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WHAT DID PUNITIVE DAMAGES DO? WHY MISUNDERSTANDING THE HISTORY OF PUNITIVE DAMAGES MATTERS TODAY

ANTHONY J. SEBOK*

INTRODUCTION

Punitive damages occupy a unique place in Anglo-American law. They require juries to measure damages based on the defendant's attitude when he injured the plaintiff, and they allow juries tremendous discretion in doing so. Most recent debate over punitive damages has focused on the frequency and scale of damages awarded by juries.[1] Some have questioned whether juries are capable of following the instructions that they receive.[2] The more basic question—what are the purposes or rationales for punitive damages—has not played as great a role as one might think. This is because, as commentators have pointed out, punitive damages are explained by courts and commentators as having a variety of plausible purposes, some mutually complementary and some mutually exclusive.[3]

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1. *See, e.g.*, Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damages Reform*, 46 AM. U. L. REV. 1573 (1997); Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559 (1992); Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003 (1999); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998).

2. *See, e.g.*, Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998); David A. Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000), W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313 (2001).

3. A typical commentary on modern punitive damages doctrine points out that

> [a]lthough most courts refer only to "punishment" and "deterrence" as rationales for [punitive] damages, this masks the variety of specific functions that punitive damages actually serve. The functions of punitive damages can be divided and subdivided in any number of overlapping ways, but the following division should prove useful for the particular points examined here: (1) education, (2) retribution, (3) deterrence, (4) compensation, and (5) law enforcement.

It is worth taking note, therefore, when the United States Supreme Court actually bases a decision on the grounds that, of the many possible functions of punitive damages, one is more salient than another. That is what the Court did in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[4] In *Cooper*, the Court used a claim about the contrast between the historical and contemporary functions of punitive damages to justify its conclusion that jury awards of punitive damages *today* are punishment, not compensation.[5] In turn, the Court used this historical contrast to conclude that jury determinations of punitive damages are not today "findings of facts," although, presumably, they once were.[6] The Court therefore concluded that punitive damage verdicts by juries were not within the Seventh Amendment's Reexamination Clause and, as matters of law, ought to be reviewed on appeal under a de novo standard.[7]

In this Article I will not take issue with the wisdom of the Court's holding. I will instead criticize the historical and functional arguments used by the Court to reach its holding. In Part I, I will examine the grounds offered by the Court for its holding in *Cooper*. I will show that the Court justified its functional approach to the review of punitive damages partly on the grounds that the function of punitive damages has changed since the nineteenth century. In Part II, I will show that early punitive damage awards did not compensate for losses that today would be recognized as part of the blackletter categories of compensatory damages, and so it would be at best anachronistic (and at worst misleading) to say that punitive damages served primarily a compensatory function in the early years of American tort law, as the Court claimed in *Cooper*. In Part III, I will show that punitive damages served a range of functions, including vindication and redress for insult, which the Court's either/or choice between compensation and punishment missed and cannot explain. I

David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 373–74 (1994) (citations omitted). Another commentator suggests seven:

> (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 attorney's fees.

Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

4. 121 S. Ct. 1678 (2001).
5. *Id.* at 1683, 1686 n.11.
6. *Id.* at 1686.
7. *Id.* at 1685–86.

conclude this Article by suggesting that *Cooper* was a step back for those who wish to bring principled adjudication into modern punitive damages.

The point of the Article is not to chide the Court for making a mistake about legal history. As will become apparent as the argument unfolds, the real story of what punitive damages were supposed to do in the nineteenth century is complex and rich with possibilities that could inform contemporary analysis. The crude revisionist model imposed by the Court not only weakens its argument that juries exercise moral judgment when determining punitive damages, it makes it harder to explain what the content of that moral judgment is, and how it should be presented to juries. In fact, as I suggest in my conclusion, the Court's historical errors will probably have the unintended consequence of strengthening the already popular views that punitive damages are simply one way that society deters bad conduct and that punitive damage awards should be calculated according to the logic of efficient deterrence.

I. *COOPER V. LEATHERMAN* AND THE HISTORICAL FUNCTION OF PUNITIVE DAMAGES

The *Cooper* case involved a suit by a tool manufacturer against another manufacturer.[8] The defendant marketed a tool very similar to one already marketed by the plaintiff.[9] The plaintiff sued for trademark infringement, arguing, among other things, that the defendant had gone so far as to have photographed the plaintiff's product and used that photograph in promotional material advertising the defendant's own product.[10] A jury found for the plaintiff and awarded $50,000 in compensatory damages and $4.5 million in punitive damages.[11] The district court rejected the defendant's argument that the punitive damages were grossly excessive in violation of due process under the United States Constitution.[12] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the award of punitive damages based on the conclusion that the district court had not abused its discretion in declining to reduce

8. *Id.* at 1680.
9. *Id.*
10. *Id.* at 1681.
11. *Id.*
12. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 1997 US Dist LEXIS 22763 at *9 (D. Or. Nov. 14, 1997).

the award.[13] The Supreme Court, in a decision written by Justice Stevens, reversed the Ninth Circuit.[14]

The constitutional question raised in *Cooper* was under what standard the Ninth Circuit should have reviewed the trial court's judgment concerning the constitutionality of the jury's award of punitive damages.[15] There were two choices available to the Ninth Circuit. Under the de novo standard, the appellate judges look directly at the trial record and test the jury's award against their own best understanding of the demands of the Fourteenth Amendment. Under the abuse of discretion standard, the appellate judges examine the trial judge's review of the jury verdict and overturn the trial judge's judgment only if the trial judge's application of the Fourteenth Amendment was clearly erroneous.

In order to answer this question, the Court argued that de novo review is required because the test for whether a jury award violates the Fourteenth Amendment is like the test used in other cases in which the federal appellate courts review the application of punishment by the states.[16] On the other hand, the Court rejected the argument that the Seventh Amendment required abuse of discretion review.[17] The Court noted that, although the Seventh Amendment's Reexamination Clause had been interpreted by the Court, in earlier decisions, to direct the appellate courts to review trial court judgments concerning jury awards under an abuse of discretion standard, the Seventh Amendment did not apply to punitive damage awards, since punitive damage awards were not findings of fact "found" by a jury.[18]

In *Cooper*, therefore, there are two arguments, one positive and one negative. On the positive side, the Court made a case for why punitive damage verdicts should be reviewed under a de novo standard. On the negative side, the Court made a case for why punitive damages should not be reviewed under the abuse of discretion standard. The positive argument turned on drawing a comparison between punitive damages and criminal and civil penalties, and the negative argument turned on emphasizing the disanalogy between

13. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 205 F.3d 1351 (9th Cir. 1999).
14. *Cooper*, 121 S. Ct. at 1683.
15. *Id.* at 1682.
16. *Id.* at 1683.
17. *Id.* at 1684, 1686.
18. *Id.* at 1686–87.

punitive damages and "facts." The two arguments were not explicitly connected; but, as I will show, both depended on characterizing the determination of the size of punitive damages as a moral judgment. The Court's assumption was that where state law requires juries to make moral judgments, the Seventh Amendment no longer applies, and the Fourteenth Amendment requires de novo review.

A. *The Positive Argument: Punitive Damages Awards Are Value Judgments*

The first part of the Court's argument began with the following claim: "A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."[19] The Court argued that, because punitive damage awards reflect moral judgments, they are like criminal punishments set by legislatures.[20] Of course in 1989, the Court held in *Browning-Ferris* that punitive damage awards were not criminal penalties and therefore could not be reviewed under the Eighth Amendment.[21] However, both punitive damage awards and criminal penalties share something in common: the Due Process Clause of the Fourteenth Amendment. In the context of criminal law, the Eighth Amendment is imposed against the states through the Fourteenth Amendment's Due Process Clause; and in the context of tort law, the Due Process Clause is applied directly to the states.

The Due Process Clause, said the Court, constrains the states in criminal law and tort law in related ways. In criminal law the states are prohibited from imposing excessive fines and cruel and unusual punishment, and in tort law they are prohibited "from imposing 'grossly excessive' punishments on tortfeasors."[22] A punitive damage award is *grossly* excessive when it bears no reasonable relationship to the compensatory damage that underwrites it.[23] Penalties that bear no reasonable relationship to underlying compensatory damages violate due process, the court explained in *Gore*, because they (by definition) cannot be anticipated in advance, and hence violate the

19. *Id.* at 1683.

20. *Id.* at 1683–86.

21. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989).

22. *Cooper*, 121 S. Ct. at 1684 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996)).

23. *Id.* at 1691.

basic principle that no one should be punished without prior notice of the penalty.[24]

The Court suggested in *Cooper* that where it has struck down an entire class of punishment it is because it was "grossly excessive" in the same way that a tort penalty could be "grossly excessive."[25] For example, in cases involving the death penalty, life imprisonment, or forfeiture, the Court has used "the same general criteria" that it adopted in *Gore*.[26] Those criteria are: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct.[27]

The Court summarized the three-part test for excessiveness under the following rubric: a penalty violates the Due Process Clause of the Fourteenth Amendment if it is "'grossly disproportional to the gravity of . . . defendants' offenses.'"[28] Let us call this the "grossly disproportionate" standard (the "GD Standard"). The Court may be correct that this norm regulates the limits of the states' power to punish, both in criminal law and tort law. This does not explain why, however, an appellate court should review a trial court's application of the GD Standard de novo.

