-1207 (West Supp. 1997) (granting courts discretion to distribute punitive award among plaintiff, plaintiff's attorney, and the state); MO. REV. STAT. § 537.675 (Supp. 1992) (allocating to the state 50% of punitive damages remaining after payment of expenses and fees); OR. REV. STAT. § 18.540(b) (1995) (allocating 60% of punitive damages to the state); UTAH CODE ANN. § 78-18-1(3) (1996) (allocating 50% of punitive damages in excess of $20,000 to the state after payment of fees and costs).

defendants' procedural protections from jury prejudice or error, to limit the size of punitive awards, and to force victorious plaintiffs to share the proceeds of punishment.

2. Reform at the Supreme Court

The Supreme Court has shown a marked interest in punitive damages over the last decade or so. The effect of this interest has been to subject punitive awards to a very loose due process scrutiny. The essence of this scrutiny is that awards that are " ' "grossly excessive" ' "[97] and "jar [a judge's] constitutional sensibilities"[98] violate due process. The Court's road to constitutionalizing this necessarily standardless (and thus, in a sense, lawless) layer of review bears close examination, as it illustrates one of the central difficulties confronting those seeking to rationalize punitive damages by insisting on "reasonable" awards: Just as the Lord Chief Justice remarked in 1763, the measure of tort damages—certainly punitive damages, in any event—is "vague and uncertain."[99] No practical, stable frame of reference exists for determining the substantive reasonability of awards designed to punish and deter. Trying to corral punitive damages by way of free-floating reasonableness or excessiveness tests is a bit like trying to lasso the wind.

The Supreme Court grappled with the due process implications of punitive damages in 1991 in *Pacific Mutual Life Insurance Co. v. Haslip*.[100] Ruffin, an agent of Pacific Mutual, had pocketed the health insurance premiums of city employees of Roosevelt City, Alabama.[101] The policies of these employees soon lapsed, which a number of them discovered to their dismay after receiving medical care.[102] Cleopatra Haslip and several other plaintiffs sued Ruffin for fraud and sued Pacific Mutual under the theory of respondeat superior.[103] The jury returned a general verdict of $1,040,000 for Haslip.[104] Pacific Mutual appealed to the Supreme Court of Alabama, which upheld the

97. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1592 (1996) (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993) (quoting Waters Pierce Oil Co. v. Texas (No. 1), 212 U.S. 86, 111 (1909))).

98. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

99. Huckle v. Money, 95 Eng. Rep. 768, 768 (C.P. 1763).

100. 499 U.S. 1 (1991).

101. *See id.* at 5.

102. *See id.* at 4-5.

103. *See id.* at 5-6.

104. *See id.* at 7 n.2.

punitive damages award.[105] It then appealed to the Supreme Court, arguing that Alabama's method for calculating awards violated the Due Process Clause because it allowed "unbridled jury discretion."[106]

The Supreme Court rejected Pacific Mutual's wholesale attack on Alabama's punitive damages regime. It remarked that, under the "traditional common-law" approach, a jury determined the size of a punitive award by considering "the gravity of the wrong and the need to deter similar wrongful conduct," and that then the trial and appellate courts reviewed the award for reasonableness.[107] The Court observed that every federal and state court that had reviewed the propriety of this method had ruled that it did not violate due process per se.[108] The Court agreed with this venerable line of authority, noting that " ' "[i]f a thing has been practised [sic] for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." ' "[109] It recognized, however, that "unlimited jury discretion ... in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[110] In this vein, the Court observed that "general concerns of *reasonableness* and *adequate guidance* from the court ... to [the] jury properly enter into the constitutional calculus."[111]

The Court therefore examined the Alabama courts' approach to punitive damages to make sure it provided such "adequate guidance." It gave its stamp of approval[112] to the following instruction given to the *Haslip* jury:

> This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as direct result they were injured in addition to compensatory damages you may in your discretion award punitive damages.

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105. *See id.* at 7.

106. *Id.*

107. *Id.* at 15.

108. *See id.* at 15.

109. *Id.* at 17 (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988) (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922))).

110. *Id.* at 18.

111. *Id.* (emphasis added).

112. *See id.* at 19-20.

> Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.
>
> Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.[113]

The Court stated that this instruction gave the jury "significant" (a marvelous understatement) but not "unlimited" discretion.[114] It added that "[t]he instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory."[115]

The Court also approved of Alabama's use of the following factors to govern post-trial and appellate review of punitive awards:

> (a) whether there is a reasonable relationship between the punitive damages 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 reprehensibility of the defendant's conduct, the duration of that conduct, the defendant'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.[116]

The Court concluded that "application of these standards . . . imposes a sufficiently definite and meaningful constraint on the discretion of

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113. *Id.* at 6 n.1; *see also id.* at 19-20 (discussing the effect of these instructions).

114. *Id.* at 19.

115. *Id.*

116. *Id.* at 21-22 (citing Central Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 377 (Ala. 1989); Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989)).

Alabama factfinders in awarding punitive damages."[117] Of course, the problem with this last conclusion is that the Court provided no guidance as to how to *weigh* these factors, leaving this type of review endlessly manipulable.

Lastly, the Court eyeballed the size of the actual punitive damages award, noting that it was four times as large as the compensatory damages award and 200 times Haslip's out-of-pocket expenses, as well as far greater than the fine for insurance fraud in a criminal context. It decided, however, that "in this case [the award] ... does not cross the line into the area of constitutional impropriety."[118]

Boiling down the due process approach of *Haslip* to its essence reveals that, at a constitutional minimum: (1) courts should cabin jury discretion by telling jurors what punitive damages are for; (2) courts should then review such awards for "reasonableness," perhaps using a multi-factor test (that can, frankly, justify just about anything); and (3) finally, courts should make sure awards are not too big. This characterization is not meant as a flippant criticism of the Court. Rather, it is meant to highlight the central problem confronting judicial control of punitive awards. If punitive damages are meant to deter and punish civil wrongs, then the size of awards should be reasonably related to fulfilling these purposes. As is discussed in more detail below, however, there is no stable frame of reference in the ad hoc world of punitive damages for determining how much wrong needs how much punishment and deterrence.[119] Instead, such awards are necessarily initially a product of a factfinder's guided, or perhaps not-so-guided, intuition. Judges who then review these awards quite naturally apply their own intuitions to this job. As a general rule, however, legal culture does not permit a judge to justify overturning a jury verdict by saying that the size of an award struck him or her as just plain crazy. In the punitive damages context, the Court has responded to this problem by listing factors courts should consider in reviewing awards—offering a rhetorical cloak to cover judicial discretionary review of punitive awards and creating the illusion that the process is more constrained and ordered than it is.

The Supreme Court's next foray into punitive damages law,

117. *Haslip*, 499 U.S. at 22.

118. *Id.* at 24.

119. *See infra* notes 164-75 and accompanying text.

TXO Production Corp. v. Alliance Resources Corp.,[120] dramatically exposed the malleability of post-*Haslip* review of awards. The petitioner, TXO, had brought a bad faith claim for oil and gas development rights even though it knew that the respondent, Alliance Resources, held perfectly good title to them.[121] A West Virginia jury found TXO liable for slander of title and awarded $19,000 in compensatory damages and $10 million in punitive damages.[122] As in *Haslip*, the trial court denied motions for judgment notwithstanding the verdict and for remittitur.[123] The Supreme Court of Appeals of West Virginia affirmed.[124] Before the United States Supreme Court, TXO argued that because the punitive award was 526 times greater than actual damages, it was so excessive that it necessarily violated the Due Process Clause.[125] A plurality of the Court disagreed and held that the damages award was reasonable because TXO's scheme would have netted millions of dollars had it succeeded. The $10 million award was appropriately commensurate with these *potential* ill-gotten gains.[126] This conclusion is not absurd, but, coming from a court that just two years earlier had implied that a punitive award four times the size of a compensatory award raised serious constitutional concerns, it indicates that perhaps factor-listing does not do much to control punitive damages review coherently.[127]

The Court continued its efforts to corral punitive damages with the Due Process Clause in the 1996 case of *BMW of North America, Inc. v. Gore*.[128] BMW had a policy of not disclosing to the buyer damage to a new car when it amounted to less than three percent of a new car's value.[129] Dr. Gore sued BMW for selling as new a car that had been repainted to repair damage from acid rain, causing him perhaps $4000 in actual damages.[130] He argued that a $4 million punitive award was appropriate, however, because BMW had sold

120. 509 U.S. 443 (1993) (plurality opinion).

121. *See id.* at 448-49.

122. *See id.*

123. *See id.* at 451-52.

124. *See id.* at 452 (citing TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 875 (W. Va. 1992)).

125. *See id.* at 453, 459.

126. *See id.* at 461-62.

127. *See id.* at 480-81 (O'Connor, J., dissenting) (condemning the emptiness of the plurality's reasonableness review).

128. 116 S. Ct. 1589 (1996).

129. *See id.* at 1592-93.

130. *See id.* at 1593.

roughly one thousand repainted cars as new.[131] The jury agreed and awarded the full $4 million.[132] The Supreme Court of Alabama ruled, however, that the jury improperly had computed the amount of punitive damages based on occurrences happening outside of Alabama and thus beyond the power of Alabama juries and courts to punish, a proposition with which the Supreme Court later agreed.[133] Because the jury should have based its award on the fourteen repainted cars sold in Alabama, the Alabama high court ordered remittitur reducing the award to $2 million.[134]

The Supreme Court ruled that this award violated due process. The first sentence of the majority opinion cites *TXO* for the proposition that, "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor."[135] The legitimate purposes of punitive damages are punishment and deterrence. "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[136]

The Court's rule that punitive awards may not be "grossly excessive" sounds like a creature of substantive due process. However, having stated this principle, the Court then turned to a form of notice inquiry. In essence, it concluded that BMW had no way of knowing that Alabama would inflict a $2 million punishment

131. *See id.*

132. *See id.* at 1594.

133. *BMW* sent somewhat mixed signals on this issue. The Court clearly noted that a state may not use punitive damages to punish or deter conduct that is lawful where it occurred. *See id.* at 1597-98. It reserved judgment, however, on whether a state "may properly attempt to change [by way of punitive damages] a tortfeasors' [sic] *unlawful* conduct in another State." *Id.* at 1598 n.20. However, in support of the first proposition—that states may not impose punitive awards for conduct that was lawful where it occurred—the Court cited precedent to the effect that states cannot give their laws extra-territorial application generally. *See id.* at 1597 n.16. If that is the case, then it is difficult to see how a state could use its own punitive damages law to punish and deter out-of-state conduct regardless of its legality where it occurred. Nonetheless, the Court also stated that out-of-state conduct is relevant to determining the "reprehensibility of the defendant's conduct," *id.* at 1598 n.21, and thus is presumably also relevant to the issue of how harshly the defendant should be punished. So out-of-state conduct apparently *can* justify increased punishment after all. Thus, the power of states to use out-of-state conduct as a basis for punitive damages is bounded, but it is not entirely clear just where the boundaries lie.

134. *See id.* at 1595 n.10. It is not clear where this $2 million figure came from. At least the jury had some math on its side.

135. *Id.* at 1592.

136. *Id.* at 1595.

due to a nondisclosure policy that was legal in many other states.[137] This lack of notice caused the award to violate due process. In this vein, the Court announced three "guideposts" to aid analysis:

> Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.[138]

In short, the Court reasoned that what BMW had done was not all that bad;[139] Dr. Gore had suffered only $4000 in damages,[140] and the maximum civil penalty for violation of Alabama's Deceptive Trade Practices Act is $2000.[141] Given these facts, Alabama blindsided BMW by upholding $2 million of the jury's $4 million award.

At a very quick first glance, *BMW* might seem to provide a slightly more meaningful approach to due process scrutiny than *Haslip* and *TXO*. Part of this appearance stems from the fact that in *BMW*, unlike its two predecessors, the Court actually struck down an award as grossly excessive. Also, the Court's instruction to use the civil penalties available under statute to guide calculation of punitive damages seems refreshingly concrete and number-bound. However, the "guideposts" are, like the factors approved in *Haslip*, actually tools for justifying an intuitive decision rather than reaching a "reasoned" one. Because the Court could not, in the nature of things, provide a definitive and non-arbitrary answer for how much wrong equals how much money, it could not provide a meaningful framework for how the guideposts should be applied or how they should interact. As Justice Scalia remarked in dissent, "[t]he Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of

137. *See id.* at 1598.

138. *Id.* at 1598-99.

139. *See id.* at 1599.

140. *See id.* at 1602 (noting that the ratio of the $2 million award to the $4000 actual harm was 500 to 1).

141. *See id.* at 1603 (citing ALA. CODE § 8-19-11(b) (1994)).

punitive damages was not 'fair.' "[142]

Thus, to summarize recent reform efforts, the Supreme Court has tried to control punitive damages with a reasonableness approach which, while it signals a certain hostility to high awards and no doubt spurs courts to review them more actively, can justify just about any conclusion a judge wants to reach. Many states have thrown up procedural hurdles of various sizes to winning punitive damages, passed allocation statutes, and capped the amounts juries can award. Nonetheless, even in reform states, it generally is true that juries continue to enjoy vast discretion both to decide whether defendant conduct merits punitive liability and to determine the size of punitive awards.

C. *General Observations About Punitive Damages: Some Things We Know, and Some We Don't*

A few general observations concerning the theory and practice of punitive damages should frame any suggestion that yet another attempt at reform of the system is needed. Thanks to recent scholarly efforts, we have more and more empirical data concerning the frequency and amounts of punitive awards. Contrary to what some critics of the system might have one believe, juries exercise their vast discretion to impose such awards relatively rarely. Regardless, however, of whether punitive awards have "skyrocketed" over the last several decades (in some senses a rather sterile question of characterization), mean awards have substantially risen, and, on occasion, juries have found defendants punitively liable for amounts that are huge by anyone's standards. It is critical, however, to bear in mind how *little* we actually know concerning the implications of these data. If knowledge requires more than somewhat educated guesswork and anecdote, then we do not actually know whether, as a general matter, punitive awards under the present system are too high or low to serve best their ostensible purposes of retribution and deterrence. In this same vein, we do not actually know whether, on balance, the purported safety benefits of punitive damages in discouraging misconduct are worth the purported costs of stifling valuable technological and industrial innovation.[143] From such agnostic observations the following picture emerges: On infrequent occasions, juries use punitive damages to cause financial pain—

142. *Id.* at 1614 (Scalia, J., dissenting).

143. *See generally* Elliott, *supra* note 27 (discussing problems inherent in determining whether punitive damages deter corporate misconduct).

sometimes an enormous amount of it—to defendants who have behaved especially badly; we do not understand—at least not very well—the effects in the world of these financial beatings.

1. The Frequency of Punitive Awards

Punitive damages awards are far rarer than critics of the current regime might have one think. A recent study, led by Professor Theodore Eisenberg of Cornell Law School, surveyed jury verdicts in forty-five of the seventy-five most populous counties in the country for the fiscal year July 1, 1991 to June 30, 1992.[144] It found that juries awarded punitive damages in roughly 3% of all civil trials.[145] Other studies confirm this finding and reveal that this rate seems to have remained fairly constant over the last fifteen years or so. For instance, a RAND Corporation study published in 1996 compared the punitive award rates in fourteen counties for 1985-89 and 1990-94.[146] It found that juries awarded punitive damages in 4.2% of all civil verdicts from 1985 to 1989 and in 3.6% of all civil verdicts from 1990 to 1994.[147] Reaching back in time a little further, Stephen Daniels and Joanne Martin analyzed 25,627 civil jury verdicts from forty-seven counties during 1981 to 1985. Their study found that juries awarded punitive damages in 4.9% of all civil verdicts (1287 of the 25,627).[148] None of the studies purports to be truly national in scope. Nonetheless, a comparison of the Daniels and Martin 1981-85 rate (4.9%) to Eisenberg's 1991-92 rate (roughly 3%) and the RAND Corporation's 1990-94 rate (3.6%) indicates that there is little reason to think that juries have become much more willing to grant punitive damages over the last fifteen years.

Such figures mask considerable geographical variation,

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144. *See* Eisenberg, *supra* note 94, at 632-33.

145. *See id.* at 10. Plaintiffs win a compensatory award in roughly half of civil trials. It follows that they win punitive damages in approximately 6% of those trials in which they win compensation. *See id.*

146. *See* ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985, at 55 (1996). The rate of punitive awards across the whole fourteen-county sample was fairly constant between these two time periods. However, some counties within the survey experienced large fluctuations in the numbers of awards inflicted. For instance, there were 51 punitive awards in Cook County, Illinois, in 1985-89, but only 29 in 1990-94. *See id.* at 34.

147. *See id.* at 55-56.

148. *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 31 (1990); *see also* DANIELS & MARTIN, CIVIL JURIES, *supra* note 19, at 214-15 (finding, in a survey of 19,404 civil jury verdicts from 1988-90, that juries awarded punitive damages in 4.5% of all verdicts, or 8.3% of those in which plaintiffs won compensation).

however.[149] In the Eisenberg study, juries awarded *no* punitive damages in *thirteen* of the forty-five counties surveyed.[150] In three counties, however, juries awarded punitive damages in over 20% of civil verdicts. These counties were: San Francisco County, California, in which plaintiffs won in 64 civil trials and received punitive damages in 17 of them (26.56%); Fulton County, Georgia, in which plaintiffs won 62 civil trials and received punitive damages in 16 of them (25.81%); and Dallas County, Texas, in which plaintiffs won 129 civil trials and received punitive damages in 29 of them (22.48%).[151] It bears noting that there is little reason to think such percentages remain constant from year to year in any given jurisdiction.[152]

2. The Size of Punitive Awards

Less complete data are available on the size of punitive awards, but a sampling of recent studies indicates that mean awards have grown substantially over the last several decades. Daniels and Martin have analyzed the growth in the size of punitive awards from 1970 to 1990 in four sample counties—Cook County, Illinois; Dallas County, Texas; Jackson County, Mississippi; and Los Angeles County, California.[153] In three of the four sites—Cook, Dallas, and Jackson—*median* awards remained relatively constant throughout this twenty-year period, although they sharply rose in Los Angeles.[154] By contrast, *mean* awards substantially rose in all four jurisdictions over this time—especially in Cook and Los Angeles.[155] For instance, the mean award in Cook increased from on the order of $100,000 in

149. The likelihood of a punitive award also varies by category of tort. The Eisenberg study found, unsurprisingly, that juries are more likely to grant such awards in categories of cases that necessarily involve some form of evil intent. *See* Eisenberg, *supra* note 94, at 637. Punitive awards are particularly likely, for instance, where the defendant has committed an intentional tort (punitive damages awarded in 21% of such cases where the plaintiff won compensation) or where the defendant has fraudulently breached a contract (19% of plaintiff "wins"). *See id.* Punitive awards are much less likely in medical malpractice (3% of plaintiff wins) and products liability (3% of plaintiff wins) cases. *See id.*

150. *See* Eisenberg, *supra* note 94, at 640.