At one level, it is strange that one even has to pose the question. One might simply argue that if the application of the GD Standard is an *interpretation* of the Constitution, the judge who performs the task of interpretation is obliged to interpret the Constitution, and not defer to another judge's interpretation. But such an argument has never been the view of the Supreme Court and the Court did not invoke it in *Cooper*. Instead, the Court made an argument about

24. *Gore*, 517 U.S. at 562, 574–75.

25. *Cooper*, 121 S. Ct. at 1684.

26. *Id.* at 1684 (citing United States v. Bajakajian, 524 U.S. 321, 324 (1998) ($357,144 penalty excessive for reporting violation); Solem v. Helm, 463 U.S. 277, 290 (1983) (life imprisonment excessive for nonviolent felony); Enmund v. Florida, 458 U.S. 782, 787, 801 (1982) (death penalty excessive for robbery leading to murder); Colker v. Georgia, 433 U.S. 584, 592 (1977) (death penalty excessive for rape) and comparing these cases to *Gore*).

27. *Gore*, 517 U.S., 575–85

28. *Cooper*, 121 S. Ct. at 1684 (quoting *Bajakajian*, 524 U.S. at 334). This explains why, for example, the court might hold that the death penalty is not excessive in the case of murder, or why a punitive damage award of $5 billion is not excessive in the case of a tort resulting in a $2 billion loss.

institutional competency that was both prudential and based somewhat in the legal process tradition.[29]

The Court began its justification of de novo review by observing that the only issue at stake was the review of the trial court's determination that a tort-based punishment was not grossly excessive according to the Fourteenth Amendment.[30] The Court's argument for de novo review must be read against a background in which district court judgments generally are treated under the abuse of discretion standard under Federal Rule of Civil Procedure 59. Under Rule 59, the district court may order a new trial or offer a remittitur.[31] When considering a Rule 59 motion challenging the compensatory or punitive damages awarded by the jury, the court must decide whether the award is against the weight of the evidence or excessive given state law. A typical common law test for excessiveness in punitive damages is that the award "shocks the judicial conscience" or is unreasonable in light of the punitive and deterrent purposes of the award. There might be other state statutory limits as well, although it is not clear whether these would properly be raised under Rule 8, Rule 59, or Rule 60 of the Federal Rules of Civil Procedure, or perhaps simply imposed by the court as part of its duty under *Erie*.[32]

29. The theory of "institutional competence" propounded by the Legal Process School held that "there could be a kind of natural, functional correlation between different kinds of disputes and different kinds of institutions, so that the categories of dispute could be matched up with the kinds of institutional procedures corresponding to them." Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561, 594 (1988).

30. *Cooper*, 121 S. Ct. at 1685.

31. *See* Colleen P. Murphy, *Judgment As A Matter of Law on Punitive Damages*, 75 TUL. L. REV. 459, 462–64 (2000).

32. This issue has arisen frequently with regard to the failure to plead statutory caps. *See, e.g.*, Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987) (statutory limitation on professional negligence may be pled postverdict under Rules 59 and 60); Ingraham v. United States, 808 F.2d 1075 (5th Cir. 1987) (statutory limitation on professional negligence must be pled under Rule 8 or waived); Jakobsen v. Mass. Port Auth., 520 F.2d 810 (1st Cir. 1975) (statutory limitation on Port Authority liability should have been pled as an affirmative defense). The Supreme Court has not answered this question. *See* Taylor v. United States, 485 U.S. 992 (1988) (White, J., dissenting). The most recent treatment of the question anticipated the court's comments in *Cooper*. In *Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995), the defendant, a municipality, moved under Rule 59 to limit its liability under a state law capping municipal liability at $200,000. The district court held that since it had not raised the cap under Rule 8 in anticipation of the judgment, it had waived the limitation. The Fourth Circuit noted that:

> The district court found that the cap is an affirmative defense, which therefore must be raised, according to Federal Rule of Civil Procedure 8(c).... The district court found that because the defense had not been raised or tried by the parties, it was waived.
>
> We review a district court's factual findings on a Rule 59(e) motion for abuse of discretion, *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990), but we review the district court's legal holdings *de novo*, *Taylor v. United States*, 821 F.2d 1428, 1430

In a case arising from a Rule 59 motion, the district court's judgment will be reviewed by the appellate court under an abuse of discretion standard.[33] Therefore, when a federal trial judge has to determine whether a punitive damage award "shocks the judicial conscience" under Rule 59, her judgment is reviewed by the appellate court under a lower standard than when she has to determine whether the same award is "grossly excessive" under the Due Process Clause.[34] The procedural basis for this disparate treatment of what otherwise appears to be the same question is that "gross" excessiveness under the Fourteenth Amendment concerns the application of federal constitutional law, and common law excessiveness is a matter of state law.[35]

n.1 (9th Cir. 1987) (*Taylor I*), *cert. denied*, 485 U.S. 992, 108 S.Ct. 1300, 99 L. Ed. 2d 510 (1988) (White, J., dissenting from denial of certiorari) (*Taylor II*).

Westfarm, 66 F.3d at 689. The court, noting the split in the circuits, then determined that it need not decide whether the limitation on liability should have been raised under Rule 8, because the answer was nonoutcome determinative. *Id.* at 690.

These cases raise an interesting question: how ought a state (or federal) statutory cap or ratio on punitive damages enter into a case? The court in *Cooper* seemed to assume that if the defendant wished to take advantage of a cap or statute, she ought to raise it under Rule 59. *See Cooper*, 121 S. Ct. at 1687 n.13. The answer has direct application to the due process issue, since one could argue that the Due Process Clause imposes an "upper cap" on the range of punitive damages that a jury may award, much like a statutory cap. *See, e.g.*, Brief for the Chamber of Commerce of the United States of America, 1999 Lexsee US Briefs 2035, *15–*16 ("the excessiveness inquiry under *Gore* and comparable state-law standards is analogous to the application of a statutory damages cap"). I thank Professor John Goldberg for pointing this argument out to me.

33. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279. n.18 (1989):

> The role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard.

Cooper is in accord. *See Cooper*, 121 S. Ct. at 1684.

34. Furthermore, even when confining itself to a case arising under the Fourteenth Amendment, the court noted that the appellate court was obliged to defer to a trial judge on matters of fact. *Cooper*, 121 S. Ct. at 1685.

35. *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 438 n.22 (1996):

> It is indeed "Hornbook" law that a most usual ground for a Rule 59 motion is that "the damages are excessive." See C. Wright, Law of Federal Courts 676-677 (5th ed. 1994). Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York. See . . . *Browning-Ferris*, 492 U.S., at 279 ("standard of excessiveness" is a "matte[r] of state, and not federal, common law").

Since *Cooper* was handed down, a majority of states courts have used the de novo standard to review a trial court's review of the constitutionality of an award of punitive damages and the abuse of discretion standard to review the trial court's review of a punitive damage award under the state's common law excessiveness standard. *See* Cent. Bering Sea Fisherman's Ass'n. v. Anderson, 54 P.3d 271, 277 (Alaska 2002); Romo v. Ford Motor Co., 122 Cal. Rptr. 2d 139, 165 (Ca. Ct. App. 2002); Time Warner Entm't Co. v. Six Flags Over Ga., 563 S.E.2d 178, 183 (Ga.

But what rationale is there for the difference? The Court's explanation did not directly address that gap.[36] Instead, it focused on the unique features of a constitutional norm like the GD Standard. What are those features? The Court noted that the question of whether a punishment is proportionate is like the question of whether a police officer had reasonable suspicion or probable cause.[37] In both cases, the norm cannot be articulated except through application to the facts of the case. There are three reasons for this. First, gross excess in punishment is a "'fluid concept that takes [its] substantive content'" from the context in which it is being assessed.[38] Second, a standard like gross excess takes its "content" not only from context but "'only through application.'"[39] Third, de novo review of such a constitutional standard "'tends to unify precedent and stabilize the law.'"[40] This argument takes one of the primary practical features of the GD Standard—that in order for a punishment to be fair, it must be comparable to other punishments awarded for similar wrongs, and that comparability must be knowable in advance—and marries it to a claim of comparative institutional competency—that the appellate courts are in the best position to engage in broad comparisons across the federal system. It roots the argument for de novo review of judgments about the Due Process Clause in pragmatic concerns.

But there is still a nagging question: if the right way to apply the GD Standard to jury verdicts is de novo review (for the reasons described in the previous paragraph), why not insist on de novo review when appellate courts review district court judgments under Rule 59? Everything that the Court argued concerning the pragmatic advantages of de novo review when inquiring into the gross excess of a penalty could be argued about the inquiry into whether a penalty is so excessive that it shocks the judicial conscience. As Justice Ginsburg put it in her dissent, the Court's opinion now "requires lower

Ct. App. 2002); Stroud v. Lints, 760 N.E.2d 1176, 1180 (Ind. Ct. App. 2002); Mosing v. Domas, 830 So. 2d 967, 970 (La. 2002); Baker v. Nat'l State Bank, 801 A.2d 1158, 1162–63 (N.J. Super Ct. App. Div. 2002); Leisinger v. Jacobson, 651 N.W.2d 693, 696 n.2 (S.D. 2002). *But see* Diversified Holdings L.C. v. Turner, 2002 UT 129 ¶ 4 (holding that de novo review should be used for review under federal and state standards).