151. *See id.* Harris County, Texas, with 44 punitive awards, had the most such awards of any county surveyed in the Eisenberg study. *See id.*

152. *See* MOLLER, *supra* note 146, at 34 (noting large variations in the number of punitive awards between 1985-89 and 1990-94 in some sample jurisdictions).

153. *See* DANIELS & MARTIN, CIVIL JURIES, *supra* note 19, at 227-38.

154. *See id.* at 227.

155. *See id.* at 231-32.

1970-75 to in excess of $2 million in 1986-90.[156] The authors attributed this contrast in median and mean increases to substantial growth in the size of "high-end" verdicts—the larger verdicts in the punitive damages continuum became much larger in all four jurisdictions, which tended to drag the mean of awards much higher.[157]

The 1996 RAND study also analyzed changes in the amounts juries award, comparing awards made in the fourteen sample counties during 1984-89 with those made during 1990-94.[158] The study concluded that juries tended to grant higher awards during the latter period but that the trend was not uniform—in five of the fourteen counties mean and median awards decreased.[159] Also, variations between these two time periods in amounts awarded (regardless of direction of such change) were often large; for example, the study noted that "[m]edian awards increased from $29,000 to $250,000 in Cook County [Illinois] and from $62,000 to $215,000 in Harris County [Texas]; they decreased from $320,000 to $180,000 in Manhattan [New York] and from $652,000 to $31,000 in Erie County [New York]."[160]

In addition, the RAND study compared maximum punitive awards in its sample jurisdictions, revealing a checkered pattern: Maximum awards increased between the two time periods in seven sample counties but decreased in the other seven.[161] In either event, the maximum punitive award for all fourteen counties during both periods was astoundingly large—during 1984-89 a Harris County jury imposed a punitive award of several billion dollars; during 1990-94 a Los Angeles County jury imposed an award of several hundred million dollars.[162]

Of course, one must be very careful in using studies with such small samples to generalize about the state of the tort system nationwide. A few propositions suggest themselves, however. The Daniels and Martin study indicates that mean awards rose substantially between 1970 and 1990, but that this increase was largely fueled by increases in high-end verdicts. The RAND study arguably suggests that any "skyrocketing" stopped by about 1990

156. *See id.* at 232 fig.6.5.
157. *See id.* at 231.
158. *See* MOLLER, *supra* note 146, at 36-38.
159. *See id.* at 36-37.
160. *Id.*
161. *See id.* at 37.
162. *See id.*

because, while the study concludes that awards generally have increased from 1984-89 to 1990-94, it also reveals a highly checkered pattern of increase and decrease across its fourteen sample counties. Leaving aside, however, the characterization problem of whether it is fair to say that punitive awards have "skyrocketed" (and, if so, when and how much), perhaps the most important and indisputable fact about the size of modern-day punitive damages awards is crystal clear: On rare occasions, juries will use their power to assess punitive damages to compel defendants to pay plaintiffs astounding amounts of money, sometimes running into the millions of dollars, and, on several occasions, the billions.[163]

3. Problems in Assessing the Proper Size of Awards

Critics often discuss the problem of punitive damages as if it were overwhelmingly obvious that juries routinely impose awards that are crazily harsh and that the civil justice system has run completely amok;[164] they frequently use anecdotal evidence of awards that sound outlandishly high at first blush to back these criticisms.[165] Given that punitive awards sometimes involve amounts of money that are startling by just about anyone's standards, such anecdotes are ready at hand. However, to return to the problem implicit in *Haslip*, *TXO*, and *BMW*, it is probably impossible to quantify meaningfully how often juries "overdo it"; as Justice Kennedy remarked in his concurrence in *TXO*:

> To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to

163. *See supra* note 4 (noting the $3 billion *Texaco*, $5 billion *Exxon Valdez*, and $3.5 billion *CSX Corp.* verdicts).

164. For instance, a prominent critic of the current tort system recently wrote:

> Our mechanism for the peaceable resolution of civil disputes has transmogrified into an insatiable organism that is devouring a segment of our society and culture from the inside-out. Like the giant underground fungus discovered several years ago in Michigan, which manifests itself above the ground only in the form of an occasional mushroom, our civil justice system parasite is barely perceptible to the average person on a day-to-day basis, except for the occasional but increasingly frequent news reports of a freakish lawsuit or [an] outlandish jury verdict. But the destructive process is nevertheless continuously at work, growing and relentlessly consuming vital resources and disabling our productive capacity.

Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359, 359 (1994) (footnote omitted). For a critique of the rhetorical techniques often used by the proponents of reform, see DANIELS & MARTIN, CIVIL JURIES, *supra* note 19, at 205.

165. *See* Olson, *supra* note 164, at 360.

> what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend.[166]

For a jury to award an incorrect punitive award, it must award either more or less than that needed to cause the optimal amount of retribution and deterrence. However, no consensus frame of reference exists for determining how much retribution is warranted in any given case. Practically speaking, the same is true for deterrence calculations. Therefore, it is impossible to measure sensibly how often and how badly juries inflict "unreasonable" punitive awards.

This point is most obvious with regard to retribution. Juries necessarily base their retribution determinations to some degree on subjective fairness concerns. Suppose a jury awards $1 million in a products liability case because the defendant maliciously ignored the dangerousness of the widget it manufactured. A critic of punitive damages might respond by asserting that, even if the act was malicious, a $500,000 award would have been plenty to serve retribution purposes.

Who is right, the jury or the critic? These judgments are too value-laden and idiosyncratic to provide a stable framework for criticism of punitive damages in any but the most extreme cases. Each person examining a given award has his or her own intuitive reaction molded by knowledge, self-interest, and values as to whether it feels right. In a given case, an award might be sufficiently far from the examiner's notion of the correct amount to motivate the examiner to say the award was "wrong." She would reach this judgment with more and more confidence as the monetary distance between her notion of the optimal award and the actual award grew. Eventually, the examiner would confidently say that the award was crazy and that all right-thinking people who knew the facts would agree. One can imagine hypotheticals in which this judgment of

166. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 466-67 (1992) (Kennedy, J., concurring).

craziness undoubtedly would be correct in some sense. For example, every sane person should agree that a jury would be crazy to award a plaintiff $5 trillion because the defendant maliciously failed to shovel his walk after a snowstorm, thus causing the plaintiff to slip, fall, and bruise a hip. Actual punitive damages awards, however, are not *that* absurd—certainly not to the juries that impose them, and certainly not to the passionate defenders of the current regime.

Where a single punitive award is supposed to cause both proper retribution and deterrence, the inevitable subjectivity of the retribution component taints analysis of the whole award—including the deterrence component. Imagine a judge were able to determine the optimal amount of deterrence "needed" in a given case, but that the jury awarded a greater amount. Unless the jury returned a special verdict that specifically allocated its punitive award between retribution and deterrence, one could attribute the surplus above optimal deterrence to the jury's subjective retribution determination. Thus, a judge typically cannot say a punitive award is excessive merely because it exceeds the judge's notion of how large an award is needed to deter.

In any event, "calculating" deterrence awards poses its own difficulties, particularly where the conduct to be deterred is not profit-motivated. As a threshold matter, the civil justice system is slow and uncertain, whereas effective deterrence is commonly understood to require swift, certain sanctions.[167] Therefore, the deterrent effect of punitive damages may not be great. Compounding difficulties, deterrence is not an on-off switch but instead involves innumerable shades of gray. Suppose a defendant has been found liable for assaulting a plaintiff. With regard to specific deterrence, probably no damages award is high enough to *guarantee* that he will never assault again. All one can say is that a stiff enough punishment probably will have some effect on his behavior. With regard to general deterrence, no one can honestly say with any degree of precision how awards of any given size on any given defendant affect the conduct of others. At what point in a sea of unknowables is a jury to say enough is enough for deterrence?

Deterring profit-motivated torts poses some of the same problems, as well as some all its own. To begin, such torts often involve corporate culprits. Deterrence uses pain to influence future behavior. Corporations cannot feel pain and thus cannot be deterred.

167. *See, e.g.*, Elliott, *supra* note 27, at 1062 (discussing factors that are generally understood to govern the deterrent effects of sanctions).

Instead, one must deter the people who run them and work for them. If punishment for a corporate misdeed comes at all, it may come very late, particularly for products liability claims—most notably in this vein, asbestos cases have challenged actions that occurred decades before the plaintiffs brought suit.[168] The persons actually responsible for tortious acts may not suffer even indirectly from a punitive damages judgment against a corporate defendant; indeed, they may be long gone from the scene by the time any such judgment arrives.[169] Thus, the people who actually make corporate decisions that cause tortious harm may have little to fear personally from punitive damages, which minimizes whatever mild deterrent value they may have. Of course, if punitive damages are not an effective tool with which to deter, it makes little sense to worry too much about determining "optimal," non-effective awards.

Leaving such problems to one side, however, profit-motivated torts at least offer the mirage that the calculation of deterrence awards can be relatively objective.[170] To deter a profit-seeking actor from repeating a given kind of conduct, one must, of course, create circumstances such that the actor, faced with the opportunity to misbehave again, will conclude that to do so would not be profitable. The following gross oversimplification suggests how a jury might try to do so. First, it must determine how much profit the defendant gained from the tort at issue so that the jury can take that profit away, and the defendant will learn that it cannot keep ill-gotten gains.[171] Where the defendant's benefit from the tort exceeds the

168. *See id.* at 1062 (citing Fischer v. Johns-Manville Corp., 512 A.2d 466, 476 (N.J. 1986) (rejecting the argument that stockholders should not be punished 50 years after the fact for the misdeeds of asbestos companies in the 1930s)).

169. *See id.* at 1063 (suggesting that "punitive damages against corporations for events far in the past are like 'corruption of the blood,' the ancient common law remedy that punished the children for the sins committed by the parents" (footnote omitted)).

170. For discussions of how to structure punitive awards to deter profit-motivated behavior, see STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 162 (1987), Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143 *passim* (1989), and Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 29 (1990).

171. *See* Dobbs, *supra* note 35, at 874-76 (suggesting that one way to enhance the deterrence value of punitive damages would be to use them to force defendants to disgorge ill-gotten profits). It bears noting, however, that basing punitive damages on an attempt to take the profit out of conduct assumes that the goal of punitive awards should be to deter conduct because a jury has determined this conduct *is* tortious and should be prevented. Efficiency analysis (of the sort discussed by the articles cited in the previous note) suggests a different analysis. If a defendant derives more profit from the conduct than the plaintiff derives harm, then the conduct increases the wealth of society (even though it makes the plaintiff poorer). Although it is proper to take steps to ensure the

value of compensatory damages awarded to the plaintiff, full deterrence will require a punitive award to make up the difference. The analysis does not end there, however, because one could not expect an award only as large as profits from a past tort to deter future torts. Not all tort victims sue. If a victim successfully sues and wins only the defendant's ill-gotten gains from that tort, then the defendant is no worse off than if it had done no wrong in the first place. If the victim does not sue, then the defendant keeps everything. Excluding for the moment the real-world considerations of attorney's fees and loss of reputation, torts become a no-lose situation for the tortfeasor. To deter future torts, the jury must inflict an award that makes the defendant absorb this "enforcement error."[172] To do so, the jury could multiply the defendant's profits from the tort by the inverse of the risk the defendant perceived it faced of incurring a judgment due to its behavior.[173] For example, suppose a jury decides a defendant wrongly profited $1 million from a fraud and that the defendant probably figured there was roughly a 10% chance that its victim would sue and win. To deter, the jury should assess $10 million dollars in total damages ($1 million times 10, the inverse of 1/10); the extra $9 million of punitive damages is to teach the defendant that, in the future, it should not commit torts on the gamble that it will retain profits because some victims do not sue and win.

Of course, one of the problems with this sort of analysis is that it assumes that juries can intelligently determine the enforcement error involved in any given case.[174] In the example just given, how is the jury supposed to arrive at this 10% figure? How often do victims of this sort of tort sue and win? Does anyone know? How do the idiosyncratic facts of a case affect analysis of enforcement error? If such questions cannot be answered with some degree of specificity,

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defendant internalizes the plaintiff's loss, the legal system should not set damages so high as to remove all incentives for the defendant's wealth-increasing behavior. Assuming the correctness of this view, to ensure optimal deterrence, the tort system should strive to ensure that defendants pay for all *harms* they cause plaintiffs. *See, e.g.*, Cooter, *supra* note 170, at 1149 (using harm to plaintiff as the basis for measuring deterrence damages). Where defendants must do so, they will engage in conduct only where they expect the benefits of acting to exceed the harms inflicted on plaintiffs, i.e., they will act to increase societal wealth.

172. *See* Cooter, *supra* note 170, at 1149-50 (discussing the problem of "enforcement error").

173. *See id.* at 1150.

174. For criticism suggesting such approaches are unrealistic, see Jerry J. Phillips, *A Comment on Proposals for Determining Amounts of Punitive Damage Awards*, 40 ALA. L. REV. 1117, 1118-19 (1989).

then enforcement-error type analysis can have only limited usefulness as a tool to make the calculation of punitive awards for profit-motivated torts something more than intuitive guesswork.

In sum, there is no consensus frame of reference for "calculating" retribution awards or deterrence awards for non-profit-motivated torts. Calculating deterrence awards for profit-motivated torts perhaps offers a theoretical hope of some objectivity, but that hope may be chimerical.

None of this discussion, however, is meant to imply that punitive damages never cause appropriate retribution or that they never deter tortious conduct. Nor is it meant to suggest that juries never impose "crazy" awards. It is merely to observe that punitive damages are not a precision tool that juries use to fine-tune the behavior of defendants and potential tortfeasors. They are a financial club that juries use, to paraphrase the Lord Chief Justice loosely, to express outrage, to take revenge upon defendants, and to try to slam sense into them—as well as everyone else who may consider committing malicious torts in the future.[175] Perhaps it is not such a good idea to hand juries this club (an issue this Article does not directly address), but to pretend or imply that consistent, remotely precise, non-arbitrary standards exist to govern juries' use of this crude tool is absurd.

III. A PROPOSAL FOR ANOTHER LAYER OF REFORM: MAKING ROOM FOR THE STATE IN THE PUNITIVE DAMAGES PROCESS

The central thesis of this Article is that the punitive damages regime would be *better* if state officials, rather than financially-interested private parties, prosecuted claims for punitive awards. Implicit in what already has been said, however, are two arguments against tinkering with the current regime in this fashion. First, juries rarely inflict punitive awards. They are therefore probably not an imminent threat to the safety or health of the Republic, and thus there is no pressing need for reform. Second, no remotely precise, non-arbitrary standards exist for determining the optimal size of punitive awards. If, as a general matter, one cannot meaningfully determine whether any given award is substantively "correct," then, lacking such a frame of reference, it is difficult to see how one could

175. *Cf.* Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (C.P. 1763) ("Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.").

justify reforms designed to make such awards "better."

One answer to these threshold arguments: Perhaps paradoxically, when it is difficult or impossible to assess the substantive propriety of legal actions, it is all the more important that the *process* for determining them be, and appear to be, as fair as possible. For instance, one can see this proposition at work in the way courts review discretionary decisions by agencies. For an agency decision to involve meaningful discretion, several outcomes must be legally permissible. Suppose an agency takes an action that, on its face, appears to be plausibly within the agency's zone of discretion, i.e., it is not apparent that the decision is substantively "wrong" or "unreasonable." A court may nonetheless reject this action if the agency's consideration of irrelevant, improper factors tainted the *process* by which it reached its decision.[176] Of course, the need for fair procedures should be at its peak where the state uses discretionary powers to inflict punishment on those within its grip. Punitive awards are a relatively rare but sometimes surprisingly harsh form of punishment. Thus, it is important that they both be and appear to be fair.

The current punitive damages regime, however, violates several norms of fairness that limit the ways in which the state can inflict *criminal* punishment. Three examples: First, although allocation statutes lessen this problem, plaintiffs win an unjustified windfall whenever they collect extra-compensatory damages. This potential for windfalls creates an obvious and massive conflict of interest for plaintiffs and their attorneys when they argue how harshly defendants should be punished; it creates the appearance—and presumably the reality, in many cases—that the desire for money improperly influences punishment. Second, even though judges review punitive awards for excessiveness and many state legislatures have recently imposed caps limiting their size, juries exercise an alarmingly vast amount of power in awarding punitive damages. The lessons of separation of powers, especially as applied in the criminal law, teach that such a concentration of power in any one entity in the punishment process is dangerous and encourages arbitrary results. Third, in cases involving mass torts, because the present system

176. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (examining the "arbitrary and capricious" standard); Yepes-Prado v. I.N.S., 10 F.3d 1363, 1370 (9th Cir. 1993) ("Agencies abuse their discretion no less by arriving at *plausible* decisions [i.e., decisions that appear reasonable] in an arbitrary fashion than by reaching unreasonable results." (emphasis added)).

allows each plaintiff claiming harm to bring his or her own action for punitive damages, separate juries may grant successive awards that repetitively punish the same conduct, in contravention of the premise of the criminal law embodied in the Double Jeopardy Clause that the state should punish any given "offence" only once.[177]

The basic rationale behind all three of these norms is that the manner in which the state intentionally inflicts pain on its citizens should be carefully limited and controlled. Prima facie, this basic premise should apply to all forms of state punishment, not just those labeled "criminal."[178] Again, punitive damages are, at core, a form of state-inflicted punishment. It follows that the state should carefully limit and control the process by which it authorizes their imposition. In short, all three of these norms that control criminal punishment should, to the extent practicable, govern punitive damages as well. Money should not influence their prosecution, the power to inflict them should be carefully divided, and defendants should not have to face needlessly repetitive "jeopardies."

States could, with relative ease, make their punitive damages regimes better reflect these norms by adopting this Article's superbifurcation proposal, which would encourage private plaintiffs and public prosecutors to *cooperate* in the process of punishing malicious tortfeasors.[179] The remainder of Part III first provides a model statute, discusses the constitutional concerns it raises, and then analyzes the effects it would have on the rate and size of punitive awards, as well as the rate and size of settlements in cases involving plausible punitive claims. Part III concludes that these effects would not be demonstrably objectionable—superbifurcation would reform, not destroy, punitive damages. Part IV then makes the affirmative case for reform, discussing the three ways in which the proposed model would enhance the fairness of the punitive damages process.

177. U.S. CONST. amend. V. ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]").

178. *Cf.* United States v. Halper, 490 U.S. 435, 447-48 (1989) ("The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.").