36. The Court states simply that "[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination under an abuse-of-discretion standard.'" *Cooper*, 121 S. Ct. 1684.

37. *Id.* at 1685 (citing Ornelas v. United States, 517 U.S. 690 (1996)).

38. *Id.* (quoting *Ornelas*, 517 U.S. at 696).

39. *Id.* (quoting *Ornelas*, 517 U.S. at 697).

40. *Id.* (quoting *Ornelas*, 517 U.S. at 697–98).

courts to distinguish between ordinary common law excessiveness and constitutional excessiveness."[41] The point is not that the Court's argument for de novo review is unpersuasive, given the premise that punitive damages are punishment. The point is that it proves too much: if de novo review is such a good idea, why isn't it required for all federal appellate review of the excessiveness of punitive damages?[42]

There is no way to answer this question without bringing in the Seventh Amendment, which is the missing piece in the *Cooper* story. The question of whether a punitive damage award is excessive under state law is a question of fact, and the Seventh Amendment severely restricts a reexamination of any finding of fact by the federal courts.[43] In *Gasperini v. Center for Humanities, Inc.*,[44] the Court held that appellate review of a federal trial court's refusal to set aside a jury verdict as excessive is reconcilable with the Seventh Amendment if "appellate control [is] limited to review for 'abuse of discretion.'" *Cooper* was not supposed to modify *Gasperini*, which placed all Rule 59 review under the protection of the Seventh Amendment:

> We agree with the Second Circuit, however, that "[f]or purposes of deciding whether state or federal law is applicable [under the Seventh Amendment], the question whether an award of *compensatory* damages exceeds what is permitted by law is not materially differ-

41. *Id.* at 1693.

42. In this context it is useful to recall Justice Kennedy's early plea for uniform standards if the Supreme Court was to engage in substantive due process review of punitive damages:

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

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 466–67 (1993) (Kennedy, J., concurring). The problem is, what Justice Kennedy argues about due process is, in theory, no less true about remittitur.

43. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

44. 518 U.S. 415, 419 (1996); *see also* Hetzel v. Prince William County, 523 U.S. 208, 211–12 (1998) (per curiam) (Court reaffirming that the Seventh Amendment does not permit the outright reduction of an excessive jury award (citing *Gasperini*, 518 U.S. at 433)).

> ent from the question whether an award of *punitive* damages exceeds what is permitted by law."[45]

The short answer as to why excessiveness under state law cannot be treated like excessiveness under the Constitution is not that the standards might be different (they may not be) or that de novo review of Rule 59 judgments might not benefit from "interpretation through application" (it might). The reason is that the Seventh Amendment will not permit it.

The Court recognized that, until its decision in *Cooper*, many observers thought that the Seventh Amendment applied to cases like *Haslip* and *Gore* and that federal trial courts were engaged in the same sort of project when they reviewed punitive damages under Rule 59 and then the Fourteenth Amendment. In *Cooper* the Court set the record straight:

> Because the jury's award of punitive damages does not constitute a finding of "fact," appellate review of the District Court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent.... Our decisions in *Gasperini* and *Hetzel*, both of which concerned compensatory damages, are not to the contrary.[46]

It is true that both *Gasperini* and *Hetzel* raised questions about the excessiveness of compensatory damages under Rule 59 only. So it remained a logical possibility that, *if* punitive damage awards were not facts when viewed from the perspective of due process, *and* the Seventh Amendment requires that appellate courts use an abuse of discretion test when they review district court judgments relating to facts, *then* appellate review of whether a punitive damage award violates the Fourteenth Amendment would not be governed by the Seventh Amendment. The Court seized this logical possibility, and thereby provided an answer to critics (such as Justice Ginsberg in dissent) who would otherwise have demanded an explanation as to why the Court had, until now, treated punitive damages very differently from criminal punishment imposed by the state.[47] But, of

45. *Gasperini*, 518 U.S. at 435 (alteration in original) (quoting Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1012 (2d Cir. 1995)).

46. *Cooper*, 121 S. Ct. at 1686.

47. And what about appellate review of whether a punitive damage award is excessive under state law? The Court did not answer this question (it was not before it), but hinted at a solution: if the state treats the question of excessiveness as a matter of fact—as indicated, perhaps, by its adoption of the term "remittitur"—then the federal court should treat the punitive damage award as a factual finding for purposes of Rule 59. I admit that this is a speculative claim. It is based on note 10 of the majority opinion:

course, to make this argument stick, the Court had to explicitly state—and justify—the somewhat novel view that when juries assessed punitive damages, they were not engaged in fact-finding.

B. The Negative Argument: Punitive Damage Calculations by Juries Are Not "Seventh Amendment" Facts.

The positive component of the Court's argument was that punitive damages are punishment imposed by the state, and, as punishment imposed by the state, ought to be treated like other state-imposed punishment in questions of due process under the Fourteenth Amendment. The argument for this was partially one of family resemblance (both criminal penalties and tort penalties are tested under the GD Standard) and one of pragmatism (the GD Standard works best when appellate courts review trial court applications of it de novo). The negative component of the Court's argument was that punitive damage awards are not findings of fact. That argument was raised in order to disable the Seventh Amendment argument.

The first component of the Court's argument posited that punitive damages are more similar to penalties in criminal law than tort awards, which are based on "concrete" fact.[48] The second component posited that punitive damages judgments are more similar to findings of law than findings of fact.[49] The decision as a whole relied on two contrasts: (1) factual loss vs. punishment and (2) findings of fact vs. legal findings. Placed alongside one another, it is obvious that the idea of a "fact" is doing different sorts of work in each contrast. In the former, damages based on "fact" are awarded in order to replace the things the private litigant has lost, and damages that "punish" are

> Respondent argues that our decision in *Honda Motor Co. v. Oberg* . . . rests upon the assumption that punitive damages awards are findings of fact. In that case, we held that the Oregon Constitution, which prohibits the reexamination of any "fact tried by a jury," . . . violated due process because it did not allow for any review of the constitutionality of punitive damages awards. Respondent claims that, because we considered this provision of the Oregon Constitution to cover punitive damages, we implicitly held that punitive damages are a "fact tried by a jury" . . . . It was the Oregon Supreme Court's interpretation of that provision, however, and not our own, that compelled the treatment of punitive damages as covered.

Id. at 1686 n.10 (citations omitted).

48. *Id.* at 1683. What is a concrete fact? A fact "'which presents a question of historical or predictive fact, see, *e.g.*, [*St. Louis, I.M. & S.R. Co. v. Craft*, 237 U.S. 648, 35 S.Ct. 704, 59 L.Ed. 1160 (1915)], the level of punitive damages is not really a 'fact' 'tried' by the jury.'" *Cooper*, 121 S. Ct. at 1686 (quoting *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting)).

49. *Id.* at 1683–84.

awarded to promote public policy. In the latter, conclusions that are within a layperson's competency are deemed factual while conclusions requiring the skills of the court are deemed legal.

The Court seemed to be assuming that there is a common element in the factual nature of private redress and the special range of jury decisionmaking protected under the Seventh Amendment. What is the common element? It seems that the Court's answer is that, like the calculation of compensation, the determination of a fact by a jury does not employ moral concepts or reasoning. As the Court said in setting out the first contrast, "a jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."[50] Later, when pressed to explain why, despite the fact that they are awarded by juries, punitive damages are not facts found by juries, the court again invoked morality as the contrast to fact.[51] In fact, the Court's insistence on drawing as sharp a distinction between jury fact-finding and jury moralizing was so strong that it downplayed the vast (and widely accepted) literature that stresses punitive damages' deterrent function,[52] since even admitting that juries might be trying to base their awards on factual determinations such as the costs and benefits of defendants' wrongdoing would bring their decisionmaking too close to the Seventh Amendment. Instead, the Court made a passing reference to various theories of punishment that are not deterrence-based.[53]

To be clear, let me stress that the purpose of this section is not to criticize the Court's holding. I am very attracted to the idea that punitive damages are primarily about moral judgment. And it seems to me for a variety of reasons that appellate review of trial court judgments pertaining to the constitutionality of a jury's punitive damages award ought to be de novo. The purpose of this section is to criticize the reasoning used by the Court that brought it to its salutary

50. *Id.* at 1683 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

51. *Id.* at 1686–87.

52. "Deterrence is probably the most universal rationale [of punitive damages]." David F. Partlett, *Punitive Damages: Legal Hot Zones,* 56 LA. L. REV. 781, 795 (1996) (citing many sources, among them, Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143 (1989) and Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1989)).

53. See *Cooper*, 121 S. Ct. at 1687 (citing Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism,* 42 AM. U. L. REV. 1393, 1436, 1449–50 (1993) (arguing that punitive damages are a form of "expressive defeat" of conduct juries find "morally offensive")).

conclusions. The Court's two arguments, which were detailed above, relied on a single common claim—that whatever juries are doing when they award punitive damages they are not engaging in fact-finding *because* when they calculate a punitive damages award they are engaged in a moral enterprise.

The Court could have reached its holding without drawing a stark contrast between fact-finding and moral judgment.[54] The Court left open the possibility that the special protection extended by the Seventh Amendment to jury verdicts is triggered not by the verdict's function (to compensate) or its method (judgment without moral reasoning), but by the relative absence of legal standards controlling the calculation of the damages, compensatory or otherwise. Under this argument, what distinguishes punitive damages from compensatory damages is not that juries make moral judgments in the former and factual judgments in the latter, but that the calculation of the quantum of compensatory damages is not typically controlled by either statute or constitutional text. Were it to be the case that it were (for example, in the case of a statutory damage cap), then the jury's determination—to the extent that it related to the satisfaction of that legal requirement—would be viewed as a matter of law, not fact, and an appellate court's review of the trial court's treatment of the damage cap would be under a de novo, not an abuse of discretion, standard.[55] The Court did not argue, however, that whether a dam-

54. I thank Professor John Goldberg for pointing out this argument to me.

55. This interpretation of the Court's reasoning for its holding in *Cooper*, albeit attractive, would require further elaboration that the Court does not offer. For example, if the distinction between compensatory damages and punitive damages from the perspective of the Seventh Amendment is not their function but the degree to which each are constrained by legal standards, why does the Court leave open the question of whether a treble damage rule would be reviewed under an abuse of discretion standard?

> We express no opinion on the question whether *Gasperini* would govern—and *de novo* review would be inappropriate—if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury's finding of compensatory damages. This might be the case, for example, if the State's scheme constrained a jury to award only the exact amount of punitive damages it determined were necessary to obtain economically optimal deterrence or if it defined punitive damages as a multiple of compensatory damages (*e.g.*, treble damages).

Cooper, 121 S. Ct. at 1687 n.13; *see also supra* note 32. Second, assuming that the Court's view is that whenever a jury operates within a legally imposed damages computation rule, de novo review is required, why is the due process limit of "gross excessiveness" an example of a legal standard whereas the common law limit of "excessiveness" is not? Finally, assuming that the Court were to provide a satisfactory answer to these questions (by declaring that the application of state damage caps and common law excessiveness review should not be raised under Rule 59), the Court would still have had to explain why, as a historical matter, the Court had not previously characterized the constitutional limitation of due process as a legal constraint on the computation of punitive damages similar to a cap or a ratio. Its answer to this question would seem to be that, until *Gore*, the constitutional due process limit on the computation of punitive

ages calculation by a jury counts as "'fact' within the meaning of the Seventh Amendment's Reexamination Clause"[56] depended on the existence of a precise legal rule or constitutional standard under which it could be reviewed. Rather, what it argued in *Cooper* was that whether a damages calculation by a jury counts as "'fact' within the meaning of the Seventh Amendment's Reexamination Clause" depended on whether the jury was compensating or punishing. The former argument, had it been made by the Court, would have put it on a very different path than the one it pursued.

The problem with an argument that views the jury's tasks of compensating and punishing as mutually exclusive activities is that it explains a distinction that did not seem to be in need of explanation. Until *Cooper*, the most typical response to the question "why is the right to a jury protected under the first clause of the Seventh Amendment?" would have been answered by reference to the second clause of the Seventh Amendment—because it is the unique province of the jury to find facts. As the Court said in *Dimick v. Schiedt*, "[t]he controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts."[57] Since the Seventh Amendment guaranteed that both compensatory and punitive damages would be determined by a jury, and the Seventh Amendment protected all findings of fact in part by requiring appellate courts to review trial courts' judgments deferentially, it seemed obvious that the Seventh Amendment would protect punitive damage judgments as jealously as compensatory awards. That was what Justice Ginsburg concluded when she equated *Gasperini* (in which the jury's compensatory award was reviewed by the appellate court for excessiveness under an abuse of discretion standard) with *Browning-Ferris* (in which the jury's punitive damage award was reviewed for excessiveness under an abuse of discretion standard).[58] The Court's answer was that none of these cases presented the exact problem raised in *Cooper*.

damages was not precise enough to function as a legal constraint. This answer has the virtue of honesty, in that it suggests that *Gore* changed the constitutional status of punitive damage calculations by juries, but it does not say why. If the Court's answer is that because punitive damages were once primarily about compensation and today they are about punishment (as the first paragraph of note eleven seems to suggest), then it falls back into relying upon a historical argument, which, as I show, is unsustainable. If the argument is based on another ground, the Court has an obligation to develop it.

56. *Cooper*, 121 S. Ct. at 1686 n. 11.

57. 293 U.S. 474, 486 (1935).

58. *Cooper*, 121 S. Ct. at 1690.

This response, while technically correct (in *Browning-Ferris* the real debate was over whether the Eighth Amendment would apply to punitive damage judgments and the excessiveness inquiry was conducted under Rule 59),[59] misses the point. Until *Cooper*, the Court had never suggested that punitive damage judgments were not based on the same competency—the ability to judge fact—as compensatory judgments. If anything, the reporters were filled with decisions that suggested otherwise. For example, in *Feltner v. Columbia Pictures Television, Inc.* (which concerned the right to a jury trial for actual damages), the Court illustrated its holding that "[t]he right to a jury trial includes the right to have a jury determine the *amount* of statutory damages" by reference to a litany of classic eighteenth-century cases in which punitive damages were awarded.[60] The reason the *Feltner* Court focused on cases involving punitive damages was that it wanted to emphasize the critical role the jury played in cases where damages were uncertain: "'the common law rule as it existed at the time of the adoption of the Constitution' was that 'in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.'"[61] According to the *Feltner* Court, uncertainty was a feature inherent in compensatory as well as punitive damages, and it was the jury's special competency with facts that gave it the prerogative enshrined in the Seventh Amendment.[62]

The Court was aware of the fact that history, while not directly contradicting its holding in *Cooper*, is in tension with the story it wants to tell about punitive damages. A lot turns on the claim that, although unnoticed and unacknowledged, punitive damage judgments by juries are not matters of fact *in the way that the Seventh Amendment* means fact. Why had this not been noticed until now, given the near conflation of compensatory and punitive damages in so much

59. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 263–75, 279–80 (1989).

60. 523 U.S. 340, 353 (1998) (citing Coryell v. Colbaugh, 1 N.J.L. 77 (1791); Wilkes v. Wood, Lofft 1, 19, 98 Eng. Rep. 489, 499 (C. P. 1763); Huckle v. Money, 2 Wils. 205, 95 Eng. Rep. 768 (C. P. 1763); Genay v. Norris, 1 S.C. L. 6, 7 (1784)).

61. *Id.* at 353 (alteration in original) (quoting *Dimick*, 293 U.S. at 480).

62. It is worth recalling Justice Ginsburg's observation that:

> Punitive damages are thus not "[u]nlike the measure of actual damages suffered," in cases of intangible, noneconomic injury. One million dollars' worth of pain and suffering does not exist as a "fact" in the world any more or less than one million dollars' worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as fact-finding . . . it seems to me the other should be so regarded as well.

Cooper, 121 S. Ct. at 446 (citations omitted).

Seventh Amendment jurisprudence? The Court's answer was that punitive damages themselves had changed; until the twentieth century punitive damages were matters of fact because they served to compensate, not punish. The explanation, which comes late in the decision, is placed in footnote eleven of the decision. It is so important to the Court's overall argument that it is reproduced below:

> Nor does the historical material upon which respondent relies so extensively . . . conflict with our decision to require de novo review. Most of the sources respondent cites merely stand for the proposition that, perhaps because it is a fact-sensitive undertaking, determining the amount of punitive damages should be left to the discretion of the jury. . . .
>
> In any event, punitive damages have evolved somewhat since the time of respondent's sources. Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time. See Haslip, 499 U.S. at 61 (O'CONNOR, J., dissenting); see also Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 520 (1957) (observing a "vacillation" in the 19th-century cases between "compensatory" and "punitive" theories of "exemplary damages"). As the types of compensatory damages available to plaintiffs have broadened . . . the theory behind punitive damages has shifted towards a more purely punitive (and therefore less factual) understanding. Cf. Note, 70 Harv. L. Rev., at 520 (noting a historical shift away from a compensatory—and towards a more purely punitive—conception of punitive damages).[63]

The Court was not saying, I think, that the Seventh Amendment's Reexamination Clause once covered punitive damages and stopped at some point (perhaps around 1900).[64] I think its argument was simply that, to the extent that the *constitutional* dimension of a punitive damage award is triggered by punitive damages when awarded in order to punish, deter, or express moral condemnation, punitive damage judgments by juries in the nineteenth century raised relatively few constitutional concerns since the vast bulk of those judgments were designed to compensate plaintiffs for intangible harms such as pain and suffering. If this were true, then the failure of the Court or others to have seen that an appellate court could not review a trial court's judgment about the excessiveness of punitive

63. *Id.* at 1686 n.11 (some citations omitted).

64. Although if the court was making this argument, it would be an interesting application of Lessig's "*Erie* Effect" theory of legal translation. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

damages in the same way would have been understandable, and would explain why so many lawyers still hold the confused idea that punitive damage verdicts should be treated under the Due Process Clause like judgments relating to concrete losses.