179. This proposal is presented as a state reform because punitive damages largely are rooted in state law. However, with minor alterations, the proposal also could work as a federal reform where a federal cause of action authorizes an award of punitive damages.

A. A Model Superbifurcation Statute

The following is a sketch of a hypothetical state statute that creates a cooperative punitive damages process by splitting the duties of proving punitive *liability* and seeking punitive *damages* between private plaintiffs and public prosecutors, respectively:

> Section 1) The court shall award a reasonable attorney's fee as part of costs to any plaintiff who proves the defendant's punitive liability by demonstrating that the defendant tortiously injured the plaintiff and further demonstrating by [whatever standard of proof the enacting state chooses] that the defendant committed this tort with malice or reckless disregard for the plaintiff's rights;
>
> Section 2) The Attorney General may bring one action for punitive damages against any defendant found punitively liable under Section 1 for all acts committed within [the enacting state[180]] as part of the defendant's tortious course of conduct and all harms . . . caused by such acts;
>
> > (a) In such an action, the defendant will be estopped from denying the facts necessarily proven in the course of reaching an underlying finding of punitive liability;
> >
> > (b) The trier of fact may in no case award greater damages for the defendant's malicious course of conduct than the amount requested by the Attorney General;
>
> Section 3) Punitive damages assessed against a defendant in a punitive damages action under Section 2 shall be payable to the Office of the Attorney General, which will retain from any such damages an amount sufficient to compensate for any resources it expended in prosecuting the punitive damages action and will pay any remainder to the Office of the Treasury.

This model[181] builds on the premise of the current system that

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180. This bracketed qualification and the one that follows are necessary in light of the Supreme Court's admonitions on the territorial limits of the states' power to punish in *BMW*. *See supra* note 133.

181. This model is not meant as a complete description of a punitive damages regime. For instance, it does not speak to pleading procedures, burden of proof, caps on awards, or whether private plaintiff actions should be bifurcated into compensatory and punitive liability stages. For the most part, the proposal is consistent with whatever approach an enacting state wishes to take to such issues, e.g., the proposal should work regardless of what burden of proof a state chooses for issues of punitive liability or whether it caps punitive awards, etc. Of course, the exception to this general rule is that superbifurcation is not consistent with allocation statutes and is meant to supplant them.

plaintiffs should be encouraged to act as private attorneys general in the process of punishing malicious torts. If one assumes that it is good to punish those who commit serious civil wrongs, then one reasonably could argue that a plaintiff who proves that a defendant is punitively liable, and thus vulnerable under the proposal to a "Section 2" punitive damages action by the state, has done society a valuable service, for which the plaintiff should be paid. The problem then becomes determining fair payment. On the face of things, the current system's method of paying a plaintiff with a punitive damages award makes little sense because these awards bear no logical relation whatsoever to the effort and money plaintiffs expend in a lawsuit.[182] In other contexts, courts and legislatures have used the private-attorney-general doctrine to justify awarding reasonable attorney's fees to plaintiffs.[183] In civil rights cases, courts typically calculate such fees using the "lodestar" approach, which requires a court to multiply the reasonable hours counsel spent on a case times a reasonable hourly rate to determine a base fee award, which the court may then adjust to take into account the nature of the given case and counsel's role in it.[184] Unless strong, demonstrable policy reasons dictate a different approach, it would seem reasonable, prima facie, to pay punitive liability plaintiffs for their "legal work" similarly.[185] Section 1 of the superbifurcation proposal does just that—it pays plaintiffs their reasonable attorney's fees for performing the societal service of proving punitive liability.

Once a plaintiff proves punitive *liability*, its active part in the punitive damages process would be over. Section 2 provides that the Attorney General of an enacting state may bring one action to seek punitive *damages* in light of all wrongful acts that occurred within his or her state that were part of the tortious course of conduct that gave rise to punitive liability and all harms caused by such acts. It also provides that the trier of fact may award no more in punitive

182. *See, e.g.*, Note, *supra* note 35, 1903-04 (arguing that punitive awards in excess of plaintiff litigation costs are windfalls).

183. *See, e.g.*, 42 U.S.C. § 1988 (1994) (awarding attorney's fees in federal civil rights cases); Serrano v. Priest, 569 P.2d 1303, 1312-15 (Cal. 1977) (awarding attorney's fees where state constitutional rights are protected to the benefit of a large number of people).

184. *See, e.g.*, Venegas v. Mitchell, 495 U.S. 82, 87 (1990) (discussing calculation of fees under 42 U.S.C. § 1988); Hensley v. Eckerhart, 461 U.S. 424, 433-37 (1983) (same).

185. Of course, a defender of the current regime could argue that punitive awards to plaintiffs in excess of their legal fees and costs are necessary to ensure that plaintiffs have sufficient incentive to bring meritorious suits. For a discussion on why there is little reason to think this is the case, see *infra* text accompanying notes 216-20.

damages than the prosecutor requests.[186] In such an action for punitive damages, the defendant would be estopped from denying any facts necessary to an underlying finding of punitive liability. Thus, a prosecutor would be able to take maximum advantage of the information a plaintiff's initial lawsuit provides.

The model statute, however, does not by its terms limit the factual basis for punitive awards to the facts proven in the course of reaching findings of punitive liability. For instance, where a prosecutor proves that the defendant's course of conduct within the forum state caused harms other than those proven in an underlying punitive liability action, the prosecutor could seek to persuade the jury that these extra, "non-Section 1" facts justified increased punitive damages.[187] Suppose a plaintiff were to prove that a company was punitively liable for manufacturing defective breast implants that caused serious harm to the plaintiff. This showing of punitive liability could serve as a basis for a punitive damages action in which the prosecutor could seek an award based on all harms caused to all persons injured by the defendant's intrastate course of conduct (i.e., manufacturing and selling defective breast implants). Allowing the prosecutor to seek punitive damages for all such harms would help ensure that the jury in a damages action would have as full a picture as possible of the defendant's behavior and culpability. At the same time, because the proposal limits prosecutors to seeking only *one* award per course of conduct, it would help rationalize the punishment of mass torts by eliminating the current regime's practice of permitting an unlimited number of plaintiffs allegedly harmed by a given course of conduct to seek separate punitive awards against the defendant in separate lawsuits—a practice that creates obvious dangers for repetitive, unreasonable punishment.[188]

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186. How the state should determine how big an award to request in a given case is beyond the scope of this Article.

187. Such a system would place the defendant in a Section 2 punitive damages action in a situation somewhat similar to that faced by a criminal defendant facing sentencing in federal court. *Cf.* U.S. SENTENCING GUIDELINE MANUAL § 1B1.3. At sentencing, the defendant cannot argue that the jury was wrong in finding guilt; the defendant is stuck with that "fact." In determining the appropriate sentence, however, the judge considers not just the offense of conviction, but also acts "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." *Id.* Likewise, a defendant confronting an action for punitive damages would be stuck with the facts underlying the finding of punitive liability, but the prosecutor would be free to prove other damaging facts arising from the defendant's tortious course of conduct.

188. *See infra* notes 278-324 and accompanying text (discussing the problem of mass torts and multiple punishment).

Section 3 of the model determines where the money goes. Obviously, if the prosecutor's office lacks the resources to press punitive damages actions, then superbifurcation cannot work. As a threshold matter, lack of resources should not be too grave a problem because punitive damages awards are relatively rare.[189] Still, to help ensure that adequate resources are available, Section 3 compensates the prosecutor's office for the expenses it incurs in seeking punitive damages—much like Section 1 pays plaintiffs for proving punitive liability.[190] Any remainder goes to the general fund—that is, to the public.

B. Superbifurcation and the Constitution

Of course, to be viable, superbifurcation must be constitutional. The proposed model raises several constitutional concerns. First, the proposal allows the state to take advantage of findings of punitive liability reached in actions between private plaintiffs and defendants, i.e., it allows a second plaintiff (the state) to club the defendant with a weapon created by a first plaintiff. This use of offensive, non-mutual collateral estoppel warrants but clearly survives due process scrutiny. Second, the proposal puts the state in charge of pursuing punitive awards and makes the state their beneficiary. This change would make punitive damages actions and awards subject to scrutiny under the Excessive Fines[191] and Double Jeopardy[192] Clauses. Subjecting punitive awards to Excessive Fines Clause analysis should not cause any noteworthy effects as such awards are already subject to a due process "excessiveness" analysis. In rare instances, however, double jeopardy concerns might block Section 2 actions for punitive

189. *See supra* notes 144-52 and accompanying text (discussing the relative rarity of punitive awards).

190. At first blush, it might seem ironic that an article that inveighs against plaintiff conflicts of interest in the punitive damages process should suggest partial payment of punitive award proceeds to prosecutorial offices. Such payments should not create any undue conflict of interest, however. Because punitive awards in excess of prosecutorial costs would go into a state's general fund, prosecutors, unlike plaintiffs' attorneys under the present system, would not be able to profit financially (directly or indirectly) by pressing punitive damages claims. As such, money should not cloud prosecutorial judgment or create any appearance of impropriety.

In any event, such payment of costs is an incidental device designed to alleviate resource problems prosecutors might encounter in pressing punitive damages claims. Such problems would not be significant in any event because punitive awards are relatively rare. Thus, were this financing mechanism to prove in any way problematic, it could be sliced off the proposal.

191. U.S. CONST. amend. VIII.

192. U.S. CONST. amend. V.

damages.

Allowing the state to take advantage of Section 1 findings of punitive liability by estopping defendants from denying them in Section 2 proceedings should be constitutional under the due process principles set forth in *Parklane Hosiery Co. v. Shore.*[193] In that case, the Supreme Court stated that trial courts should have broad discretion to apply offensive, non-mutual estoppel except where a plaintiff seeking to invoke it easily could have joined the earlier action giving rise to the estoppel or where its application would be unfair to the defendant.[194] The first concern about free-rider plaintiffs is not an issue because the proposed model does not contemplate government participation in suits to determine punitive liability. As for fairness, the Court indicated that application of offensive, non-mutual collateral estoppel may be unfair to a defendant in at least three circumstances: (1) where a defendant lacked sufficient incentive to litigate an issue fully in an earlier proceeding (e.g., if the defendant were sued for nominal damages in that suit only to face a far more substantial claim later); (2) where "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant";[195] or (3) "where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result."[196]

None of these problems seriously undermines the viability of the proposal. That a finding of punitive liability would give the state an opportunity to sue for punitive damages should suffice to give defendants incentive to litigate actions involving a plausible punitive liability claim. As for the problem of seemingly inconsistent judgments, the potential for them clearly exists in the mass tort context. A defendant could win ten Section 1 punitive liability actions against ten different plaintiffs, lose to the eleventh, and then find itself vulnerable to a governmental Section 2 action. This particular concern, which in any event could arise only in exceptional circumstances, is less bothersome when one remembers that, broadly speaking, the alternative to superbifurcation is simply to let juries continue to award punitive damages without prosecutorial "help" and regardless of whether previous, "inconsistent" judgments

193. 439 U.S. 322 (1979).
194. *See id.* at 331.
195. *Id.* at 330.
196. *Id.* at 331.

involving different plaintiffs exist. It cannot be unfair to defendants to place an additional barrier between them and punitive awards by adding the check of prosecutorial review to the process. Lastly, with regard to the Court's "procedural opportunities" concern, the proposed model contemplates that a Section 1 finding of punitive liability would give rise to a Section 2 punitive damages action in the same state. Therefore, punitive damages actions are unlikely to create much in the way of extra procedural opportunities for defendants. There is nothing remotely unfair to defendants about superbifurcation; therefore, its use of offensive, non-mutual collateral estoppel should be constitutional.

Punitive damages are not currently subject to Excessive Fines Clause scrutiny because, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[197] the Supreme Court ruled that this clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[198] Superbifurcation would both put the state in charge of the prosecution of punitive damages actions (as opposed to actions for punitive liability, which private plaintiffs would continue to bring) and also give the state the right to any proceeds of punishment. The implication of *Browning-Ferris* is therefore that punitive awards under the proposed model would become subject to excessive fines scrutiny. No particularly interesting conclusions should follow from this result, however, because, as was mentioned above, the Court has already used the Due Process Clause to forbid "grossly excessive" punitive awards.[199]

The double jeopardy implications of the proposal are more interesting. In dictum in *United States v. Halper*, the Supreme Court remarked that punitive damages, because they result from private actions between private litigants, are not subject to the Double Jeopardy Clause.[200] State involvement obviously would rob punitive damages of this particular rationale for double jeopardy immunity. The law concerning when ostensibly civil penalties may trigger a constitutional jeopardy is, to put the matter mildly, challenging, and it is filled with nice distinctions.[201] It is therefore difficult to make

197. 492 U.S. 257 (1989).

198. *Id.* at 264.

199. *See* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1596 (1996).

200. *See* United States v. Halper, 490 U.S. 435, 451 (1989). For a fuller discussion of judicial analyses of how the Double Jeopardy Clause affects punitive damages, see BOSTON, *supra* note 36, § 4:16.

201. *See, e.g.*, United States v. Ursery, 116 S. Ct. 2135, 2147-49 (1996) (discussing

categorical predictions about how courts would view prosecutor-initiated punitive damages actions for purposes of double jeopardy. Without diving too deeply into this rather murky subject, however, it seems fair to hazard that, under the proposal, where the trier of fact inflicts a punitive award in part to cause retribution, that award would trigger the clause's protections.[202]

Of course, punitive awards are generally supposed to cause both retribution and deterrence. The presence of a retributive purpose indicates that state officials would need to consider the double jeopardy implications of bringing either a criminal or a Section 2 action against a defendant who has been found punitively liable for a wrong that is arguably both criminal and civil.[203]

Double jeopardy forbids multiple prosecutions or punishments of one "offense."[204] *Blockburger v. United States* provides that, where "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires

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application of double jeopardy to civil forfeitures and explaining the somewhat counter-intuitive result that civil forfeiture of a person's house is not "punishment" for purposes of triggering double jeopardy).

202. In *Halper*, the Court stated that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment" that triggers double jeopardy scrutiny. *Halper*, 490 U.S. at 448. The Court explained that " '[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.' " *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979)). It would be difficult to explain away a given punitive award without invoking what are, after all, the ostensible purposes of such awards—to punish and deter. Therefore, under *Halper*, government-initiated punitive damages actions ought to be subject to double jeopardy scrutiny.

In *Ursery*, however, the Court, over Justice Stevens's vigorous dissent, took a very different approach to deterrence, observing that "we long have held that this purpose may serve civil as well as criminal goals." *Ursery*, 116 S. Ct. at 2149. The Court used the "civil" nature of deterrence to help justify its conclusion that civil forfeitures ostensibly meant to deter do not trigger double jeopardy. *See id.* After *Ursery*, it seems that one could plausibly argue that, where one can reasonably describe a "punitive" award as serving only a deterrence function, that award is not a punishment for purposes of double jeopardy. *But see* Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997) (referring to deterrence and retribution as the "two primary objectives of criminal punishment"). At the very least it seems clear, however, that where one must invoke retribution to provide a reasonable explanation for an award, that award should trigger double jeopardy protections.

203. The proposal envisions that state officials would prosecute claims for punitive damages; county or city officials generally prosecute crimes. Dealing with the double jeopardy implications of superbifurcation would therefore require some degree of coordination between state and local officials.

204. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same *offence* to be twice put in jeopardy of life or limb[.]" (emphasis added)).

proof of a fact which the other does not."[205] In other words, provisions create different "offenses" where each provision requires proof of an element that the other does not. One certainly can imagine cases in which a tort and a crime would amount to the same offense under this test. For instance, suppose civil liability for wrongful death requires proof only that one unreasonably caused the death of another. Ignoring complications such as felony murder for the moment, murder similarly requires proof of an (unreasonable) killing as well as some appropriately culpable intent. In this hypothetical, wrongful death does not require proof of an element that murder does not require as well—it is a lesser-included "offense" of murder. A prosecutor would not be able to bring a retributory Section 2 punitive damages action for this tort after a defendant has been prosecuted (successfully or not) for murder.[206] A prosecutor who tried to sue for retributory punitive damages for the tort before bringing the criminal action could find that the Double Jeopardy Clause blocked the murder prosecution.

At least three points should be made about the concerns double jeopardy could pose for superbifurcation. First, such concerns probably would not arise very often. Presumably, the most likely torts to give rise to criminal proceedings would be intentional torts, such as assault and battery. Intentional torts accounted for fewer than twenty of the 177 punitive damages awards that Professor Eisenberg's recent study analyzed.[207] By contrast, roughly half of these awards were inflicted in contract-related tort litigation, a category one would not intuitively expect to give rise to much in the way of criminal proceedings.[208]

Second, the Supreme Court has recently held that deterrence of wrongdoing may be a "civil" function for purposes of double jeopardy.[209] It is therefore at least plausible that a prosecutor could

205. 284 U.S. 299, 304 (1932) (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).

206. To cite the inevitable example, the Goldmans and Browns would not have been able to sue O.J. Simpson for punitive damages under the superbifurcation system. In the Simpson case, former star football player O.J. Simpson was acquitted in a criminal trial of murdering his wife, Nicole Brown Simpson, and her companion Ronald Goldman. Their families sued Simpson in civil court and won a multi-million dollar verdict in which he was found liable for the deaths of both. *See, e.g.*, B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay $25 Million Punitive Award*, N.Y. TIMES, Feb. 11, 1997, at A1 (discussing Simpson civil verdict).

207. *See* Eisenberg, *supra* note 94, at 635.

208. *See id.*

209. *See* United States v. Ursery, 116 S. Ct. 2135, 2149 (1996). *But see* Kansas v.

bring a Section 2 action solely to inflict a deterrence award without triggering double jeopardy.

Third, it is not so obvious why the state *ought* to be able to use a punitive action and a criminal action to cause retribution twice. Suppose a defendant has committed a tort that is also a crime. Suppose also that no criminal prosecution has commenced before a jury finds the defendant punitively liable in a Section 1 action. The state has a choice: to bring a criminal action or a civil one for punitive damages. Whichever one is brought first blocks the second. Suppose a prosecutor chooses to bring a criminal action and the defendant is found guilty and sentenced. The only reason the state could have for then seeking a punitive award against that defendant would be if the court imposed a criminal sentence that was too light to punish properly.

The criminal system, however, should be designed to inflict optimal punishment without the fortuitous help of the civil system. If crimes are not punished harshly enough, then the legislature should write stricter sentences into law. Punitive damages, by contrast, should be most appropriate where a defendant's conduct, though not subject to criminal punishment (for whatever reason), is nonetheless outrageous enough to warrant some sort of retribution and deterrence.[210] In such instances, because (by hypothesis) criminal punishment is not contemplated, double jeopardy poses no concern.