The Court's historical account about the two different functions of punitive damages in 1850 versus 1950 is an important part of its overall argument, because without it, the Court would have been in the awkward position of having created a distinction—jury judgments that "are about facts" versus jury judgments that are "about morality"—that solves a problem that one might think the Court invented. Nonetheless the Court still needed to explain why it chose to treat jury judgments that are labeled "punitive damages that violate the Fourteenth Amendment" differently from every other type of jury judgment—including some that are excessive only under common law standards. The Court's answer, underwritten by footnote eleven, was, in essence, that punitive damages are now more frequently about morality than before, and that juries, although asked to do the job, are not as competent at moral judgment as they were (and are) at judging facts (even facts relating to the value of pain and suffering, reputation, or dignity).

II. PAIN, DISTRESS, AND INSULT: THE MANY MEANINGS OF COMPENSATION

The only problem with footnote eleven is that it is wrong. The idea that punitive damages once performed a compensatory function was based on two arguments, one historical and the other doctrinal. The historical argument looked to the statements found in nineteenth-century opinions and treatises that say that the reason punitive damages were awarded in tort cases was to compensate for intangible injuries such as humiliation, sense of insult, and other forms of mental anguish. The doctrinal argument compared the set of compensatory damages available to a typical plaintiff in the nineteenth century to the expanded set available to a plaintiff today. It notes that the intangible injuries punitive damages addressed in the nineteenth century are compensable under contemporary categories of personal injury, such as emotional distress, loss of enjoyment of life, and the like. The doctrinal argument concludes that, since punitive damages are no longer needed to do what they once did, they must be awarded for something else—punishment and deterrence.

The doctrinal argument depends on the historical argument, and the historical argument stands or falls on the strength of the evidence that punitive damages were awarded in the nineteenth century to compensate for pain and suffering damages. What is the evidence?

The Court in *Cooper* relied heavily on two sources for its claim. The first was Justice O'Connor's dissent in *Haslip*, where she stated that punitive damages were awarded to fill a "gap" created by the fact that in the past, "compensatory damages were not available for pain, humiliation and other forms of intangible injury."[65] The second was a student note published in the Harvard Law Review in 1951.[66] It should be noted that in *Haslip,* Justice O'Connor relied (again) on the 1951 Harvard Law Review note and Redden's *Punitive Damages*, a leading treatise.[67]

The Harvard note and the Redden treatise tell a story in which punitive damages were clearly awarded as compensation for "wounded feelings" in the eighteenth and early nineteenth centuries, a situation that was necessitated by the unavailability of noneconomic compensatory damages.[68] The author of the Harvard note commented that during this time, the Illinois courts "restricted 'actual damages' to out-of-pocket pecuniary loss and did not include intangible harm."[69] Yet both the Harvard note and Redden describe the law's attitude towards punitive damages as one of "confusion" between compensation and punishment.[70] To be sure, both texts claim that the confusion was cleared up by the end of the late nineteenth century, because of the broadening of actual damages to include intangible harms.[71] The story these texts tell, relied upon by the court in *Cooper*, is one in which punitive damages grew out of one function (compensating intangible injury) into another (punishment) because the conception of personal injury in nineteenth-century America grew broader and more sensitive to psychological harm. One might say that it is a story where "law follows function."

65. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991).

66. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1951).

67. K. REDDEN, PUNITIVE DAMAGES (1980).

68. *Id.* § 2.3(A); Note, *supra* note 66, at 519-20.

69. Note, *supra* note 66, at 520.

70. *See* REDDEN, *supra* note 67 § 2.3(B) (discussing Boston Mfg. Co. v. Fiske (1820); Wiggin v. Coffin (1836)); Note, *supra* note 66, at 519 (discussing *Merest v. Harvey* (1814)).

71. REDDEN, *supra* note 67, § 2.3(B) ("[The mid-nineteenth century was] to witness an almost total eclipse of the compensatory function precedent to, although very nearly contemporaneous with, the growing incidence of actual damage recovery for mental suffering"); Note, *surpa* note 66, at 520.

The law follows function argument has a certain pedigree. It can be traced back to the debate in the middle of the nineteenth century between two of America's leading scholars. Theodore Sedgwick (a practicing lawyer and an editor) and Harvard's Simon Greenleaf sparred very publicly over punitive damages. Professor Greenleaf argued that punitive damages were a mistake because they confused public and private law functions. Thus, in his very influential *Treatise on the Law of Evidence*, Greenleaf categorically rejected punitive damages.[72] Sedgwick, who wrote an equally influential treatise entitled *A Treatise on the Measure of Damages*, rejected Greenleaf's methods and conclusions.[73] The law, Sedgwick argued in 1847, "permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender."[74]

Sedgwick was right—only a handful of courts opposed punitive damages.[75] But Greenleaf and his defenders were not impressed by the fact that both English and American common law were committed to the concept of exemplary or punitive damages. Their point was that, as Thomas Street argued, it really made no difference what the courts *said*, since "damages which in one jurisdiction are recoverable as exemplary damages are, in another jurisdiction, recovered under the guise of compensatory damages for mental suffering, insult, or outrage."[76] Even Sedgwick had to admit that there was a tendency

72. 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 240 n.2 (16th ed. 1899).

73. According to Perry Miller, Sedgwick considered Greenleaf to be an academic formalist and a "logic chopper." *See* THE LEGAL MIND IN AMERICA 184 (Perry Miller ed., 1962) (quoting Sedgwick). It is tempting to view Sedgwick as a protorealist and antiformalist, but Morton Horwitz cautions against this view. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 83 (1977).

74. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 39 (Arno Press 1972) (1847).

75. At various times between 1860 and 1920, Massachusetts, Colorado, Connecticut, Louisiana, Nebraska, Washington, Michigan, and New Hampshire had rejected punitive damages. *See* 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 358 (9th ed., 1912); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1302 (1993).

76. 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 480 (1906). He noted that in Wisconsin, the same intentional tort was tried three times, twice with jury instructions permitting exemplary damages, and once without, and that the verdict awarded in each trial was the same. *Id.* (citing Bass v. Chicago, etc. R. Co., 36 Wis. 450 (1875); Bass v. Chicago, etc. R. Co., 39 Wis. 636 (1878); Bass v. Chicago, etc. R. Co., 42 Wis. 654 (1881)).

among some states, such as West Virginia, to call damages for pain and suffering *exemplary* damages.[77]

The most famous defense of the Greenleaf position is Justice Foster's opinion in *Fay v. Parker*, which roundly attacks punitive damages as a "deformity" on "the sound and healthy body of the law."[78] Justice Foster's objection was not that he thought that a jury should not hear evidence of a defendant's proven malice in determining damages. Justice Foster, an avowed opponent to punitive damages, thought it was obvious that sometimes the *amount* of pain and suffering experienced by the plaintiff was a function of the defendant's motive. His opposition to punitive damages stemmed from the fact that they were an impermissible form of "double counting":

> Call them what you may, compensatory in fact, or punitory in their operation; if the same damages are awarded but once the distinction is merely verbal . . . when we tell juries to give the plaintiff what the defendant ought to pay and the plaintiff ought to receive, in view of the wrong and suffering inflicted by the malice, insult, and indignity exhibited by the circumstances of the case.[79]

In fact, Justice Foster was intent on clearing up any misunderstanding about where he and Greenleaf stood. He noted that Sedgwick recruited Chancellor Kent as an ally.[80] Kent, reported Sedgwick, denounced any attempt to "'exclude all considerations of the malice and wickedness and the wantonness'" of the tortfeasor in the calculation of the "'*proper compensation of the victim.*'"[81] Justice Foster argued that Kent's denunciation was not directed at Greenleaf, since Greenleaf would have agreed with the sentiment.[82] Kent was attacking an anonymous writer in the *Law Reporter* who in 1847 argued that "'there would seem to be no reason why a plaintiff should receive greater damages from a defendant who has intentionally injured him, than one who has accidentally injured him, . . . *his loss being the same in both cases.*'"[83] Justice Foster was quite angry that anyone would claim the view stated in the *Law Reporter* to be Greenleaf's or his. The view expressed in the *Law Reporter* was "so repugnant to 'social

77. *See* SEDGWICK, *supra* note 75, § 359 (noting that Nevada and Wyoming follow the same practice).

78. 53 N.H. 342, 397 (1872).

79. *Id.* at 361–62.

80. *Id.* at 357, (citing SEDGWICK ON DAMAGES 466 (5th ed.); 1 KENT'S COM. 606 (11th ed.)).

81. *Id.* (quoting 1 KENT'S COM. 606 (11th ed.)).

82. *Id.*

83. *Id.*

sympathy' that it would be monstrous, if it were not, instead, ridiculous."[84] It was, in short, a straw man, and it did not represent the true viewpoint of the opponents to Sedgwick's theory of punitive damages.

The true theory of compensation that Greenleaf held, according to Justice Foster, was quite subtle. It was based on the fact that "an injury to *property* or *character* is totally different from an injury to *feelings*."[85] Compensation for pain should come in two forms. The first is purely subjective: what did the plaintiff experience as a consequence of the injury? The second is intersubjective: what did the plaintiff experience as a consequence of the defendant possessing a certain attitude when the tort occurred? Justice Foster therefore argued that tortfeasors who engage in intentional torts inflict two different injuries when they cause the victim to suffer:

> [I]f A plunges his knife into B and burns his house and accuses him of forgery, and the person and property and reputation of B are injured thereby, such injuries to person, property, and reputation are not spoken of as injuries to the spirit, or soul, or mind. The knife causes pain, but the pain is always taken in the *sense of bodily pain only*; and if we have reference to the mental suffering, the sense of disgrace, the wounded honor, &c., we always go on to describe it by other words than "injuries to person, property, and character."[86]

The distinction drawn by Justice Foster seems easy to accept: physical pain and mental suffering are simply different sorts of hedonic loss. The fear that arises during an assault, for example, is not physical pain because, by definition, it is in *anticipation* of physical contact and pain.[87] But just because there is a difference between physical pain and mental suffering does not mean that mental suffering was "in fact" what punitive damages were compensating. To see why, recall that the tort of assault was one of the earliest torts.[88] Courts routinely awarded compensatory damages for mental suffering throughout the nineteenth century. And while courts routinely awarded punitive damages in addition to compensatory damages in assault, there is no evidence to suggest that they were awarding punitive damages (when they awarded punitive damages) in order to satisfy a functional need that could not be fulfilled by existing doc-

84. *Id.* at 360.

85. *Id.* at 358.

86. *Id.* at 359 (emphasis added).

87. *See* RESTATEMENT (SECOND) OF TORTS §§ 21 cmt. c, 24 cmt. c, 29 cm.t a, 905 cmt. e.

88. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 10 (4th ed. 1971) (citing cases from fourteenth- and seventeenth-century England).

trinal categories. In fact, it appears that courts had no trouble distinguishing between mental suffering (which was the basis of awarding damages to compensate the victim) and punitive damages (which were awarded, but not to compensate the victim). For example, in *Newell v. Whitcher*, the plaintiff was a young blind woman who was the target of threatening sexual demands.[89] The Supreme Court of Vermont held that the defendant's conduct (leaning over the plaintiff "with the proffer of criminal sexual intercourse") was actionable assault and upheld the jury verdict of $225 compensatory damages for mental suffering and $100 punitive damages without comment.[90] If, as Justice Foster argued, punitive damages were needed to make up a gap in the court's ability to recognize and compensate mental suffering, why were the courts able to recognize, measure, and compensate the injury resulting from assault in a case like *Newell*? Under the logic urged by the law follows function argument, assault should have been entirely a matter of punitive damages—and yet the cases reveal just the opposite.

For Justice Foster and Greenleaf, the question was not whether nineteenth-century tort law was able to compensate some forms of mental suffering, but whether the tort law could recognize the mental suffering that was associated with the award of punitive damages. Mental suffering resulting from a "sense of disgrace [or] wounded honor" was in need of punitive damages' crypto-compensatory function, since it would have otherwise been left unremedied.[91] It is crucial to see that the category of mental suffering at issue is not defined so much by its scale (extreme distress vs. minor anxiety) or its connection to physical manifestation ("pure" emotional distress vs. consequential emotional distress), but its etiology. The injury identified by Justice Foster and Greenleaf is one in which the subjective mental state of the defendant changes the subjective experience of the victim. The injury is found not in the insult expressed by the defendant, but in its effect on the victim. In this way, the damages that result from insult are unlike the damages that result from defamation. In defamation, the injury caused by a false statement is to one's reputation, not to one's feelings.[92] According to Justice Foster

89. 53 Vt. 589, 590–91 (1880).

90. *Id.* at 589–91.

91. *See supra* note 86 and accompanying text.

92. *See* RESTATEMENT (SECOND) OF TORTS § 559. More generally, a defamatory statement was a statement that "caused the plaintiff to be shunned or avoided by others . . . lowering her in the esteem of the community or deterring people from associating or

and Greenleaf, the injurious aspect of insulting and humiliating tortuous conduct lay exactly in its reception by the victim.[93]

Once one defines the precise contours of the type of injury that the "punitive damages equals compensation" camp describes as the primary focus of punitive damages in the nineteenth century, it is clear that, on one descriptive level, it was correct: the tort law did not recognize as a separate compensable form of mental suffering the hedonic loss flowing from being subjected to insult and disgrace. If it were really the case that the law viewed such losses as palpable in the same way that it viewed physical pain or the mental suffering caused by assault, then the law follows function argument would be strengthened by evidence that the law came to recognize such damages as palpable damages for which compensation ought to be paid. As I will show below, however, there is very little evidence that the common law ever revealed a suppressed desire to recognize such a category of hedonic loss, either in the nineteenth century or even later, under the tort of the intentional infliction of emotional distress ("IIED").

As an initial matter, the evidence that any court conceived of "insult" as a compensable category in tort in the nineteenth century is ambiguous at best. For example, in 1872 the Wisconsin Supreme Court went as far as distinguishing between two types of compensatory damages: those which may be recovered for "actual" loss (which includes "loss of time, bodily pain and suffering, impaired physical or mental powers, mutilation and disfigurement, necessary expenses of surgical and other attendance,") and those for "injuries to the feelings" (which includes "the insult, the indignity, the public exposure and contumely;"); however, this second category was only available if the defendant was "animated by a malicious motive."[94] But in 1875

dealing with her." DAN B. DOBBS, THE LAW OF TORTS § 403 (2000). This has been understood to mean *false* statements that lead others to believe reputation-harming false things about the victim. Insults, of course, may be hurtful even if they are believed by no one. The common law of defamation left some conceptual space for defamatory statements that were neither true nor false. *See* Burton v. Crowell Pub. Co., 82 F.2d 154 (2d Cir. 1936) (plaintiff was photographed in way that was grotesque but obviously unrealistic; court found that falsity was not an element of defamation).

93. This is why a number of courts in the nineteenth century held that a plaintiff who provoked a defendant's immoral and illegal act could only recover mitigated punitive damages, regardless of the evidence the plaintiff might have as to the actual emotional distress that the defendant's wrongdoing may have caused, as evidenced by the fact that the defendant would still be obliged to pay full compensatory damages. *See infra* note 162 and accompanying text.

94. Wilson v. Young, 31 Wis. 574, 582 (1872). Unlike the New Hampshire Supreme Court, the Wisconsin Supreme Court had no trouble adopting Justice Foster's theory of the varieties of compensatory damages *and* also awarding punitive damages:

the court reversed itself, noting that in trying to understand Sedgwick, it had grown confused.[95] It now understood that Sedgwick had meant to distinguish between:

> "[T]he mental suffering produced by the act or omission in question: vexation: anxiety:" which he holds to be ground for compensatory damages: and the "sense of wrong or insult, in the sufferer's breast from an act dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade, or insult," which he holds to be ground for exemplary damages only.[96]

The former category, something that Greenleaf's nemesis was more than willing to concede, was entirely a matter of compensation, since "vexation" and "anxiety" are mental deprivations, that are not, in the end, a function of the tortfeasor's state of mind.[97] The latter category, on the other hand, might be. It was this second category about which Sedgwick was skeptical.

> [I]njuries to the feelings . . . [for] the insult, the indignity, the public exposure and contumely, and the like . . . [which] unlike those for mere personal and bodily injury . . . can only be recovered when the aggressor is animated by a malicious motive–when there is an intention on his part to outrage the feelings of the injured party. [Yet] the right to recover exemplary damages rests upon precisely the same grounds.

Id. (citing SEDGWICK ON DAMAGES at 33) (emphasis added).

95. Craker v. Chi. & N.W. Ry. Co., 36 Wis. 657, 677 (1875).

96. *Id.* (quoting SEDGWICK, MEASURE OF DAMAGES at 35).

97. A tortfeasor's state of mind may add to or increase a plaintiff's vexation or anxiety (I would be more afraid if I knew that my assailant's purpose was to kill me and not just injure me), but that is just to say that victims rationally attribute a greater probability of suffering an injury to situations where the tortfeasor has exhibited a proportionately greater ability to inflict the injury. Emotional suffering resulting from a rational response to a threat is not a response to insult but to threat.

There is a middle ground between Greenleaf's and Sedgwick's positions, which is that Sedgwick is correct as a matter of theory, but that Greenleaf is right as a matter of practice. That is to say, that the mental suffering called "anxiety" and "vexation," which is the subject of compensatory damages, is distinct and separate from the wrong of "insult" and "humiliation," which is itself not an injury but might produce "anxiety" and "vexation," but that there is no way for juries to separate the two in practice. In *Craker* the court made just this argument:

> [Of course] mental suffering, vexation and anxiety are subject of compensation in damages. And it is difficult to see how these are to be distinguished from the sense of wrong and insult arising from injustice and the intention to vex and degrade. . . . But if there be a subtle, metaphysical distinction which we cannot see, what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental suffering and his sense of wrong–so much for compensatory, and so much for vindictive damages? . . . If possible, juries are surely not metaphysicians to do it.

Id. at 678.

There was a reason for the court's willingness to fudge the border between compensatory and punitive damages, even in the teeth of Sedgwick's distinction: the defendant in this case was a railway, and at the time the case was brought, Wisconsin, like many states, would not have allowed the plaintiff to recover punitive damages against the railway in respondeat superior at all. So, if evidence of the defendant's employee's malice was to be properly placed before the jury, it could not be in order to measure punitive damages based on the employee's subjective state of mind.