Suppose, however, the defendant wins an acquittal in the criminal action. In such an instance, a state official might rationally believe that, although the defendant evaded punishment under the reasonable doubt standard applicable in criminal cases, enough evidence existed to prove liability under the more relaxed standards of proof applicable in civil proceedings for punitive damages. If such proof sufficient for civil purposes indeed existed, then one plausibly could argue that it would be a good thing to force that person to pay punitive damages. The loss of this power to seek punitive damages after "improper" acquittal—one might refer to it as the "O.J. Simpson power"—would be a cost of superbifurcation. The example of Mr. Simpson notwithstanding, however, it seems likely that such

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Hendricks, 117 S. Ct. 2072, 2082 (1997) (characterizing deterrence as a primary objective of criminal punishment).

210. Notably, this suggestion squares fairly well with the private-attorney-general rationale for punitive damages. That rationale generally assumes that punitive damages are a good idea because the state is too busy or ignorant to punish everyone who deserves it. Where, however, the state has brought a criminal action against a defendant, the need for a private attorney general is obviously less.

situations would arise only rarely.[211]

To summarize constitutional concerns: Superbifurcation's use of offensive, non-mutual collateral estoppel passes due process muster. Under the proposal, punitive awards would trigger Excessive Fines Clause scrutiny, but no interesting consequences follow because due process already strikes punitive awards that are "grossly excessive." The proposal probably also would cause punitive damages to trigger the protections of the Double Jeopardy Clause, which, in rare cases, would force the state to choose between bringing a Section 2 punitive damages or a criminal action against a defendant found punitively liable.

C. *The Effects of Superbifurcation on the Power of Punitive Damages to Punish and Deter*

This Article is aggressively agnostic on the subject of whether punitive damages do good in the world. Its larger point is that, *regardless* of whether punitive damages actually make any sense as a device to punish and deter, they can be made fairer by superbifurcation. Because, however, this Article proposes a "reform" rather than the abolition of punitive damages, it has an obligation to demonstrate that its proposal would preserve—to some acceptable degree—whatever deterrence and punishment powers the present system may possess. A rough and necessarily speculative analysis of the problem indicates that the proposal would do so. It is not simply a sneaky way to do away with punitive damages.

The power of the present system to serve its ostensible purposes depends on its ability to make defendants part with money they could otherwise keep under a purely compensatory tort system. Payment of extra-compensatory amounts causes retribution by making the defendant endure the pain of paying money to the plaintiff. It deters future wrongdoing on the theory that the defendant and other potential tortfeasors will fear for their wallets and refrain from

211. One last point: *Halper* seems to leave open the possibility that states could fashion combined proceedings to seek both criminal and civil penalties, which would eliminate double jeopardy concerns. In discussing why its ruling that civil penalties under the False Claims Act may trigger double jeopardy was not going to disrupt government efforts to combat fraud, the Court stated, "[n]or does the decision prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." United States v. Halper, 490 U.S. 435, 450 (1989). Thus, it seems possible that, where a defendant has not been subject to a jeopardy prior to a finding of Section 1 punitive liability, the state may be able to pursue both criminal punishment and punitive damages in one subsequent proceeding.

committing malicious torts. The present system causes defendants to pay this money in two ways: (1) it authorizes judgments for punitive awards; and (2) by doing so, it gives plaintiffs the power to bargain for higher settlements in cases that do not go to trial. Any reform that reduces the frequency and size of punitive awards or drives down the settlement value of punitive claims would tend to reduce (for good or ill) their impact on defendants.

Superbifurcation undoubtedly would affect all three in ways that are difficult to predict but not obviously good or bad. As a general matter, however, one can safely speculate that the proposal would not destroy punitive damages as an institution. It would create sufficient incentives for both plaintiffs and prosecutors to do their parts in bringing suit against malicious tortfeasors; juries would continue to use punitive awards on occasion to club malicious wrongdoers—though probably not at precisely the same rate or with the same harshness as under the present system. As for the proposal's effects on the settlement process, it could strengthen incentives for parties to settle lawsuits. To the extent it is better to settle than to litigate, this is a very good thing. By largely the same token, however, the proposal probably also would exert a measure of downward pressure on settlement amounts. Still, just as it is not clear how frequent and large punitive awards should be to serve society best, so it is also not obvious how much of a punitive premium plaintiffs ought to be able to extract in the settlement process. Thus, to return to one of this Article's basic themes, our ignorance sets us free to experiment.

1. Effects on the Frequency of Punitive Awards

The proposed model would do nothing to change the substantive law of punitive damages, i.e., it would not make them harder to win at trial by changing the "elements" of punitive liability. It could nonetheless affect the rate of punitive awards by decreasing the number of actions for punitive damages brought in the first place—a suit that is not begun cannot be won. Most notably in this regard: (1) prosecutors could reduce the rate by failing to bring Section 2 punitive damages actions based on underlying Section 1 findings of punitive liability; (2) private plaintiffs, deprived of the chance to win punitive damages per se, might decide that seeking to prove Section 1 punitive liability just to win fees under the superbifurcation system is not worth the trouble; and (3) defendants might avoid findings of Section 1 liability, and thus vulnerability to state-initiated Section 2 actions, by buying off plaintiffs with inflated settlements that enable

defendants to avoid facing the punitive damages music. None of these worries is sufficient justification to refuse to try the superbifurcation experiment a priori.

a. Prosecutorial Willingness and Ability to Sue for Punitive Damages

Before a prosecutor can bring an action, several conditions must be satisfied. The prosecutor must have the resources to sue—an overwhelmed office cannot seek to punish all who may deserve it. The prosecutor must know some of the facts underlying the potential case—one cannot prosecute the completely unknown. The proposed model is structured to ensure that prosecutors have sufficient resources and information to bring punitive damages actions. Another precondition is that the prosecutor must believe that the defendant's conduct warrants punishment. Superbifurcation cannot give prosecutors the will to sue for punitive damages, but then, it should not try to do so in any event. One of the chief advantages of the proposal is that it contemplates that defendants would have to face punitive damages actions only in those cases in which state officials—without personal financial interests in punishment—determine that such actions are appropriate.

Lack of resources should not interfere with states' ability to bring actions for punitive damages. Again, punitive awards are quite rare. Returning to Professor Eisenberg's recent study of punitive awards in state courts of general jurisdiction in forty-five of the seventy-five most populous counties in the country, juries in thirteen of these counties awarded *no* punitive awards from July 1, 1991, to June 30, 1992; in twenty-seven counties, juries made ten or fewer punitive awards.[212] Juries imposed more than ten punitive awards in just five very large counties: (1) Los Angeles County, California, thirty-six awards; (2) San Francisco County, California, seventeen awards; (3) Fulton County, Georgia, sixteen awards; (4) Dallas County, Texas, twenty-nine awards; and (5) Harris County, Texas, forty-four awards.[213] These numbers probably overstate the number of punitive actions prosecutors actually would need to try under the proposal, however, because one would expect that many defendants found punitively liable would rather settle than fight with the state over damages. Furthermore, trying punitive damages actions should not prove too taxing as a general matter because the proposal

212. *See* Eisenberg, *supra* note 94, at 644-45.

213. *See id.*

envisions that private plaintiffs would do the bulk of the necessary legal heavy lifting by way of proving punitive liability. Lastly, Section 3 of the proposal should allay any lingering resource concerns because it uses punitive awards themselves to pay for the costs prosecutors' offices would incur in bringing punitive damages actions. Superbifurcation would not overwhelm states with a sea of suits.[214]

As for the knowledge problem, the beauty of the proposal is that it creates a structure in which private plaintiffs, motivated by desires for compensation and attendant attorney's fees, bring Section 1 actions that provide state officials with the facts sufficient to bring subsequent Section 2 actions for punitive damages. Indeed, one of the proposal's chief goals is to allow the state to obtain the benefits of plaintiff informational advantages while restructuring the process to avoid the effects of plaintiff conflicts of interest.

Other than in rare cases in which double jeopardy presents a concern, and assuming prosecutors have sufficient resources and knowledge, the only other barrier to a Section 2 punitive damages action would be if the prosecutor in charge did not *want* to bring such an action. For instance, a prosecutor might conclude that, although a defendant's conduct merited punitive liability, the underlying compensatory award and attendant Section 1 attorney's fees were sufficient to satisfy punishment and deterrence concerns. As a threshold matter, one might note that prosecutors as a group are not known for being soft-minded with regard to punishment; there is no reason to presume that they would, as a general matter, ignore clearly meritorious claims for punitive damages. In any event, as is discussed in more detail below, it is a *good* thing for persons experienced in law enforcement and lacking personal financial conflicts of interest to exercise judgment as to when the great machinery of state should be used to inflict pain on defendants.[215] Prima facie, if prosecutors have the resources and knowledge necessary to bring claims for punitive damages as well as a good faith, vigorous interest in the enforcement of the law, then any decreases in punitive awards caused by

214. For largely the same reasons, the proposal would not add greatly to judicial workloads.

215. This is not to suggest that state officials' decisions to seek (or not to seek) punitive damages would always be made with pure heart. Political pressures and ambitions would no doubt unduly affect some decisions. That politics would taint *some* state decisions, however, cannot justify the present system in which private plaintiffs' economic interests are virtually guaranteed to taint *all* such decisions. *See infra* text accompanying notes 232-54 (expanding on the need for relatively "conflict-free" prosecution as part of the punishment process).

prosecutorial refusals to seek them should, at least as a general matter, make the punitive damages system better, not weaker.

b. Plaintiffs' Willingness to Press Claims of Punitive Liability

Of course, superbifurcation cannot work unless private plaintiffs continue to do their part by pursuing claims for Section 1 punitive liability. They should do so if the benefits of bringing such claims justify the costs. Costs should not be a problem because it typically should be relatively cheap to add a claim for punitive liability on top of an underlying compensatory claim. The key prerequisite to proving punitive liability is proving the defendant's "malice"—some level of culpable intent. Malice is not an empirically discoverable fact about a defendant's brain (at least not yet), but rather a characterization of conduct. To press an underlying compensatory claim, the plaintiff generally would be interested in learning as much as practically possible about this conduct in any event.[216] Thus, in the run of cases, seeking to prove punitive liability (i.e., characterizing the defendant's course of conduct as "malicious" or "outrageous") should not add greatly to the plaintiff's otherwise existent informational needs. Therefore, it generally should be cheap for plaintiffs to press claims for punitive liability in addition to claims for compensation.

However, while superbifurcation does not increase the costs of proving malicious conduct, it does somewhat reduce plaintiff incentives to do so because, in most (but by no means necessarily all) cases in which a jury awards punitive damages, one would usually expect punitive awards to exceed fees. Furthermore, the proposed model obviously would deprive plaintiffs and their attorneys of the hope of winning a punitive damages jackpot—an exceptionally large, multi-million dollar punitive award.

Sufficient incentives should remain, however, to ensure that plaintiffs would bring most meritorious claims. For one thing, juries very rarely grant substantial punitive awards in the absence of a substantial compensatory award.[217] It presumably would follow that, in almost all cases in which a plaintiff reasonably could expect to

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216. Even when some level of malicious intent is not technically an element of the tort forming the basis for a compensatory award, e.g., the tort sounds in negligence, it seems reasonable to assume that plaintiffs should remain very interested in finding evidence of defendant skullduggery.

217. Professor Eisenberg reports that "[c]ases with low or zero compensatory awards and substantial punitive awards comprise approximately 2 percent of the punitive awards." Eisenberg, *supra* note 94, at 639.

prove punitive liability (whether under the current system or the proposal), that plaintiff should expect to win a sizable compensatory award as well. Even if one removes the enticement of punitive damages or attorney's fees from the picture, such a plaintiff would have a large incentive to sue to obtain compensation. Of course, by giving this plaintiff the chance to win reasonable attorney's fees at low cost, the superbifurcation proposal could only increase this incentive.[218]

Furthermore, it is important to remember the incentives the settlement process would provide. Although plaintiffs would not be able to win punitive damages under superbifurcation, their actions would lay the necessary groundwork for prosecutorial punitive damages actions. It obviously would be in the best interests of defendants to avoid findings of punitive liability due to this gate-opening effect; they would therefore pay a premium in the settlement process to avoid them.[219] The prospect of winning substantial compensation at trial with reasonable attorney's fees paid or else negotiating a settlement inflated by a punitive premium should provide sufficient litigation incentives in the run of cases.

Exceptions would exist, of course. A case might be so expensive

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218. The chance to win statutory fees also would increase attorney incentives to take such cases. It is important to be clear on why this is so. One can imagine instances in which the promise of a contingent cut of a compensatory claim looks far more attractive than winning a judge's notion of an appropriate lodestar-based fee. Therefore, if the proposal were to require attorneys to accept statutory fees in lieu of contingency fees, it could create perverse incentives for attorneys to refrain from bringing claims for punitive liability.

The proposal does not impose such a requirement, however. Like 42 U.S.C. § 1988, it grants statutory fees to the victorious plaintiff, not the attorney. *See* 42 U.S.C. § 1988 (1994). How a plaintiff actually pays an attorney would simply be a function of their contract, which could call for a contingency fee. *See* Venegas v. Mitchell, 495 U.S. 82, 89-90 (1990) (explaining that contingency fee contracts requiring a civil rights plaintiff to pay attorney's fees greater than a statutory fee award are enforceable under § 1988). Given the incentives involved, one could expect that attorneys plying their trade in superbifurcation jurisdictions would structure their contracts to ensure that proving punitive liability and winning statutory fees would increase rather than decrease their financial rewards.

219. It bears noting that a different analysis would apply in the mass tort context after an initial finding of punitive liability in a given forum. Defendants would have a very strong interest in avoiding the first Section 1 finding of punitive liability in any given superbifurcation state, as that finding would make the defendant vulnerable in that forum to a state-brought Section 2 action. Thus, plaintiffs settling before any such finding should be able to extract an accordingly high premium. After the defendant suffers its first Section 1 loss in a state, however, it would have much less to fear from any subsequent private suit. Therefore, plaintiffs settling after such a finding would be able to extract little if any punitive premium in the settlement process.

to pursue that the promise of a substantial compensatory award by itself would not provide sufficient incentive to sue. If the plaintiff were 100% certain of proving punitive liability, then the certainty of winning fees would eliminate this concern about expense. More realistically, however, the plaintiff would not be certain of proving punitive liability, and the expected value of the fee award would have to be discounted accordingly. It is therefore certainly possible that, in a given case, the combined expected value of a compensatory award and fees might still be insufficient to outweigh expected expenses. In such an instance, the chance to win punitive damages, which are generally greater than attorney's fees,[220] might tip the balance. By depriving plaintiffs of this chance, the proposal could therefore cause some plaintiffs to refrain from suing in instances in which: (1) a case seems very expensive to litigate even relative to the prospect of a substantial compensatory award, and (2) the plaintiff doubts her ability to prove punitive liability, but (3) nonetheless thinks that, were a jury to award punitive damages, they would exceed reasonable (but by hypothesis, quite high) attorney's fees. It is not obvious whether the world would be made a much worse place by reducing incentives to litigate this subset of potential suits.

c. Effects on Incentives to Settle

The proposal also could alter the rate at which juries inflict punitive awards by increasing the likelihood that parties will settle. Settlement occurs where both plaintiff and defendant believe they will gain more by settling than by going to trial and where neither side thinks that it can cost-effectively extract more concessions from the other in further negotiations. Both sides to a dispute must determine a settlement value for the plaintiff's claims. To determine this value under the present system, the plaintiff must first determine the sum of the expected outcomes for its compensatory and punitive claims, i.e., the expected size of these awards multiplied by the plaintiff's notion of how likely a jury would be to award them. From this amount, the plaintiff must subtract the expected forward-going transactional costs required to take the case to trial rather than settle, i.e., how much it will cost to acquire the compensatory and punitive awards. This difference is the plaintiff's minimum price for settlement. If the defendant offers more than this amount, then the plaintiff should settle—at least once the plaintiff thinks no more

220. This supposition is less likely to be true in the sort of cases under discussion because they are, by hypothesis, expensive cases to pursue.

money can be negotiated out of the defendant. Likewise, the defendant must gauge the maximum price it is willing to pay the plaintiff to avoid trial. This amount is the defendant's notion of the sum of the expected outcomes for the compensatory and punitive claims plus the defendant's expected trial costs. If the plaintiff offers to settle for less than this amount, then the defendant should settle—subject, of course, to the same negotiation proviso.

In superbifurcation settlement negotiations, by contrast, the plaintiff's settlement value would be based on the expected compensatory outcome plus the expected outcome for its claim for sunk attorney's fees (i.e., fees already incurred times the likelihood of proving punitive liability). The defendant's settlement value, however, would be based on its notion of the expected outcomes for the plaintiff's compensatory claim, the plaintiff's fee claim, the defendant's future transactional costs, *and* the state's claim for punitive damages. The settling defendant would be paying for (and receiving) more than the plaintiff would be getting.

This result should make it somewhat more likely, in any given case, for the defendant to offer a settlement amount greater than the minimum value the plaintiff has placed on its claims, i.e., the proposal encourages settlement by expanding the financial "space" in which settlement rationally can occur.[221] How effective this incentive would prove in causing settlement would depend in part on the parties' respective assessments of the expected outcomes for the plaintiff's various claims. It seems reasonable to suppose that, in the bulk of cases, differing valuations of the compensatory claims at issue would tend to drive negotiations because punitive awards are rare enough that the prospect of winning them should not significantly affect most settlement discussions. Some cases, however, would settle that would not have done so under the present system.[222]

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221. *Cf.* Note, *supra* note 35, at 1914 (noting the problem that any system that splits punitive awards between the plaintiff and the state encourages plaintiffs and defendants to reach settlements allowing the parties to split the state's share of the award).

222. Allocation statutes should have the same effect for similar reasons. Suppose a state permits successful punitive damages plaintiffs to keep one-half of their awards while the rest flows into state coffers. Ignore compensatory awards, transaction costs, and the time value of money and suppose also that the plaintiff in a punitive damages case believes that the expected outcome for its punitive claim is $10 million. The plaintiff's minimum settlement value is $5 million, due to allocation. Suppose the defendant believes the expected outcome for the punitive claim is $6 million. Without the 50% allocation statute in place, settlement would be impossible—the plaintiff would demand $4 million more than the defendant would pay. Under the hypothetical 50% allocation statute, however, the plaintiff and defendant should, barring strategic problems, settle the claim for between $5 million and $6 million. Thus, by permitting plaintiffs to recover only

2. Effects of Superbifurcation on the Amounts Defendants Must Pay

In addition to affecting the rates at which juries inflict punitive awards, the proposal also would affect the power of punitive damages to punish and deter by affecting both the size of awards where punitive claims proceed to trial and by affecting the amounts for which defendants settle claims to avoid trial. Any concerns in this regard are not serious enough to justify rejection of the superbifurcation experiment without first trying it.

It is difficult to gauge how public prosecution of punitive damages would affect the size of awards. They might well lessen them. One of the problems with the current punitive damages system is that it permits private plaintiffs and their attorneys to argue how harshly defendants should be punished.[223] The plaintiffs' interest in such situations is to serve their pocketbooks—not the public good. Plaintiffs' lawyers have a powerful incentive to argue for as high a punitive award as they can seek with a straight face.[224] It is reasonable to speculate that permitting plaintiffs' lawyers to make their self-interested arguments to juries tends to inflate awards (although it is, of course, theoretically possible that juries completely see through such self-interest and discount their awards accordingly). In any event, prosecutors would not face this same powerful financial conflict of interest. Lacking this particular pressure to argue for higher awards, prosecutors probably would tend, as a group, to request lower awards.[225] Smaller requests could lead to smaller awards, especially because, under the proposed model, juries would not be able to award more in damages than requested by prosecutors.

On the other hand, adding prosecutors to the process may

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a fraction of punitive awards while leaving defendants liable for the whole amount (i.e., by "decoupling" plaintiff recovery and defendant payment), allocation increases the likelihood that plaintiffs and defendants will price claims in ways that allow settlement. Superbifurcation would operate similarly.

223. *See infra* text accompanying notes 227-54 (discussing problems of plaintiff windfalls and conflicts of interest).

224. For instance, ABC ran an exposé on PrimeTime Live in 1992 in which it charged that Food Lion, Inc., a supermarket chain, sold expired meat. Food Lion sued because, in the course of their research, ABC employees had lied to get jobs with Food Lion and surreptitiously filmed their work with cameras hidden in their wigs. Food Lion's lawyer requested $52 million to *$1.9 billion* in punitive damages. The jury deliberated six days before deciding on $5.5 million. *See* Howard Kurtz & Sue Ann Pressley, *Jury Finds Against ABC for $5.5 Million*, WASH. POST, Jan. 23, 1997, at A1.

225. Of course, one can imagine situations in which state officials would seek inordinately high damages to take credit for enriching states' coffers or punishing unpopular defendants in order to fuel political ambitions. State officials who give in to such temptations might request even larger punitive awards than plaintiffs motivated by personal financial interests.

encourage juries in some cases to inflict larger awards by removing the windfall problem. Courts instruct juries to make plaintiffs whole by awarding compensatory damages and to punish defendants with punitive damages which, until the advent of allocation statutes in some states, went wholly to the compensated plaintiff. This windfall problem may exert a downward pressure on punitive awards under the current system. A jury might well wonder why it should transfer wealth to a plaintiff whom it has just made whole, as it were, and the jury might therefore inflict a smaller award than it would in the absence of this windfall problem. If, however, it is clear that the punitive award goes to the state rather than to a compensated plaintiff, then this downward pressure disappears and awards may go up.

In any event, given that the vast majority of civil cases settle (and the proposed model would somewhat increase settlement incentives), the effects of superbifurcation on the size of settlements might have more important consequences for the world than its effects on actual punitive awards. Under the present system, plaintiffs can use plausible punitive damages claims to drive up the price of settlements. As was alluded to above in the discussion on plaintiff incentives to bring Section 1 actions, plaintiffs would not lose all of this leverage under the proposed model because defendants would have a strong interest in avoiding findings of punitive liability that the state could use as the basis for subsequent Section 2 damages actions and would pay premiums above compensation in the settlement process to avoid them.

Under the proposal, the size of the punitive premium a defendant would pay in a given case depends on, among other things: (1) how strong a possibility the defendant perceives it faces of being forced to pay attorney's fees to the plaintiff and a punitive award to the state in the absence of settlement; and (2) how large the defendant thinks these sums would be. Superbifurcation may, as a general matter, reduce the size and frequency of punitive awards for the reasons discussed (although removal of the windfall problem may tend actually to increase award amounts). Any downward pressure on punitive awards in turn would reduce the value of punitive claims as bargaining chips in the settlement process.

Furthermore, plaintiffs generally would not be able to capture the settlement value of potential punitive awards under superbifurcation to the degree they can under the present system. Again, settlement figures lie between the minimum amount of money a plaintiff will take and the maximum amount a defendant will pay to

avoid or end a lawsuit. Suppose that, under the present system, a plaintiff at settlement negotiations believes that a jury would be 50% likely to award her $400,000 in compensatory damages and would be 10% likely to grant punitive damages of $5 million. During the settlement negotiations, the expected outcome (the expected award times the perceived likelihood of winning it) for the compensatory claim is $200,000; the expected outcome for the punitive claim is $500,000. The plaintiff already has incurred $50,000 in litigation expenses and expects to incur $100,000 more in trying her case to a jury. The plaintiff's minimum settlement value is $600,000—the sum of the expected compensatory and punitive outcomes minus future transaction costs. A superbifurcated system would allow the plaintiff who successfully proves punitive liability to win only a compensatory award plus reasonable attorney's fees. Keeping her expectations concerning the value of her claims constant, under the proposed model, the plaintiff's minimum settlement value becomes the sum of the expected outcome for the compensatory award ($200,000) plus the expected outcome with regard to winning the sunk attorney's fees by proving punitive liability ($50,000 times 10%, or $5,000). The plaintiff rationally should prefer settlement to trial for all settlement offers greater than $205,000, as opposed to $600,000 under the present system.

Superbifurcation thus generally would have the effect of reducing the minimum price plaintiffs would charge defendants to avoid trials. Defendants, of course, would be perfectly aware of this result and would therefore seek lower settlement figures. In any given case, however, the plaintiff also would know that the defendant rationally should prefer to settle for any amount less than the defendant expects it would have to pay by trying the plaintiff's Section 1 action and perhaps then facing a state-brought Section 2 action. In short, superbifurcation might not do much to reduce the maximum price a defendant rationally should pay to avoid trial even while it reduces the minimum rational price a plaintiff should charge. The amount for which the parties settle between these two figures is a product of their negotiating skill and knowledge of each other. Superbifurcation would have some tendency to reduce settlement figures, however, because it makes it possible for parties to reach settlements that would be irrationally low for plaintiffs under the present system. Thus, the proposal would tend to reduce the punitive premium that plaintiffs extract from defendants in the settlement process.

In sum, for all the reasons given above, the proposed model

likely would reduce the rate at which juries inflict punitive awards, increase the settlement rate of lawsuits with serious punitive claims, and exert downward pressure on the size of punitive awards and settlements. As has been repeatedly stressed, however, no stable frame of reference exists for determining the "optimal" size of punitive awards with any precision.[226] The same is true for settlements of punitive claims, because it is not clear how much plaintiffs should extract from defendants as punitive premiums in the settlement process to make the world the best it can be. It therefore follows that there is no obvious reason to prefer the rate and size of punitive awards and settlements generated under the present system to those that would be generated under the proposal.

Broadly speaking, however, the most important point to take from this analysis is that adoption of superbifurcation generally would leave plaintiffs with sufficient incentives to pursue meritorious claims for punitive liability and also would ensure that prosecutors would have the resources and information—they would have to provide the will themselves—to seek punitive damages where appropriate. Thus, the proposal is not a backhanded way to destroy the institution of punitive damages.

IV. THE ADVANTAGES OF SUPERBIFURCATION

Part III presented the negative case for superbifurcation, arguing that adoption of this proposal would not destroy any demonstrable advantages the present system enjoys while at the same time it would preserve the core power of that system to hurt, on appropriate occasions, those who commit malicious torts. Part IV takes a more affirmative approach, discussing the procedural fairness advantages of superbifurcation—notably: (1) it gets rid of the taint that the potential for windfalls and attendant conflicts of interest bring to punishment under the present system; (2) it checks the troublingly vast and relatively uncontrolled power most juries now have to inflict punitive awards; and (3) it lessens the risk of repetitive punishment in the context of mass torts.

A. Eliminating Money as a Motive for Punishment

1. Ending Windfalls

Perhaps the most obvious drawback of the current punitive

226. *See supra* text accompanying notes 164-75.

damages regime, notwithstanding the advent of allocation statutes, is the windfalls that it gives plaintiffs and their lawyers. Courts instruct juries to award compensatory damages to make plaintiffs whole—to cure plaintiffs of the harms caused by defendant misconduct. If a tort is outrageous enough to merit punitive liability, then, to hurt the defendant, a jury may award punitive damages to the plaintiff on top of the compensatory award. Thus, as a formal legal matter at any rate, a plaintiff who wins punitive damages has won the tort lottery—he or she is in better shape in the eyes of the law than if the defendant had never committed the wrong. The government ought to have some demonstrable policy reason for compelling wrongdoers to put such extra-compensatory "windfalls" in plaintiffs' pockets rather than state coffers.

One possible justification is that granting punitive awards to plaintiffs encourages them to act as private attorneys general and thus ensures that society's retributive and deterrence goals are better served than if punishment functions were left solely to the state. The private-attorney-general rationale depends for its force, however, on the assumption that the enforcement role plaintiffs perform under the present system would go undone if plaintiffs could no longer win the punitive jackpot. As was discussed above, there is little reason to think that the superbifurcation model, which awards successful plaintiffs their reasonable attorney's fees, would not provide sufficient incentive as a general matter for plaintiffs to seek to prove punitive liability in cases warranting it, nor to think that state officials would fail to discharge properly their duties to bring subsequent punitive damages actions.[227] If this is the case, then there is also little reason to think that state actions would not serve the broad retributive and deterrent functions of punitive damages roughly as well as private actions could. If one grants all this, then the private-attorney-general theory does not justify choosing the present system over superbifurcation.

Another possible justification for "windfalls," however, is that they actually serve worthwhile compensatory functions. One need not accept the premise that the current compensatory regime is sufficient to make plaintiffs whole. Most obviously, compensatory awards typically do not grant plaintiffs their attorney's fees. This practice is, in a sense, an exception to the more general rule that the plaintiff may win compensation for all harms proximately caused by defendant misconduct. It should be reasonably foreseeable to a

227. *See supra* text accompanying notes 212-20.

tortfeasor that the person he or she harms may sue for recompense and incur attorney's fees along the way. Thus, that portion of a punitive award that makes up for the absence of attorney's fees is not a windfall at all.[228]

Moreover, some scholars have argued that compensatory damages do not, as a general matter, sufficiently compensate plaintiffs for emotional and other intangible losses that are quite real but non-quantifiable.[229] Punitive damages may thus be defended as a means to fill the serious gaps left by an inadequate compensatory regime.

The question remains, however, whether awarding plaintiffs punitive damages is the best available means to finish the compensatory job. Again, according to most courts, the ostensible purposes of punitive damages are to punish and deter. The penalty a jury concludes is the appropriate amount to accomplish these tasks may be far removed from the amount the jury would choose if its goal were to grant full compensation—however broadly construed. The possibility always exists that a jury will award the plaintiff a massive windfall.

The superbifurcation model avoids this danger by addressing the problem of inadequate compensation directly by forcing defendants to pay the reasonable attorney's fees of those whom they maliciously injure. Admittedly, it does not address the objection that the present compensatory regime does not allow sufficient recovery for emotional or other intangible losses. Even, however, if one grants the premise that compensatory damages as presently conceived are not sufficiently generous to plaintiffs, the solution to this problem should be to change our approach to compensatory awards, not to continue to use a punitive damages regime because it has the "byproduct"[230] of ensuring full compensation. It follows that the hidden compensatory effects of the current punitive damages regime do not justify preferring it over superbifurcation.

The proposed model both provides a reasonable amount of incentive for private attorneys general and also forthrightly serves the primary compensatory functions of the current punitive damages system. By doing so, it robs the present system of its justification for

228. For a similar analysis, see Note, *supra* note 35, at 1903-04, and Owen, *supra* note 3, at 378-79.

229. *See, e.g.*, Owen, *supra* note 3, at 379.

230. *See* Ellis, *supra* note 3, at 11 (suggesting that "compensating some plaintiffs for otherwise uncompensable losses or attorneys' fees may be viewed, not as justification for, but as a byproduct of punitive damages").

granting plaintiffs the chance to play the tort lottery. In short, superbifurcation provides a logical means to do away with windfalls.[231]

2. Getting Rid of the Financially Interested Private Prosecutor

Windfalls are worse than mere unjustified transfers of wealth to plaintiffs. They also cause the desire for money to taint the process for determining punishment of malicious torts. Punitive damages plaintiffs and their attorneys are financially interested in maximum punishment—the more the jury hurts the defendant, the better for the plaintiff. One therefore would expect plaintiffs to follow their rational economic self-interest and to request as much in the way of punitive damages from juries as they feel they colorably can. A thought experiment: An attorney says to her client, "I've heard tell of juries sometimes awarding many millions in punitive damages for your sort of injury caused by this huge, unfeeling, multi-national corporation. I think, however, that to properly deter and punish the defendant in this case will require an award of only $100,000, and that's what I'll ask for." This imaginary attorney would soon be looking for new imaginary clients. Because no one actually knows how large punitive awards should be, only the plaintiff's attorney's imagination limits the size of her award request. Indeed, a plaintiff's attorney who asks for anything less than the maximum request she thinks might tend to increase the jury's award may be committing malpractice and is certainly not zealously pursuing her client's interests.

Unless proponents of the present system can demonstrate clear policy advantages for preserving the practice of permitting plaintiffs to argue how harshly to punish defendants, it should be abandoned for at least two reasons. First, as has been mentioned earlier, it is reasonable to assume (though terribly difficult to prove) that this practice may, in fact, improperly influence juries, in the sense that they may impose different awards than they would if ostensibly conflict-free prosecutors drove the system.[232] Second, on a less speculative and more emphatic note, permitting plaintiffs with a financial interest in maximum punishment to argue for and collect

231. A large caveat: The proposal would not prevent plaintiffs from extracting punitive premiums from defendants in the settlement process; superbifurcation does not eliminate "settlement windfalls." However, it would, as a general matter, probably tend to reduce them. *See supra* note 219 and discussion of settlements in text following note 225.

232. *See supra* text accompanying notes 223-25.

punitive damages smells rotten. Again, unnecessarily injecting plaintiff financial incentives into the punishment process undermines the law's legitimacy.

Of course, this Article is by no means the first to suggest that the current punitive damages regime is flawed because it permits financially motivated parties to argue how harshly defendants should be punished. As Professor Clarence Morris observed in his seminal 1931 article, *Punitive Damages in Tort Cases*:

> Punitive damages go to the private purse of an individual. A person who is to profit by the punishment of another is likely to prefer severe punishment to admonition that will best serve social ends, and the two are not necessarily synonymous. The plaintiff's position is analogous to that of the prosecuting attorney whose pay is determined by the number of convictions he is able to secure. Past experience seems to indicate that such prosecutors have a tendency to be more interested in sending people to the penitentiary than in punishing the guilty. The plaintiff in a punitive damage case not only profits by securing the admonition of the defendant; he profits more by heavy punishment than by light. So it would not be surprising if plaintiffs in punitive damage cases attempted to introduce evidence which might influence juries to give high awards and which has little or no bearing on the proper admonition of defendants.[233]

But on the very next page of his article, Professor Morris dispensed with this argument by turning to that rhetorical device that so often turns up in discussions of punitive damages (including this one, of course)—the burden of proof:

> But at best this criticism is based on hypothesis, and its value depends on the facts. We need to know whether defendants in punitive damage cases are being held for inadvisedly large sums; whether plaintiffs are attempting to prejudice juries for the purpose of getting high punitive damage awards; whether judges are unable to frustrate such attempts; whether juries can see through such attempts and avoid being influenced by them. If the facts support this criticism, the punitive damage device can only be regarded as a poor tool which must be abandoned or improved.[234]

Whoever has the burden of proof in this context loses.[235]

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233. Morris, *supra* note 70, at 1178.

234. *Id.* at 1179.

235. *See, e.g.*, Elliott, *supra* note 27, at 1059 (making this observation in the context of the evaluation of the deterrence effects of products liability punitive awards).

Because no usefully exact, consensus framework exists for determining the proper amounts of punitive awards,[236] simple factual inquiry cannot genuinely settle whether, as a general matter, juries are awarding "inadvisedly large sums." Furthermore, given the lack of a stable framework for analysis and comparison, it is difficult to imagine how one could examine rigorously whether juries are able to "see through" and "avoid being influenced by" plaintiffs' quite natural attempts to talk them into imposing inflated punitive awards.

Notwithstanding this layer of uncertainty, examination of the role of the prosecutor in the enforcement of the criminal law—the other and primary arena for state punishment—highlights the dangers of permitting plaintiffs with intense conflicts of interest to act as prosecutors. Private prosecution plays a very small role in the modern-day punishment of crime. It was not always so.[237] At common law, private parties could seek vengeance by bringing criminal actions. They may do so to this day in some jurisdictions, albeit subject to various severe restrictions.[238] Without a doubt, however, the public prosecutor, the ostensibly conflict-free employee of the state, has been the dominant enforcer of the criminal law in America for well over two hundred years.[239]

The Supreme Court commented at length on the modern importance of the conflict-free prosecutor to our system of justice in *Young v. United States ex rel. Vuitton et Fils S.A.*[240] This case had its inception in a trademark action by Louis Vuitton, S.A., against the Klaymincs and their family-owned handbag business.[241] The parties entered into a settlement agreement, part of which was embodied in a permanent injunction requiring the Klaymincs to refrain from further infringement. They infringed anyway.[242] Vuitton's attorney asked the district court to appoint him and a colleague as special

236. *See supra* text accompanying notes 164-75.

237. For discussions of the history of private prosecution in England and the United States, see John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515-20 (1994), Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359-70 (1986), and Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 101-03 (1992).

238. *See* Bessler, *supra* note 237, at 529-43.

239. *See* Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 762 (1976).

240. 481 U.S. 787 (1987).

241. *See id.* at 790.

242. *See id.* at 790-91.

counsel to prosecute the Klayminc for criminal contempt.[243] The court granted this request, and, upon learning of the arrangement, the Chief of the Criminal Division of the local United States Attorney's Office wished the Vuitton attorney good luck.[244] Sol Klayminc was later convicted of criminal contempt and sentenced to five years imprisonment; four accomplices were convicted of aiding and abetting.[245]

The Supreme Court reversed the convictions, holding that the district court had erred in appointing the attorneys of an interested party to prosecute the criminal contempt.[246] The Court began the relevant analysis with a reflection on the role of the prosecutors in the federal courts:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.[247]

The Court observed that, because prosecutors owe fidelity to the state, they may not act as counsel for clients whose interests may conflict with those of the state—indeed, if a Justice Department attorney with the same conflicts of interest as the Vuitton attorneys had prosecuted the criminal contempt, that government attorney would have been subject to prosecution under 18 U.S.C. § 208(a), which provides for a fine of up to $10,000 and imprisonment for up to two years.[248] The reason for this policy is obvious:

> The Government's interest [in a criminal contempt prosecution] is in dispassionate assessment of the propriety of criminal charges for affronts to the Judiciary. The private party's interest is in obtaining the benefits of the court's order. While these concerns sometimes may be congruent, sometimes they may not. A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client.