Of course, one might argue that the absence of any explicit characterization of the "sense of wrong or insult, in the sufferer's breast from an act dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade, or insult" as *compensable* mental suffering in the nineteenth century proves nothing, since it was exactly the absence of judicial recognition that forced these damages to travel under the guise of punitive damages. But that is not exactly correct, as the two cases from Wisconsin illustrate. Furthermore, legal scholars in the nineteenth century were already developing a contemporaneous version of the law follows function argument. Thomas Street took the position that Greenleaf was ultimately correct in that the "true goal" of tort law is to compensate only, but that arguments like the one made by Justice Foster were premature:

> What seems really to have happened here, is that in the course of legal development the law of damage has outstripped the conception of legal wrong. . . .
>
> If it had been practicable for the judges to analyze and define for the jury with precision all the elements of legal harm which enter into every case, there would have been no necessity for the recognition of the idea of punishment as a proper end in the administration of the law of civil wrong. But they did not essay this task and . . . [t]he doctrine of exemplary damages answered this end well enough for practical purposes, and hence gained currency. *As our theory of wrong catches up with the law of damage*, the idea of punishment will appear more and more out of place in the civil system, and it may possibly in time altogether disappear.[98]

Street was making a prediction—that someday the tort law would develop completely and no longer need the fiction of punitive damages. He admitted that day had not yet arrived by 1906.[99] But it is crucial to the law follows function argument that such a day must have arrived at some point near the end of the nineteenth century, if the historical claim about the recession of punitive damages' compensatory function is to make any sense. One might argue that Street's prediction has been proven true by the emergence of the tort of IIED. This argument would not have been as helpful to the Court in *Cooper* as would appear at first glance, since even if it were true, it would have left an embarrassing lacuna of at least fifty years.[100]

98. STREET, *supra* note 76, at 488 (emphasis added).

99. *Id.*

100. The tort of IIED is of relatively recent vintage. It was recognized in the Restatement of Torts in 1948, although it had been the subject of intense scholarly speculation before that date. *See, e.g.*, Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936). The argument made by the Court is that punitive damages ceased

Regardless of its theoretical value, the argument has a worse defect: it is simply wrong as a doctrinal matter. The early punitive damages cases were not proto-IIED cases, and one would have to stretch the doctrine far out of shape to fit those cases into IIED as it has come to be known in this century.

IIED is actionable when the defendant (1) causes severe emotional distress, (2) intentionally or recklessly, (3) by extreme and outrageous conduct.[101] There is no question that IIED is a tort in which punitive damages are available—as an intentional tort, proof of the underlying tort creates a set of circumstances where the predicate of punitive damages would be proven as well. But that is not relevant to the issue at hand. The question is whether the torts that were brought under the rubric of punitive damages *before* the tort of IIED was recognized were torts that today would be recognized as satisfying the elements of the tort defined in Restatement (Second) of Torts § 46.

The historical record suggests that the answer would be "no." It is true that many of the cases involving common carriers—especially railroads—that were brought throughout the end of the nineteenth century and the early part of the twentieth century look like primitive versions of IIED.[102] Here, of course, there is an entirely different possible explanation, which is that the tort law had already recognized that common carriers, as well as innkeepers, had elevated duties to the public. As Dobbs noted, "[t]he special liability of carriers was somewhat peculiar and courts today might well conclude that liability for a carrier's insult alone is no longer justified because more finely tuned rules now apply to all defendants."[103] The tort of IIED is distinct from the liability of common carriers and innkeepers because

serving a compensatory function by the end of the nineteenth century because the interest for which they insured compensation—wounded feelings—was now deemed compensable under personal injury law.

101. *See* RESTATEMENT (SECOND) OF TORTS § 46.

102. For example, railroads and trolley companies were held liable for, among other things, "wrongfully ejecting passengers; carrying passengers past their stations; accosting patrons in insulting fashions; failing to stop when signaled; failing to care for known sick; refusing to carry the blind; allowing insults and fights; willfully delaying of passengers; and obstructing the tracks." Alfred G. Nichols, Jr., Comment, *Punitive Damages in Mississippi—A Brief Survey*, 37 Miss. L.J. 131, 138 (1965) (citations omitted). Consequently, one of the most important debates surrounding punitive damages at the end of the nineteenth century and the beginning of the twentieth was whether corporations should be held liable for the intentional and insulting conduct of their agents. *See* Seymour D. Thompson, *Liability of Corporations for Exemplary Damages*, 41 CENT. L.J. 308, 309 (1895).

103. DOBBS, *supra* note 92, § 303.

of the requirement that the defendant cause *severe* emotional distress through *outrageous* behavior.

Perhaps, seen through the eyes of nineteenth-century legal culture, the acts that led to the award of punitive damages were not merely insulting (which is how we may view them today), but were experienced, within the culture in which they took place, as giving rise to extreme emotional responses. Barring a full historical and sociological study of the meaning of "insult" in nineteenth-century America, the next best way to test this hypothesis would be to look at the cases that Street chose for his chapter on punitive damages in his treatise.[104] It was in this book that Street propounded the argument to which I referred above—that, in theory, the law should be able to describe hedonic loss so precisely that the full compensation of those losses would render punitive damages unnecessary.[105] The chapter on punitive damages selects nine exemplars from English and American tort law in which "the assessment of exemplary damages . . . illustrate[s] the steps by which the doctrine has taken shape."[106] Given this view, one might think that the examples chosen by Street would illustrate his argument. If his prediction was that one day the tort law's theory of wrong would "catch up" with the compensatory ideal, and one believes that the theory of wrong to which he was referring concerned the wrong of IIED, then one would think that we should be able to map the early punitive damages cases selected by Street onto the modern tort of IIED.[107] So a brief review of the nine cases is warranted.

1. *Huckle v. Money* (1763):[108] In this well-known early punitive damages case, the defendant was the "king's messenger," or, in other words, the government of England. The King had arrested the plaintiff, a printer, because he had printed a newspaper critical of the Crown's policies. Despite the fact that the plaintiff had been treated courteously while in custody, the court found that punitive damages were allowable.

104. One of the best attempts to do something like this, with a focus on the different ways private law has allowed compensation for insult in Germany and France (but not the United States) is James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000).

105. STREET, *supra* note 76, at 479, 488–89.

106. *Id.* at 483.

107. Nor is Street's sample set idiosyncratic. Many of the nine cases are part of the usual list which appears in classic and modern scholarship on punitive damages.

108. 95 Eng. Rep. 768 (K.B. 1763).

2. *Tullidge v. Wade* (1769):[109] Like many early punitive damages cases, this was a case against the defendant for the seduction of the plaintiff's daughter. The court stressed that the damages were for the public "insult" expressed by the defendant's act.

3. *Merest v. Harvey* (1814):[110] The plaintiff was a gentleman and the defendant was a magistrate and a member of parliament. The defendant asked to join the plaintiff's shooting party, and upon being refused, insulted the plaintiff. The court stressed that punitive damages in this case should be seen as a substitute for dueling.

4. *Sears v. Lyons* (1818):[111] The defendant trespassed on the plaintiff's farm and poisoned his chickens. The court said that the jury could "consider also the object with which it [the poisoned barley] was thrown" and award punitive damages in excess of the replacement value of the livestock.

5. *Warwick v. Foulkes* (1844):[112] This was another case of false imprisonment, although today it would be called abuse of process. The defendant charged the plaintiff with a felony and then recanted his accusation at trial. The court held that the defendant's "persistence" in maintaining this false charge could be taken into account to warrant the award of punitive damages.

6. *Emblen v. Myers* (1860):[113] The defendant wanted the land owned by his neighbor, the plaintiff. The defendant arranged to have two old houses pulled down on his own property in such a way that they fell onto the plaintiff's property, destroying the plaintiff's stable. The court approved an instruction which allowed punitive damages if the defendant acted "with a high hand."

7. *Borland v. Barrett* (1882):[114] The defendant had been assigned seats in a hotel dining room for a long period of time. When he returned from a trip, he discovered the plaintiff in his wife's seat. Upon the plaintiff's refusal to vacate the seat, the defendant hit the plaintiff over the head with a bottle of sauce and an ugly scene ensued. The jury was instructed that it may award punitive damages.

109. 95 Eng. Rep. 909 (K.B. 1769).
110. 129 Eng. Rep. 761 (1814).
111. 171 Eng. Rep. 658 (1818).
112. 152 Eng. Rep. 1298 (1844).
113. 158 Eng. Rep. 23 (1860).
114. 76 Va. 128 (1882).

8. *Smith v. Holcomb* (1868):[115] The report of the case, which states that the defendant struck the plaintiff, does not give more detail. The court held that the jury should award punitive damages, since in a case of battery, "[t]he insult and indignity inflicted upon a person by giving him a blow with anger, rudeness or insolence . . . [may] constitute the principal element [of the mental suffering]."[116]

9. *Keyse v. Keyse* (1886):[117] The tort case, which arose in the context of a divorce proceeding, was for the alienation of affections. The plaintiff, the husband in the divorce, sued the defendant, the wife's corespondent, for damages. The court said that the jury was not to "punish at all" but could take into account the destruction of the plaintiff's "happy life" by the defendant.