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243. *See id.* at 791.

244. *See id.* at 791-92.

245. *See id.* at 792.

246. *See id.* at 790. Notably, the Court based its decision on its supervisory authority over federal courts rather than on constitutional analysis. *See id.*

247. *Id.* at 802 (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

248. *See id.* at 803 & n.13 (citing 18 U.S.C. § 208(a) (1994)).

> Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.[249]

Moreover, the Court observed that the ethics of the legal profession, such as they are, *compel* a prosecutor who represents an interested party to consider that party's interests as well as those of the government. Taint is inevitable.[250] A plurality of the Court added that the error of appointing an interested prosecutor is reversible per se, because "[j]ustice must satisfy the appearance of justice."[251]

Prosecutors are hardly "neutral" parties in a court proceeding; they are supposed to represent zealously the interests of the state. They also, however, are supposed to be "neutral" in the limited sense of lacking a personal or financial ax to grind against defendants. The prosecutor's ethical duty is to enforce the law evenly—without regard to person. Of course, the ostensible purity of heart of the conflict-free public prosecutor is not a *guarantee* that, in any given case, a salaried prosecutor's notion of an appropriate charge and punishment for alleged crimes would be more just (with regard to retribution) and cost-effective (with regard to deterrence) than those of a crime victim acting as a private prosecutor or of a prosecutor paid by the conviction. Indeed, drawing such comparisons is difficult because determining "optimal" criminal punishments presents some of the same measurement problems as determining optimal punitive awards. The universe has not given us an absolute scale for determining how much sin equals how much time in prison or how big a fine to pay to the state.[252] Nonetheless, despite this uncertainty, it seems fair to hazard that the practice of leaving the prosecution of alleged criminals to their alleged victims is unsettling to our modern legal system's notions of just procedure as they apply outside the anomalous context of punitive damages. The notion of paying prosecutors by the conviction or, perhaps worse, rewarding them *personally* with convicts' property (which is essentially what punitive damages do, of course) is, to say the least, even more unsettling.

In fairness, however, the case for "neutral" state prosecution of punitive damages claims is not without problems. For one thing, it

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249. *Id.* at 805.

250. *See id.* at 804.

251. *Id.* at 811 (citing Offutt v. United States, 348 U.S. 11, 14 (1954)).

252. Arguably, if we had precise answers to these questions, we would not care so much about criminal procedure. A person with an answer key does not need to care much about the process by which a problem is solved.

would not do to be too naïve about state officials' motivations. The proposal envisions that a division of a state attorney general's office would be in charge of seeking punitive damages. No doubt the political pressures and ambitions that buffet such offices would at times unduly influence prosecutorial decisionmaking with regard to punitive damages—just as politics sometimes affects decisions on whether and how vigorously to prosecute crimes. One can easily imagine situations in which it would seem politically wise to use punitive damages to "beat up" on an unpopular, wealthy, out-of-state corporate defendant (tobacco companies come to mind as potential targets) to enrich the state treasury and to enhance the attorney general's chance of becoming governor. By the same token, one can imagine situations in which state officials might refrain from using the punitive club to curry favor with powerful monied interests. These are legitimate concerns. Still, the unfortunate fact that political pressure might cause some state officials sometimes to violate their duty to enforce the law evenly cannot justify the continued existence of a system in which the natural, rational, economic self-interest of plaintiffs and their attorneys must taint (or appear to taint, at all odds) virtually all punitive damages determinations.

A critic of the proposal might also plausibly object that the case for "neutral" state prosecution of punitive damages claims should not rely on analogies to criminal prosecution because of some obvious differences between the civil and criminal contexts. For instance, one could plausibly argue that the need to avoid conflicts is less urgent in the punitive damages context because *only* money is at stake and civil juries cannot sentence defendants to terms of imprisonment. Given that juries sometimes impose awards running into the many millions of dollars, this argument seems a bit disingenuous.[253] One could also distinguish the two contexts, however, with the observation that "[p]rosecutors have 'available a terrible array of coercive methods to obtain information' " that private punitive damages plaintiffs lack.[254] This is certainly true, but, on the other hand, legislatures, prosecutors, and judges play a smaller role in the control of punitive damages under the present system than they do in the control of criminal punishment (a problem discussed in the next section).

253. *See supra* notes 4, 153-63 and accompanying text (discussing the size of punitive awards).

254. *Young*, 481 U.S. at 811 (quoting CHARLES WOLFRAM, MODERN LEGAL ETHICS 460 (1986)).

Given juries' vast and untutored power over this device, one could reasonably argue that it is all the more important that representatives of the state without financial and personal conflicts prosecute claims for punitive damages.

Professor Morris suggested over sixty years ago that critics of punitive awards had the burden to prove that private prosecution led to improper verdicts. Perhaps Professor Morris's allocation of the burden of proof is fair if the issue is whether or not to abandon punitive damages completely. If, however, one grants that the superbifurcation model provides sufficient incentives for plaintiffs and prosecutors to cooperate in pressing punitive damages claims where appropriate, then the terms of the debate change. The issue then becomes whether or not private plaintiffs or public prosecutors should represent the public interest in actions that determine how harshly to punish defendants. In this debate, for all (or at least most) of the reasons discussed in *Young*, the burden should be on those favoring the practice of permitting financially interested plaintiffs to drive punitive damages litigation to produce compelling and clear-cut policy reasons for this stance. Changing the punitive damages regime as proposed to make room for state prosecution would both remove a conceptually indefensible influence on verdicts—plaintiffs' desire for money—and, by the same token, enhance the legitimacy of this device as a means to punish.

B. Checking and Educating the Jury

One of the most notable features of the traditional punitive damages regime is the huge power it gives juries to determine in the first instance when to punish and how much to punish. The vast scope of jury power in this context stands in sharp relief to its role in criminal punishment, where legislatures, prosecutors, and judges all play more significant roles than they do in determining punitive awards, and it naturally increases the chances of outlandish verdicts. By giving to prosecutors the power to initiate punitive damages actions (based on earlier, plaintiff-driven findings of punitive liability) and to set an upper limit on awards (because juries would not be allowed to award more than prosecutors request), superbifurcation would provide a salutary check on jury discretion in this context. On a closely related note, prosecutors, by virtue of their jobs, have far more knowledge than juries about their states' past punishment practices, and one could expect that the state officials put in charge of punitive damages actions would develop particular expertise with regard to their use as a means to punish. Thus, these

officials would possess an institutional perspective on punishment and proportionality that juries should hear before exercising their vast discretion to decide how harshly to punish malicious torts.

1. Separation of Powers and Criminal Punishment

A good way to get a sense of the scope of jury power over punitive damages is first to examine the checks and balances governing the power to punish crime—a context in which the jury's role is far more limited. Criminal punishment requires a two-step process: (1) the defendant must be found guilty (i.e., criminally liable); and (2) the defendant must then be sentenced. With regard to the first step, the legislature, prosecutor, judge, and jury all stand between an actor and any finding of criminal liability. Legislatures do so by defining what conduct is criminal. Generalizing, if a legislature chooses not to criminalize certain conduct, then no other state actor may inflict criminal punishment for it.[255] Prosecutors, of course, decide whether to charge potential defendants with criminal activity. If a prosecutor chooses for any reason not to bring an action against an offender, then, once again, for most practical purposes no other state actor may inflict criminal punishment.[256] Suppose the prosecutor decides to press charges. The defendant may plea bargain or go to trial. If the defendant chooses to risk trial, then he or she is entitled, for more serious crimes, to a jury determination of guilt. Even at a jury trial, the judge, too, may play a role in this decision because if the prosecution's case is especially weak, the defendant may ask for a judgment of acquittal.[257]

The power to determine sentence—the amount of punishment as opposed to guilt—is distributed differently. In the run of cases, the legislature, prosecutor, and judge together decide how harsh criminal punishment should be; juries typically are excluded. The legislature prescribes the range of permissible punishments for any given crime. The prosecutor, by deciding how to charge, sets an upper limit. If, for instance, the prosecutor charges a killer with voluntary manslaughter instead of murder, then the killer need not fear being punished as a murderer. Suppose the killer is convicted of voluntary manslaughter,

255. *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court which is to define a crime, and ordain its punishment.").

256. This was not always the case. *See supra* note 237 (citing authority on the role of the private prosecutor in American jurisprudence).

257. *See* FED. R. CRIM. P. 29.

for which the legislature has prescribed five to fifteen years in prison. The judge traditionally has had vast discretion to sentence the offender to the term that struck the judge as most appropriate within that range.[258] In most jurisdictions, however, juries generally do not play a role in passing sentences.[259] The most obvious exception to this rule is that a jury may play a key role in determining whether to put a defendant to death.[260] On a less legal note, juries uncomfortable with potentially harsh sentences retain the practical (if not legal) power to ignore judicial instructions and find a defendant not guilty or guilty of a lesser crime rather than convict for the most serious crime warranted by the facts.

These divisions among the branches of the powers to decide whether and how much to punish crime are simply applications of the general doctrine of separation of powers. The legislature makes the laws that criminalize conduct and establish ranges for punishment; the executive enforces these laws; and the judiciary applies them—with the jury usually deciding guilt and the judge passing sentence. What makes this commonplace observation noteworthy is that criminal punishment, perhaps more than any other area of the law, highlights the fundamental rationale behind separation of powers—the preservation of liberty and the prevention of arbitrary, tyrannous governmental conduct. Montesquieu, a writer eagerly read by the framers of our Constitution and a keen observer of the English legal system, stated this rationale as follows:

> The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.
>
> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there

258. Of course, in many jurisdictions, there has been a move toward more determinant sentencing, as is exemplified by the United States Sentencing Guidelines. *See* Kevin R. Seitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645, 647-48 (1993) (providing an overview of state attempts to control sentencing). One of the goals of this movement has been to reduce the "sweeping" power of judges to determine sentences. *See* Marvin S. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 655-56 (1993).

259. *See* Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 594-95 (4th Cir. 1996) (citing juries' limited role in and competence for sentencing as a justification for less deferential judicial review of punitive awards). *See generally* Ellis, *supra* note 14, at 1004 n.172 (citing this general rule and exceptions).

260. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 190 (1976) (commenting that jury participation in death penalty determinations often is viewed as a good thing).

> can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the *life and liberty* of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[261]

Separation of powers is not fundamentally about labeling powers as legislative, executive, or judicial; it is, as James Madison wrote, an "essential precaution in favor of liberty,"[262] a device to prevent arbitrary, oppressive governmental action. The criminal law is replete with opportunities for tyrannical officials to fine, imprison, and kill. It therefore follows that division of the power to punish crimes is one of the most important applications of the separation-of-powers doctrine.

Of course, the constitutional doctrine of separation of powers has no application whatsoever to juries. The rationale behind this doctrine, however, does—at least in part. Separation of powers keeps the branches weak and ensures that no one of them can set up a permanent tyranny. Juries are temporary bodies thrown together to decide the facts of a case. They therefore pose no danger of taking over the country. However, in addition to preventing naked power grabs, the practice of dividing power serves another salutary effect that applies just as much to juries as it does to any other political power center: The cooperative and consensus requirements of this practice must tend as a general matter to ensure that no governmental power can step far outside the mainstream or take extreme steps to upset the status quo because the other powers will likely check such attempts. To be blunt, where power is "separated" into several centers, if one actor tries anything crazy, the other actors will stop it.

The principle that more heads are better than fewer operates in many areas of the law and politics. For instance, juries traditionally have had twelve people. The selection of the number twelve was not the result of an empirical study designed to determine the optimal

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261. BARON DE MONTESQUIEU (M. DE SECONDAT), 1 THE SPIRIT OF THE LAWS, bk. XI, ch. 6, 151-52 (Thomas Nugent trans., Colonial Press, rev. ed. 1899) (1766).

262. THE FEDERALIST NO. 47, at 243 (James Madison) (Garry Wills ed., 1982). For a modern exposition of the importance of separation of powers to liberty, see MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 99-134 (1995).

size for truth-seeking committees; it was a historical accident. How many jurors is "best"? This is not the sort of question that has a precise answer. Notwithstanding this line-drawing problem, however, it seems fair to speculate that most people would be uncomfortable with two-person juries—for the rather obvious reason that larger juries are less likely to be influenced by non-mainstream idiosyncrasies.[263] For the most part, the desire to prevent arbitrary, idiosyncratic exercises of power favors larger juries. On the other hand, convenience favors smaller juries, or even no juries at all; similarly, one might argue that efficiency concerns justify replacing tripartite government with dictatorship. As is the case with so many other problems in the law, we balance these concerns not by consulting rigorously researched empirical data, but by consulting a combination of tradition and notions of fairness, which have themselves been formed by tradition.

2. Separation of Powers and Punitive Damages

Historically, legislatures, prosecutors, and judges have played far smaller roles in inflicting punitive awards than in punishing crimes, and juries have filled the resultant power vacuum. For instance, in many states, legislatures historically have forfeited any significant role in defining what conduct merits liability for traditional, common-law punitive damages. Generally speaking, to commit a crime, a person must engage in conduct that includes all the requisite legislatively prescribed elements, which, for many crimes, are quite specific. By contrast, whether by statute or judicial decision, the only "element" usually necessary to trigger traditional punitive damages liability is that a defendant commit a tort that a jury deems particularly "malicious."[264] The jury fills the conceptual gap created by this lack of further legislative definition by deciding for itself what "malice" is. In the criminal context, prosecutors play an operational role in defining the scope of liability because of their charging role; of course, they play no such role in the punitive damages process—that role is usurped by plaintiffs and their attorneys. By contrast, the balance of judge and jury power with regard to liability decisions is more or less the same for punitive damages as it is for crime. In either context, the jury is the primary fact-finder. However, where

263. A couple of related thought experiments: Imagine a three-person Congress or a one-person Supreme Court.

264. For a commentary on the definitional emptiness of words such as "malice" and its many kin, see Dobbs, *supra* note 35, at 840-41.

the case for either a punitive award or a criminal conviction is especially weak, the judge may take the relevant issues away from the jury.[265] The long and short of the situation, however, is that juries have tremendous discretionary power to define for themselves what conduct is "malicious" and merits punitive liability.

After reaching a decision to hold a defendant punitively liable, juries traditionally have possessed vast power to determine how big an award to impose; by way of stark contrast, they play virtually no such role in criminal sentencing in most jurisdictions.[266] Recent reforms have, however, somewhat checked this jury power to ladle out punishment. Perhaps most notably, whereas legislatures, by their inaction, traditionally have left juries free to impose whatever damages seemed to them necessary to punish and deter, many legislatures now cap the awards juries can inflict.[267] As was noted earlier, some commentators have criticized these caps as arbitrary because they bear no relationship to the goals of punitive damages to punish and deter.[268] Ignore for a moment the many problems in determining the "optimal" size of punitive awards and posit that a big corporate defendant "needs" $1 million worth of punishment and deterrence for its wanton act that caused $10,000 worth of damage. Suppose a legislative cap on punitive damages limits them to $250,000 or three times compensatory damages—whichever is less. Application of the cap in our posited case would result in a $30,000 punitive award—$970,000 short of what was needed. The purposes of punitive damages have been frustrated, and a bad actor has escaped justice. Once one remembers, however, that juries are centers of political power—albeit temporary ones, a separation-of-powers perspective offers a defense for caps to this charge of arbitrary limitation. One can admit (at least for purposes of argument) that punitive awards, properly doled out, may be useful to punish and deter malicious torts but still insist that the traditional punitive damages regime creates the danger that juries will: (1) inflict punitive awards on defendants whose conduct does not warrant it, and (2) inflict awards that are larger than really necessary. Caps may be characterized as legislative determinations that the advantages of reducing jury power to limit the impact of jury mistakes outweigh the

265. *See, e.g.*, FED. R. CIV. P. 56 (motion for summary judgment); FED. R. CRIM. P. 29 (motion for judgment of acquittal).

266. *See supra* note 259 and accompanying text.

267. *See supra* note 94 (listing examples of legislative caps).

268. *See supra* note 95.

danger that caps will prevent juries from inflicting "ideal" awards. Caps are a legislative check on juries.

Of course, as prosecutors are absent from the punitive damages process, judges pose the only other potential check on this jury power to tailor punishment. The relationship between the jury and judge in determining the proper size of a punitive award is not simple. As an initial matter, the jury, in an exercise of vast discretion (caps aside), decides the size of the award. The trial judge then reviews the award for "excessiveness."[269] Excessiveness review is generally supposed to be deferential; if the jury's award is reasonable, the judge cannot alter it merely because the judge thinks a different award would be even more reasonable.[270] If, however, the judge concludes that the award is higher than any rational trier of fact could properly bestow ("crazy," in lay language), then the judge should offer the winning plaintiff the choice of remittitur or facing a new trial on punitive damages. Judicial review is a very real, if standardless, constraint on punitive awards; the jarringly high awards one hears reported often are reduced by the trial judge or on appeal.[271] Nonetheless, the jury, by determining the amount of a punitive award in the first instance, sets the terms of any subsequent debate over the proper amount, and, in practice, still exercises vast power over the harshness of punitive awards.

To summarize the very obvious, in stark contrast with their more limited role in punishing crime, in the punitive damages context, juries enjoy the primary power to decide what actions merit punitive liability and how harshly to punish them.

3. Prosecutors as a Check on Jury Punitive Damages Determinations

In one sense, a jury cannot get the decision to impose punitive liability wrong because the jury *defines* what conduct warrants such liability when it decides what "malice" means in practice. Practically speaking, the jury also gets first crack at *defining* how much punishment that conduct warrants by way of punitive damages. Thus,

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269. *See, e.g.*, Honda Motor Co. v. Oberg, 512 U.S. 415, 421 ("Judicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded."); *see also supra* notes 85-87 and accompanying text (discussing judicial review of the size of punitive damages awards and the practice of remittitur).

270. *See supra* note 86 and accompanying text (discussing standards for remittitur).

271. *See supra* note 87. Of course, judges do not always choose to exercise this power. *See* Camp, *supra* note 4, at 10 (reporting trial judge's refusal to reduce the jury's $5 billion punitive award in the *Exxon Valdez* case).

to claim that a given jury erred in making these determinations is merely to offer alternative definitions of malice and appropriate punishment. This is largely what a trial judge does when she finds a jury award excessive and gives the victorious plaintiff the choice between remittitur and a new trial on punitive damages—the trial judge substitutes personal notions of fairness for those of the jury. If all punitive damages determinations largely turn on subjective fairness judgments, however, then why not leave the jury with plenary power over them? After all, so long as our legal system permits punitive awards, why should one prefer a judge's fairness intuitions over those of a jury? Or, more to the point for purposes of the superbifurcation proposal, why would one want prosecutors deciding whether to sue defendants for punitive damages and setting an upper limit on how high an award a jury can inflict?

One reason is that, in light of the lessons of separation of powers, juries enjoy an alarming amount of relatively unchecked power to inflict punitive damages, and giving prosecutors a charging and enforcement role in bringing actions for punitive damages would dilute this power. Obviously, the rationales behind separation of powers do not apply with full force to juries because there is no danger that a jury collected for the limited purpose of determining the "facts" of one case is tyrannically going to ride roughshod over the country, as the relatively permanent institutions of the legislature, executive, or judiciary might. Still, much of our political system seems based on the intuition that forcing competing power centers to reach consensus gives rise to better decisionmaking. *This* rationale certainly applies in the context of punitive damages, where jury decisions can have extremely serious consequences.[272]

Of course, just stating the proposition that it is good to distribute the state's power to punish among several entities still leaves the line-drawing problem alluded to earlier. For instance, if the presence of four separate authorities in the context of criminal punishment (i.e., the legislature, prosecutor, judge, and jury) helps decrease the risk of arbitrary state action that unfairly punishes the innocent or punishes the guilty too harshly, then why not distribute this power to punish among twenty-three authorities, or thirty-one, or any prime number one likes? There is no scientific answer to this question—four is the traditional number and our judicial machinery is set up for it. Seat-of-the-pants judgment, as no doubt shaped by our legal traditions,

272. *See supra* notes 4, 153-63 and accompanying text (discussing the size of punitive awards).

also dictates that, at a certain point, the protection that extra decisionmakers give against bad decisions is too cumbersome to be worth the trouble and, indeed, may give rise to too many "false negatives," i.e., too many layers of decisionmakers give the guilty too many chances to fool the authorities and escape punishment.

All that having been said, the superbifurcation proposal provides a relatively easy, straightforward way to add another power center to the punitive damages process. Punitive awards are rare. It therefore would not be difficult or prohibitively expensive for any given state to establish a small division within its attorney general's office devoted to prosecution of punitive damages actions; superbifurcation would not overwhelm prosecutors' offices—or courts, for that matter—in a sea of suits.[273] Given the ease with which superbifurcation could be implemented, if one grants that this system would serve the retribution and deterrence purposes of punitive damages roughly as well as the current system (at least to some acceptable degree), then the burden of proof should be on those who contend that it is *not* a good idea to give prosecutors a check on the vast jury power to inflict punitive damages.

A second, closely related argument in favor of giving prosecutors the exclusive power to bring actions for punitive damages (as distinct from punitive liability) is that they possess a perspective that juries should hear before making their decisions on how harshly to punish for malicious torts. As was discussed earlier, these determinations necessarily involve subjective fairness judgments and invite juries to give vent to their intuitions on how much wrong warrants how much money. Notwithstanding the necessarily subjective nature of these fairness judgments and the problems this subjectivity creates for disciplined, rigorous review of punitive awards, most people probably would agree that *proportionality* is a critical component of fair punishment and that proper respect for proportionality requires knowledge of past punishment practices. Thus, juries should inflict similarly harsh retributory punishments for similarly reprehensible wrongs.[274] Prosecutors, by virtue of their jobs, have far more experience than any jury in seeing how the legal system punishes wrongdoing of varying degrees of reprehensibility.[275] They would be

273. *See supra* notes 212-14 and accompanying text.

274. Of course, which wrongs are worse than others is itself a subjective judgment, but that fact does not alter the point that, however they "rank" wrongs, people expect proportionality.

275. *Cf.* Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 594-95 (4th Cir. 1996) (emphasizing that judges, because of their courtroom experience, are

duty-bound to use this experience in assessing how high a punitive damages award to seek in any given case and to impart this experience to the jury so that it would have a broader perspective from which to determine how much retribution a given defendant deserved. Furthermore, unlike private attorneys, prosecutors would have no financial reason not to impart such information.[276] This same concern over proportionality also applies to the other ostensible purpose for punitive damages—deterrence. Realistically speaking, there is no good, accepted formula to determine objectively how strong a deterrence signal to send to any given wrongdoer. Given this lack of an absolute scale, proportionality again should play a strong role in determining a "fair" award, and thus, as is the case with retribution, the prosecutor's experienced perspective should prove useful to the jury.[277]

Juries possess tremendous power over punitive awards. The lessons of separation of powers, particularly as applied in the criminal law, suggest that it would be a good idea to check this power by adopting the superbifurcation proposal, which would give state prosecutors the tasks of determining when to seek punitive damages—based on underlying plaintiff-driven findings of punitive liability—and of setting the maximum amounts juries could award. Furthermore, prosecutors, as a rule, have far more experience in observing punishment in the legal system than do juries, and thus should possess a perspective on proportionality that juries would find useful in deciding how harsh a punitive award to inflict in any given case.

C. *Rationalizing the Punishment of Mass Torts*

Mass torts raise an especially thorny punitive damages problem:

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better suited than juries for the task of determining how harshly to punish).

276. A proper realism with regard to human nature, however, should lead one to conclude that political pressures and personal ambitions to win large judgments would affect the way in which state officials would prosecute some punitive damages actions, which, in those instances, would lessen or destroy the advantages associated with hearing the state's prosecutorial "point of view."

277. One could argue that adding prosecutors to the punitive damages process adds little information to the process as a whole because the judges who review punitive awards under the current system are just as capable as prosecutors of bringing their legal experience to bear on proportionality concerns. When prosecutors (and defense counsel, for that matter) argue a case, however, they are making their knowledge and legal experience available to the jury—albeit with an argumentative point of view. If the jury is to have a say in determining the size of punitive awards at all, then it makes sense to give it all the information possible up front rather than to deny it and then let the judge attempt to clean up later by way of deferential review for "excessiveness."

Imagine that a corporation builds and sells a product—it could be asbestos, Agent Orange, the Dalkon Shield, breast implants, etc.—that allegedly causes death or injury to thousands of people. Assume thousands sue[278] and that multiple cases reach verdicts that award punitive damages.[279] Under what circumstances is it fair, or even constitutional, to inflict multiple punitive awards on the defendant? A number of defendants have argued that such multiple awards violate due process, but none successfully.[280] Still, examination of the fairness and practicality concerns underlying some of the relevant decisions makes one thing seem clear: Doling out punishment in numerous discrete actions for a single course of conduct may be *constitutional*, but it is not *sensible*. It would be far better to administer punishment in one proceeding in which the factfinder could hear all available evidence relevant to the entire course of conduct that gave rise to punitive liability. The proposed model pushes the procedures for assessment of punitive damages in that

278. Some sources have estimated that plaintiffs have filed well over 100,000 asbestos suits and that hundreds of thousands more may be expected over the next five decades. *See* Dunn v. HOVIC, 1 F.3d 1371, 1393-94 (3d Cir.) (en banc) (Weis, J., dissenting), *modified in part*, 13 F.3d 58 (3d Cir. 1993). Breast implant litigation presents a similarly overwhelming picture: "By early 1995, [Dow Corning Corporation] was a Defendant in 45 putative class action lawsuits ... and over 19,000 individual lawsuits. All the suits combined involved more than 36,000 claimants." *In re* Dow Corning Corp., 187 B.R. 919, 922 (E.D. Mich. 1995), *rev'd*, 103 F.3d 129 (6th Cir. 1996).

279. For instance, 15 punitive awards had been awarded against Johns-Manville Corp., the largest manufacturer of asbestos, by the time it declared bankruptcy in 1982. *See* BOSTON, *supra* note 36, § 21:7, at 11.

280. *See, e.g.*, *Dunn*, 1 F.3d at 1391; Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 281 (2d Cir. 1990); Man v. Raymark Indus., 728 F. Supp. 1461, 1465-66 (D. Haw. 1989); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1060-64 (D.N.J.) (*Juzwin I*), *judgment vacated on reh'g*, 718 F. Supp. 1233 (D.N.J. 1989) (*Juzwin II*); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 377 (E.D. Pa. 1982), *aff'd sub nom.* Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985); Stevens v. Owens-Corning Fiberglas Corp., 57 Cal. Rptr. 525, 531-33 (1996); Owens-Corning Fiberglas Corp. v. Wasiak, 917 S.W.2d 883, 888-92 (Tex. App. 1996). There are a number academic discussions of the problem of multiple punitive awards for mass torts. *See, e.g.*, Jerry J. Phillips, *Multiple Punitive Damages Awards*, 39 VILL. L. REV. 433 (1994) (arguing that multiple punitive awards pose no constitutional problems and observing that defendants who feel "oppressed" by such awards may seek to reduce them in post-trial proceedings or avoid paying them by declaring bankruptcy); Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415 (1994) (analyzing multiple punitive awards in light of double jeopardy and joinder principles of criminal law); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37 (1983) (suggesting that courts consider alternatives such as class actions, aggressive dismissals of unfounded punitive claims, bifurcation, and close scrutiny of awards to protect defendants from repetitive awards); Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787 (1983) (suggesting use of the class action device).

direction by limiting the number of punitive damages suits to one per state for any given course of tortious conduct, i.e., each state adopting superbifurcation would have one opportunity to seek punitive damages for all wrongful conduct and attendant harms that occurred within that state's jurisdiction.[281]

As a threshold matter, the premise that it is unfair to use the machinery of state more than once per sovereign to prosecute or punish a given *criminal* offense is enshrined in the Double Jeopardy

281. Two states, Georgia and Ohio, have already taken steps to limit the number of times a defendant may be sued for punitive damages for a given course of conduct. In 1987, Georgia adopted a statute that provided that only one recovery was permissible for any given act or omission in products liability actions—no matter how many causes of action may have arisen from such act or omission. *See* GA. CODE ANN. § 51-12-5.1(e)(1) (Supp. 1997). A federal district court, in an opinion that might fairly be called Lochneresque, ruled that this provision violated due process because it was not rationally related to any legitimate state interest and violated equal protection because it irrationally discriminated against products liability plaintiffs. *See* McBride v. General Motors Corp., 737 F. Supp. 1563, 1576-77 (M.D. Ga. 1990). One could attack the *McBride* decision on any number of grounds. Suffice it to say for present purposes, however, that the superbifurcation proposal: (1) rationally furthers a legitimate state interest in punishing malicious torts in a disciplined manner; and (2) does not irrationally discriminate against products liability plaintiffs. *Cf.* Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 638-40 (Ga. 1993) (suggesting strongly in dicta that one-suit limitation is perfectly reasonable and constitutional).

Similarly, Ohio recently reformed its tort law to provide that no punitive damages may be awarded against a defendant that provides a certified judgment or other evidence demonstrating that it has already paid the maximum punitive damages allowable under Ohio law in some other case due to the same act or course of conduct alleged by the plaintiff. *See* OHIO REV. CODE ANN. § 2315.21(D)(3)(a) (Anderson Supp. 1996). The statute carves two exceptions to this one-recovery rule; multiple recoveries are allowed where: (1) a plaintiff demonstrates to the court that it will rely on previously undiscovered evidence of the defendant's malice; or (2) the court determines that previous punitive awards were "totally insufficient" to punish and deter. *See id.* § 2315.21(D)(3)(b)(i)-(ii).

As the Georgia and Ohio reforms demonstrate, it is not logically necessary to put state officials in charge of punitive damages actions in order to limit the number of punitive recoveries for mass torts. The superbifurcation model is clearly superior to these reforms for at least two reasons, however. First, limiting punitive recoveries but leaving private plaintiffs in control of punitive actions encourages an uncoordinated race to the courthouse. State officials would be in a better position to marshal all relevant evidence of defendant wrongdoing to ensure that the one allowable recovery is just. *Cf. infra* text following note 321 (discussing the need for prosecutors under the superbifurcation system to use their one chance at recovery judiciously). Second, even though no one has a "right" to punitive damages, there is something unseemly about granting a punitive recovery to one plaintiff but not to all others, who may number in the thousands. *Cf. Dunn*, 1 F.3d at 1386 (noting that accepting defendant's invitation to hold that multiple punitive awards violate due process would unfairly favor some plaintiffs over others). Punitive damages are assessed to serve the public interest; superbifurcation puts them in the public's coffers, where they belong.

Clause.[282] The Supreme Court has indicated that, legally speaking, this clause has no application to private suits for punitive damages.[283] Nonetheless, there is no obvious policy reason why the basic fairness concerns behind proscribing multiple prosecutions and punishments should not be applied to punishment generally, rather than just to criminal punishment.[284] The structure of the current punitive damages regime, however, makes it more or less impossible for courts to do so in the context of punishment of mass torts.

One case in particular, *Juzwin v. Amtorg Trading Corp.*,[285] has attracted a good deal of scholarly attention and highlights the difficulties facing courts wrestling with this problem. In *Juzwin I*, the plaintiffs sought punitive damages for conduct related to the manufacture of asbestos.[286] In his first opinion in this case, Judge Sarokin expressed concern that asbestos plaintiffs often introduce evidence of the total number of persons suffering from asbestos-related diseases to enhance claims for punitive damages and that it is "totally unrealistic to suggest that [a given jury's] award is predicated solely on the conduct of the defendant manufacturer as it relates only to the plaintiff on trial."[287] He then ruled that multiple punitive damages awards for a "single course of conduct" were fundamentally unfair and violated the Due Process Clause, and therefore issued an order stating that the court would strike the plaintiffs' punitive damages claims against any defendant who provided competent evidence that it had already paid punitive damages for the same course of conduct at issue.[288]

In *Juzwin II*, Judge Sarokin vacated his earlier order largely

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282. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]"). Of course, as the convoluted nature of double jeopardy jurisprudence itself demonstrates, it is hardly self-evident how to apply this fairness norm in practice. *See, e.g.*, United States v. Ursery, 116 S. Ct. 2135, 2147-49 (1996) (discussing application of Double Jeopardy Clause to civil forfeiture and explaining that civil forfeiture of respondent's home was not "punishment"); Witte v. United States, 515 U.S. 389, 397-99 (1995) (explaining that use of uncharged criminal conduct (importing cocaine) as a basis for imposing a higher sentence for federal marijuana charges did not "punish" defendant for importing cocaine, leaving United States free to pursue a subsequent criminal prosecution on cocaine charges).

283. *See* United States v. Halper, 490 U.S. 435, 451 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation between private parties.").

284. *Cf. id.* at 447-48 (making largely this same point).

285. 705 F. Supp. 1053 (D.N.J.) (*Juzwin I*), *judgment vacated on reh'g*, 718 F. Supp. 1233 (D.N.J. 1989) (*Juzwin II*).

286. *See id.* at 1054.

287. *Id.* at 1056.

288. *See id.* at 1064.

because he became convinced that the problem of mass tort punishment required national reform from either the Supreme Court or Congress.[289] This second opinion also makes clear, however, that the judge was concerned by the problems inherent in determining precisely what conduct juries in earlier cases had punished. Without such information, Judge Sarokin could not determine whether the *Juzwin* plaintiffs sought repetitive punishment for conduct that had already been sanctioned, or if they instead sought to punish conduct that had escaped sanction up until that time.

Suppose a company, during one general "course of conduct," builds a product that kills one thousand people. In double jeopardy parlance, that company has committed one thousand "offenses" that, if criminal, theoretically could give rise to one thousand prosecutions and attendant punishments. Returning to Judge Sarokin's problem, if juries in earlier asbestos cases had punished *different* "offenses" than those at stake in *Juzwin* (e.g., those juries punished defendants for causing harms to persons other than those whose injuries were at issue in *Juzwin*), then additional punishment would pose no more normative problem than would multiple sentences inflicted upon a murderer who has killed more than one person.[290] If, however, earlier punitive awards were intended to punish precisely the same "offenses" as those at stake in *Juzwin*, then another punitive award would constitute multiple punishment and violate fundamental fairness.

Judge Sarokin implicitly acknowledged this problem when he held in *Juzwin II* that, for a defendant to demonstrate that it would be fundamentally unfair for it to incur another punitive award for a given course of conduct, that defendant must demonstrate to the court that an earlier punitive award the defendant incurred arose in a trial that met the following rigorous conditions:

> 1. A full and complete hearing must [have been] held, after adequate time . . . elapsed to investigate and discover the full scope and consequences of such conduct and during which all relevant evidence [was] presented regarding the conduct of the defendant against whom the claim is made;
>
> 2. Adequate representation [was] afforded to the plaintiff, with an opportunity for plaintiffs similarly situated

289. *Juzwin II*, 718 F. Supp. at 1235.

290. *See generally* Schwartz, *supra* note 280, at 426 (observing that separate prosecutions and punishments of distinct criminal counts arising out of one course of conduct do not violate double jeopardy, and discussing implications for discussions of punitive damages in the mass tort context).

> and their counsel to cooperate and contribute towards the presentation of the punitive damages claim, including presentation of the past and probable future consequences of the defendant's wrongful conduct;
>
> 3. An appropriate instruction [must have been given] to the jury that their award [would] be the one and only award of punitive damages to be rendered against the company for its wrongful conduct; [and]
>
> 4. Such other conditions as [would] assure a full, fair and complete presentation of all the relevant evidence in support of and in opposition to the claim.[291]

In short, *Juzwin II* evades the problem of delineating the scope of past punishments by placing the burden on the defendant of showing that some earlier jury imposed a verdict explicitly designed to punish the defendant's entire course of conduct and that this jury had all of the information necessary to do so.

Judge Sarokin concluded that none of the *Juzwin* defendants could meet these burdens, which is hardly surprising—the current system is not designed to enable defendants to do so. Of course, it is certainly in a plaintiff's interest to paint as horrible a picture of a defendant's conduct as possible. Thus, a plaintiff may well introduce evidence of the nationwide impact of a defendant's wrongful behavior, e.g., lawyers for breast implant plaintiffs have argued that the defendants' callousness has harmed *many* women, not just the named plaintiffs.[292] A plaintiff, however, does not have the burden of proving in detail all the harms caused by a defendant's course of conduct to other potential plaintiffs. Many plaintiffs in a mass tort context no doubt would lack the means to do so in any event. Thus, as a practical matter, mass tort defendants may find it extremely difficult to prove that a jury in an earlier action had all the information necessary to inflict a single punitive award sufficient to punish completely an entire course of conduct in light of all harms

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291. *Juzwin II*, 718 F. Supp. at 1235.

292. *See, e.g.*, Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1127 (9th Cir. 1994). The court upheld a $6.5 million punitive award against Dow Corning Corporation, observing that

> [t]he evidence presented at trial established that a large number of Dow silicone gel breast implants had been implanted in thousands of women. Each of these women was at risk of encountering the same fate Hopkins suffered. Therefore, Dow's conduct in exposing thousands of women to a painful and debilitating disease, and the evidence that Dow gained financially from its conduct, may properly be considered in imposing an award of punitive damages.

Id.

flowing from it. Furthermore, precisely because the vast majority of states permit multiple punitive awards, courts generally do not instruct juries that only one punitive award may be inflicted per course of conduct. Therefore, even if a defendant could show that a given jury had the knowledge necessary to inflict complete punishment for a course of conduct, the defendant would not be able to show that the jury intended to do so.[293]

On occasion, a mass tort defendant will try to avoid the need for precise inquiry into the scope of past juries' punishments (of the sort demanded by *Juzwin II*) by attempting to persuade a court that further punitive awards in its particular case would be unconstitutional because the combined total of such awards previously inflicted already exceeds the maximum allowable under due process for the defendant's whole course of conduct. This approach has not met with much success either. For instance, in *Simpson v. Pittsburgh Corning Corp.*,[294] the Second Circuit rejected out of hand the defendant's *Juzwin*-type "single-punitive award" argument that past juries had intended to punish the defendant for the "full extent of its wrongful conduct."[295] The court acknowledged, however, at least the abstract possibility that past punitive awards against a defendant could, in aggregate, inflict the maximum punishment allowable under due process for a whole course of conduct—making subsequent punitive awards impermissible.[296] The court, however, rejected Pittsburgh Corning's contention that this "aggregate-punitive award" argument precluded further punishment in *Simpson* because: (1) the defendant had not provided the trial judge with a sufficient record to allow evaluation of the "entire scope of the defendant's wrongful conduct" and the harms it caused, and therefore the court lacked the factual record necessary to determine the due process maximum; (2) relatedly, the defendant had, in any event, made no showing that it had suffered punitive awards that were "even close" to whatever this maximum might be; and (3) returning to the concerns of *Juzwin II*, the defendant had not provided a sufficient basis for concluding that past awards punished

293. A defendant might be able to evade this problem by requesting that the jury delineate the scope of conduct it intended to punish in a special verdict. Presumably, defendants would be loath to do so on the ground that asking the jury this question would tend to encourage it to take an expansive view of what conduct to punish.

294. 901 F.2d 277 (2d Cir. 1990).

295. *Id.* at 281.

296. *See id.* at 280-81.

the *same* misconduct as that at stake in *Simpson*.[297]

The majority and dissenting opinions in *Dunn v. HOVIC*[298] perhaps provide the most thorough appellate discussion of the problems confronting application of this aggregate-punitive award argument. A Virgin Islands jury awarded William Dunn, a former pipe-fitter, $500,000 in compensatory damages for injuries he suffered working with Kaylo, an insulation product containing asbestos that was manufactured by Owens-Corning Fiberglas Corporation. In addition, the jury awarded $25 million in punitive damages against Owens-Corning for failing to put warnings on boxes of Kaylo.[299] The district court reduced this amount on remittitur to $2 million.[300]

On appeal, Owens-Corning raised a battery of arguments against the punitive award, but the most important from the court's perspective (indeed, its reason for taking this "otherwise routine product liability case in banc"[301]) was Owens-Corning's argument that the court should use its powers as the " 'Supreme Court of the Virgin Islands' "[302] to strike all asbestos punitive damages claims in that territory on the ground that the "avalanche" of claims against asbestos manufacturers ensured that they had suffered enough to meet all legitimate deterrence and retribution needs. Therefore, further punitive awards would be "overkill."[303]

While the majority opinion agreed that multiple awards raised serious concerns, it rejected the claim that, on the facts of *Dunn*, Owens-Corning had suffered unconstitutional punishment. Taking a page from *Simpson*, the majority assumed for purposes of argument that a defendant could show a due process violation by providing a judge with a sufficient factual record from which to conclude that previous juries already had inflicted maximum punishment. It concluded that Owens-Corning had not done so.[304]

In his dissent (which, in relevant part, four other members of the court joined), Judge Weis insisted, like Judge Sarokin in *Juzwin I*,

297. *See id.* at 281.

298. 1 F.3d 1371 (3d Cir.) (en banc), *modified in part*, 13 F.3d 58 (3d Cir. 1993).

299. *See id.* at 1373-74, 1391.

300. *See id.* at 1391. The Third Circuit, providing yet another example of the vagaries inherent in eyeballing punitive damages for excessiveness, sliced this $2 million figure to $1 million without any meaningful discussion. *See id.*

301. *See id.* at 1385.

302. *Id.* (quoting Polius v. Clark Equip. Co., 802 F.2d 75, 80 (3d Cir. 1986)).

303. *Id.* at 1385.

304. *See id.* at 1389-90.

that "courts must confront the unavoidable and undeniable fact that defendants are being punished over and over again for the same general course of conduct."[305] At some point, multiple punitive awards exceed just maximum punishment; the trick is to determine where this maximum lies.[306] Judge Weis suggested that courts might do so by using the factors the Supreme Court listed in *Haslip* as useful in determining the excessiveness of punitive damages awards generally.[307] In addition, however, courts should consider "other matters unique to mass torts—other punitive awards, the effect of those awards on current and future claimants for compensation [i.e., whether punitive awards threaten a company's solvency and thus its ability to pay future compensatory awards], and the adverse effect on settlement of pending claims."[308] After suggesting this standard for multiple-punitive-award review, Judge Weis then stated his firm belief that no further punitive awards were necessary to deter or punish Owens-Corning.[309] In this vein, he observed that the company had paid "compensatory awards, punitive damages, and litigation expenses [that] dwarf any profits" attributable to its Kaylo product.[310] A further punitive award to the *Dunn* plaintiffs would serve "no rational purpose" and would violate due process.[311]

Notwithstanding Judge Weis's embrace of the aggregate-award theory, close examination reveals that, like the *Juzwin* single-award theory, it offers small comfort to mass-tort defendants. As a threshold matter, under the *Simpson* and *Dunn* majority approach, it requires a defendant to provide a judge with "a factual basis sufficient for evaluating the entire scope of the defendant's wrongful conduct,"[312] presumably including all "past and probable future consequences" of that conduct.[313] The defendant, too, may lack the practical means to do so, e.g., even the asbestos manufacturers do not know how many people asbestos has harmed and how severely they have been injured.[314]

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305. *Id.* at 1402 (Weis, J., dissenting).

306. *See id.* at 1404 (Weis, J., dissenting).

307. *See supra* text accompanying note 116 (listing the factors the Supreme Court approved in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 21-22 (1991)).

308. *Dunn*, 1 F.3d at 1404 (Weis, J., dissenting).

309. *See id.* at 1405 (Weis, J., dissenting).

310. *Id.* (Weis, J., dissenting).

311. *Id.* at 1404-05 (Weis, J., dissenting).

312. Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 281 (2d Cir. 1990); *see also Dunn*, 1 F.3d at 1389 (quoting *Simpson*).

313. Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1235 (D.N.J. 1989).

314. Of course, in an adversarial system, inviting defendants to proffer evidence of

Another problem with the aggregate-award theory is that it cuts off further awards only at the due process maximum, even though punishment need not reach this maximum to be "just," as it were. Suppose a jury imposed a $100 million punitive award in light of its understanding that the defendant's conduct injured several thousand people—including, of course, the plaintiff. No later jury would be able to lower this figure, but some might effectively raise it. Suppose a later jury in a case involving a different plaintiff also inflicts a punitive award of $100 million because that jury, too, is aware that the defendant harmed thousands of people. The defendant's tentative punitive liability becomes $200 million. The judge in the latter case, however, hears the defendant's aggregate-award challenge and decides that the maximum punitive award permitted by due process is $150 million, so the judge cuts the second award in half. The defendant is then liable for $150 million, even though an earlier jury, with largely the same course of conduct in mind, imposed a presumptively sufficient award of only $100 million. Permitting multiple punishments therefore creates a bias in favor of the *maximum* punishments that due process allows. As such punishments are not, by hypothesis, unconstitutionally excessive, perhaps this is not such a terrible problem. However, there is something decidedly discomfiting in letting later juries trump the damages determinations of earlier juries until such time as a judge sees fit to call a halt to the process.[315] Compounding this problem, given the vagaries inherent in punitive damages determinations, due process maxima must necessarily be decided by the length of the chancellor's foot.

Proponents of the current regime might well observe at this point, however, that a defendant is free to try to avoid unfair compounding of punishment by arguing to a jury that it should subtract from any punitive award it would otherwise impose the amounts already inflicted against the defendant in other proceedings. Indeed, some states have passed statutes apparently encouraging this approach.[316] It does not seem terribly realistic, however. As commentators have pointed out, defendants quite reasonably worry that evidence of past awards might strengthen a jury's conclusion that

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their own wrongdoing to try to avoid liability for multiple punitive awards should raise some interesting conflicts.

315. Comparison to the criminal context is again illustrative: Imagine that, after proving a defendant guilty, the state were free to seek successive sentencing hearings from various judges until some judge sentenced the defendant to the maximum sentence permitted under the relevant statutes and guidelines.

316. *See, e.g.*, MINN. STAT. ANN. § 549.20(3) (West 1988).

a defendant's conduct justified punishment and thus may lead to more, larger punitive awards rather than fewer, smaller ones.[317] A more promising curative approach, which the Supreme Court suggested in *Haslip*, is for judges to consider past punitive awards when reviewing later awards for excessiveness, and some states allow or require them to do so.[318] Even if the results of such consideration, however, were that judges conducting such reviews always subtracted the entirety of earlier awards, this practice would not correct the bias that multiple punishments create toward maximum punishments.

One could sidestep all the messiness inherent in repetitive punitive awards if one could devise a system in which one factfinder heard all relevant evidence of a defendant's course of conduct and harms flowing from it and then inflicted one punitive award to punish it all. Under *BMW*, however, the degree to which a state may use punitive damages to punish and deter conduct occurring outside its borders is, at the very least, problematic.[319] One state-law based action—and claims in mass-tort cases typically involve products liability claims rooted in state law—to punish in light of all nationwide misconduct and harms is probably not an option.[320] The superbifurcation proposal does the next best thing by forbidding private suits for punitive damages and permitting each enacting state just *one* chance to seek them for any given course of conduct and attendant harms occurring within its borders. In the unlikely event that every state and quasi-state (i.e., territories and the District of Columbia) in the country adopted this proposal, then a mass-tort

317. *See* BOSTON, *supra* note 36, § 21:30, at 40. Such evidence presumably would pose less of a prejudice problem in states allowing or requiring bifurcation of punitive liability and damages phases. *See, e.g.*, Stevens v. Owens-Corning Fiberglas Corp., 57 Cal. Rptr. 2d 525, 536 (Ct. App. 1996) (observing that "the prejudice inherent in such evidence relates more to liability for punitive damages than to the amount of the award"), *reh'g denied*, 1997 Cal. LEXIS 61 (Cal. Ct. App. Jan. 15, 1997). Even if a defendant could totally avoid prejudice by presenting such evidence only in the damages phase, however, this practice would not solve the problem that multiple punishments create a bias in favor of maximum punishments.

318. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991) (approving consideration of the "existence of other civil awards against the defendant for the same conduct, these ... to be taken in mitigation"); *see, e.g.*, MINN. STAT. ANN. § 549.20(5) (West Supp. 1997); MONT. CODE ANN. § 27-1-221(7)(c) (1995).

319. *See supra* note 133.

320. As the substantive power of a state's law should not change in a diversity action, the extra-territoriality concerns of *BMW* would apply to state-law-based diversity actions in federal courts just as they do in state courts. While this Article does not address directly the complications inherent in adopting superbifurcation as a reform of federal law, it bears noting that these extraterritorial concerns should not apply to federal causes of action.

defendant could face no more than fifty-some punitive awards, rather than the potential for many thousands.

Admittedly, such an approach would not be without risks. Most obviously, limiting prosecutors to one action per enacting state creates the danger that a defendant could be able to evade proper punishment for its mass tort because, at the time of a state's punitive damages suit, it lacked full knowledge of the harms the defendant had caused. Prosecutors could, however, alleviate this problem by adopting, where appropriate, a watch-and-wait attitude. They could, for instance, observe the success (or lack thereof) of successive private plaintiffs seeking compensatory awards and punitive liability attorney's fees. Where, in products liability cases, causation raises complex scientific issues (e.g., breast implant litigation), they could study the relevant literature for insights into the level of harm the defendant actually caused. In short, the one-suit limitation certainly would require prosecutors to exercise due care in deciding when to sue.[321]

Another problem worth noting is that, precisely because it allows each state to bring a punitive damages action, the proposed model cannot completely fix the problem of overlapping multiple punishments. If a defendant's course of conduct has obvious nationwide impacts, then it may be unrealistic in a given case to hope that these impacts would not color any given jury's determination of how harshly to punish. In subsequent suits in other states, nationwide impacts again could color such calculations, leading to repetitive punishment for overlapping harms. Still, it is better to have fewer rather than more opportunities for repetitive punishment, and the proposal sharply limits the number of potential punitive damages claimants.

Given that most cases settle, the proposal's effects on settlement negotiations might be far more important than its effects on punitive damages verdicts. Superbifurcation could remove the threat of punitive damages as a bargaining tool in the bulk of mass-tort lawsuits—ensuring that defendants would not suffer indirect "punishment" every time they settle a claim. Where a plausible claim for punitive damages exists, a plaintiff should be able to use this claim to extract a punitive premium from the defendant.[322] The

321. *Cf. supra* note 281 (noting that private plaintiffs operating under a system that limits the number of punitive awards are not in a position to watch and wait).

322. *See supra* note 219 and Section III.C.2. (discussing punitive premiums in settlement negotiations).

premium the defendant would be willing to pay depends in part on how big an award the defendant expects a jury would inflict. Assume, as Judge Sarokin realistically suggested, that juries inflict punitive awards based on all they learn of a defendant's course of conduct and its attendant harms, rather than solely on the basis of how this conduct harmed the given plaintiff.[323] It follows that each plaintiff negotiating a settlement should be able to extract a premium based on the punitive award the defendant fears a jury would inflict—and a judge subsequently would approve—to punish all the tortious conduct and harms the defendant thinks the plaintiff could prove. Thus, under the present punitive damages regime, the potential for punishment of much or all of a defendant's whole course of conduct inflates every settlement.[324] Repetitive jury verdicts only represent the tip of the multiple punishment iceberg.

Superbifurcation would largely eliminate the ability of many mass-tort plaintiffs to extract punitive settlement premiums. A defendant would have a strong interest in avoiding the first Section 1 finding of punitive liability in any given state for a given course of conduct because that first finding would trigger vulnerability to a Section 2 punitive damages action. Subsequent punitive liability findings in that state, though they would create liability for additional attorney's fees, would not have this gate-opening effect, and the defendant's fear of such findings would lessen commensurately. Therefore, plaintiffs would not be able to extract much of a premium when settling in states in which the defendant has already been found punitively liable. Before any such finding exists, a mass-tort defendant would have a choice: to avoid trial by paying "full-sized" premiums to settle claims, or to risk trial and a punitive liability finding that would open the door to punitive damages. Giving defendants this choice between "facing the (punitive) music" and paying punitive premiums lessens any unfairness that may be associated with repetitive punishment by settlement.

In sum, the premise that a defendant should face only once per

323. *See* Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1056 (D.N.J.) (*Juzwin I*), *judgment vacated on reh'g*, 718 F. Supp. 1233 (D.N.J. 1989) (*Juzwin II*); *supra* note 287 and accompanying text.

324. Defendants have had trouble, however, persuading courts to consider punitive settlement premiums when determining whether a defendant has been sufficiently punished. *See, e.g.*, Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 282 (2d Cir. 1990) (stating that the amounts of such premiums are "too speculative a basis for a constitutional ruling" and that it was "far from clear that sums paid in private settlements may validly be counted in determining when state-compelled punitive damages awards exceed the limits of the Fourteenth Amendment").

sovereign the prospect of state prosecution or punishment for a given "offense" is deeply ingrained in American criminal jurisprudence. This premise should also control, to the degree practicable, the states' approach to punitive damages—which are, at their core, a form of state-inflicted punishment. The current regime's approach to mass-tort punishment flies in the face of this premise because it allows an unlimited number of plaintiffs to seek punitive damages in a manner that invites juries to punish repetitively the same misdeeds. Furthermore, the threat of such awards builds repetitive punitive premiums into the settlement process, ensuring that mass-tort defendants suffer repeated "punishments" in that vast bulk of cases that settle. Superbifurcation would lessen the danger of such repetitive punishments by sharply limiting the number of punitive damages actions; it also would largely eliminate the ability of many plaintiffs to extract punitive premiums in settlement negotiations.

V. CONCLUSION

For over two hundred years, American and English courts have recognized the power of juries to inflict discretionary punitive damages "as a punishment to the guilty, to deter from any such proceeding in the future, and a proof of the detestation of the jury to the action itself."[325] Such awards are infrequent but, on rare occasions, are astoundingly large. Their actual effects on the world for good or ill are difficult to measure meaningfully. Under the current system, plaintiffs seek and pocket these awards in whole or part. This practice leads, among other problems, to plaintiff windfalls and allows plaintiff financial incentives to taint the punishment process. In addition, the current system leaves juries with an alarmingly vast amount of discretion both to determine when defendants are punitively liable (i.e., when they have behaved in a "malicious" manner) and how harshly to punish. Furthermore, the current system, by permitting each plaintiff allegedly hurt by a course of conduct to seek punitive damages, invites particularly irrational punishment of mass torts.

Adoption of the superbifurcation proposal would alleviate all three of these problems while at the same time preserving the core of the present system's power to punish and deter malicious torts. Under the proposal, a plaintiff's reward for proving a defendant's punitive liability would be reasonable attorney's fees, not a chance to

325. Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (C.P. 1763).

win punitive damages. Instead, state prosecutors would seek such damages, which would be payable to the state. Removing the chance for plaintiffs to win windfalls would end the taint that plaintiffs' perfectly understandable desires for maximum recovery bring to the punishment process. Giving prosecutors the authority to decide whether to seek punitive damages and to set an upper limit on their size would decrease juries' vast power to determine whether and how harshly to punish. Lastly, adoption of the proposal would help rationalize the punishment of mass torts by lessening the number of punitive claims defendants could face and by removing such claims as bargaining chips in many mass-tort settlement negotiations.