These cases describe a fascinating variety of circumstances under which punitive damages were awarded, but they do not, in my opinion, describe the functional equivalent of IIED. *Huckle* and *Warwick* would certainly warrant punitive damages today, but not because they are cases of IIED. They are cases of false imprisonment conjoined with an abuse of process, either by the state or a private citizen. While such intentional torts are wrong according to the common law and under applicable civil rights statutes, the *ground* for their being wrong is not that they are forms of outrageous conduct that cause extreme emotional distress (although sometimes they may be just that). One might argue that the real ground for punitive damages in *Huckle* is that "oppressive conduct of government agents" is the insult, not the imprisonment.[118] This would put *Huckle* and *Warwick* on the same conceptual footing as *Merest.* That may be the case, but that still does not mean that the "oppressive conduct" punished in these cases is functionally the mental suffering for which compensatory damages are awarded in IIED. The injury sustained by the printer in *Huckle*, the criminal defendant in *Warwick,* or the nobleman in *Merest* was not like the injuries that comprise typical horn-

115. 99 Mass. 552 (1868).

116. *Id.* at 554–55.

117. 11 P.D. 100 (1886).

118. Rustad & Koenig, *supra* note 75, at 1287.

> In *Huckle*, a false imprisonment and trespass action against agents of the King, Lord Camden's introduction of the term "exemplary damages" comprised the first use of the phrase as a formal legal doctrine. English courts employed the remedy from that point on to punish and deter the misuse of wealth and power that threatened the eighteenth century English social order.

Id. at 1288–89.

book examples of modern IIED cases, such as the injury suffered by an African American who is subjected to repeated and threatening racial epithets in the course of doing business or a woman who is subjected to repeated and threatening sexual advances.[119]

Sears and *Emblen* are even more troublesome cases for the argument that the injuries once captured by punitive damages are those now addressed by IIED. From a psychological and doctrinal point of view, economic torts are not obviously the most fertile ground upon which to base a claim for extreme emotional distress based on outrageous conduct.[120] Certainly the common law has allowed IIED claims to be based on the intentional destruction of chattel: in *LaPorte v. Associated Independents, Inc.*, the court allowed punitive damages where the defendant maliciously destroyed the plaintiff's dog in her presence.[121] But in a case like that, the intent of the defendant is to produce extreme emotional distress by means of property destruction. In the cases cited by Street, it appears that the defendant's goal was to interfere with the economic interests of the plaintiff. Even if one could presume that the defendant had to have been substantially certain that his destruction of the plaintiff's chattel would evoke an emotional reaction, it seems that the real purpose of awarding punitive damages for poisoning chickens or destroying a barn was to punish the defendant for intentional interference with the plaintiff's interests. In this sense, cases like *Sears* and *Emblen* are analogous to *Cooper*, *TXO,* and *Gore.* There may be many valid reasons to support punitive damages in cases involving willful interference with another's economic interests, ranging from retribution to deterrence, but compensation for emotional distress does not seem to be the right description.

The remaining cases discussed by Street, *Tullidge*, *Borland*, *Smith*, and *Keyse*, could all be viewed as concerning, on one level or another, insults leveled by the defendant towards the plaintiff. When one harms another through sexual impropriety, one holds the other up to social humiliation and ridicule. When one hits another, espe-

119. It is instructive to compare the cases in Street's list with modern cases of IIED. *See, e.g.*, Brown v. Manning, 764 F. Supp. 183 (M.D. Ga. 1991); Ford v. Revlon, Inc., 734 P.2d 580 (Ariz. 1987).

120. Damages for intentional interference with an economic interest may include emotional distress under limited circumstances, usually involving a special relationship or a special vulnerability on the part of the victim. Emotional distress comprises an important component of claims for bad faith breach of insurance contract. *See* Foley v. Interactive Data Corp., 795 P.2d 373 (Cal. 1988).

121. 163 So. 2d 267 (Fla. 1964).

cially in public, one is telling the victim that his social status is so low that the law does not protect him. Marc Galanter and David Luban argue that tortfeasors who assert "undeserved mastery" over tort victims inflict an "injury to honor" that can only be compensated through punitive damages:

> [C]ulpably harming another person or being culpably negligent expresses a false view of the wrongdoer's value relative to that of the victim. Implicitly it says that the victim is a "low" person, the sort of person toward whom one can act in such a manner. Or it says that the wrongdoer is more valuable than the victim, indeed an especially valuable and "high" kind of person, the sort of person who is entitled to take liberties with the well-being of others. Or it says both: the wrongdoer is especially valuable and the victim is the sort of person that it is all right to treat badly. I am high and *you* are low.[122]

The problem with this argument is that it may be an accurate description of the function of punitive damages, both today and in the past, but it does not establish what the law follows function argument needs to prove. It is very likely that the victims in *Tullidge*, *Borland*, *Smith*, and *Keyse* were insulted by the defendants' acts. It is also possible that Galanter and Luban are correct in that the sort of insult experienced by the victims in these cases comes from the defendants' contemptible desire to express mastery over others. But there needs to be a connection between the insult experienced by the victims and the attitudes of the injurers that would support the conclusion that the injury that resulted is functionally identical to extreme emotional distress based on outrageous conduct. It is only this latter claim that would be of any use to someone like Street or Greenleaf. Galanter

122. Galanter & Luban, *supra* note 53, at 1432–33 (citing Jean Hampton, *The Retributive Idea*, *in* JEAN HAMPTON & JEFFRIE G. MURPHY, FORGIVENESS AND MERCY 111, 157 (1988)). To illustrate their point, Galanter and Luban refer back to early punitive damages cases:

> In *Grey v. Grant* [1764] the court upheld a punitive award because "the plaintiff [had] been used unlike a gentleman." The court in *Huckle v. Money* stated that "the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be and generally are, considered by a jury in giving damages." And in *Forde v. Skinner* [1830], the jury was instructed that if the hair of female paupers was cut off in a poor house against their will "with the malicious intent . . . of 'taking down their pride,' . . . that will be an aggravation and ought to increase the damages."

Id. at 1433–34 (alterations in original); *see also* Ellis, *supra* note 3, at 14–15.

> The reported cases from roughly the first quarter of the seventeenth century through the first quarter of the nineteenth century . . . [t]hey included cases of slander, seduction, assault and battery in humiliating circumstances, criminal conversion, malicious prosecution, illegal intrusion into private dwellings and seizure of private papers, trespass onto private land in an offensive manner, and false imprisonment. Diverse as they may have been, all of these cases share one common attribute: they involved acts that resulted in affronts to the honor of the victims.

and Luban did not insist that the reason that punitive damages are justified is because they are a form of compensation for mental suffering. In fact, they argued that punitive damages, although triggered by the defendant's insulting behavior, are not explicable in terms of compensation:

> In our view, awarding compensatory damages alone may not suffice to remedy this injury to honor, but may actually iterate it. The norm of exacting from the wrongdoer compensation equivalent to the victim's loss measures the "deserved" loss of the wrongdoer by the undeserved loss of the victim.[123]

Galanter and Luban did not characterize the wrongs resulting from the defendants' conduct in a case like *Tullidge* or *Borland* in terms of emotional distress because they had no interest in deploying a compensation-based argument. Their view was that the justification for punitive damages is that it is a special form of retribution (what they called "poetic justice").[124] So even if Galanter and Luban are correct and the rationale for the award of punitive damages in many of the early (and even contemporary) cases is that the defendant's conduct inflicted an insult upon the victim, their argument does not support the view that the institution of punitive damages was an early attempt to provide damages for emotional distress.[125]

III. WHAT FUNCTIONS DID PUNITIVE DAMAGES SERVE IN THE NINETEENTH CENTURY?

According to the sources cited by the Court in footnote eleven of *Cooper*, punitive damages once served a compensatory function and now they do not. The injury that was once compensated through punitive damages is hard to specify. The most natural place to look for a description of that injury would be in the arguments made by Greenleaf and his supporters, since they also argued that punitive damages were really just a form of compensatory damages. But as we have seen, there is a gap between Greenleaf's argument and the Court's. The Court's argument, that the law of punitive damages follows the functions it is required to serve under the circumstances of

123. Galanter & Luban, *supra* note 53, at 1433.

124. *Id.* at 1438.

125. If the Galanter and Luban argument could be used to support the law follows function argument, then they would be embarrassed, since, unlike the Court in *Cooper* or the sources it cites, they believe that punitive damages *still* provide damages in response to insult. The whole point of the *Cooper* argument is to draw a distinction between the emotional distress compensation function of the past and the public policy punishment function of today.

the day, is testable. If punitive damages served a compensatory function that is today recognized as a compensable loss, then the earlier function was made unnecessary by changes in the law. The form of injury which Greenleaf claimed was being compensated by punitive damages—the mental suffering resulting from mere insult—is not today a form of compensable injury cognizable under current tort law.[126] Therefore, reliance on Greenleaf cannot help the law follows function argument. It still lacks any empirical support.

Furthermore, there is another reason to doubt the law follows function argument: it requires us to disregard much of what the courts and other commentators said were the functions of punitive damages at that time. The challenge to the Court, if it wants to rely on the sources cited in footnote eleven, is that the record is replete with statements describing the function of punitive damages as some form of punishment or retribution, not compensation for emotional distress.

The positions taken by the majority of courts that adopted the view that punitive damages were punishment are not uniform and I will review them in this Section. However, I must acknowledge the obvious response that the proponents of the law follows function argument would raise at the outset. They could, I suppose, accept that many courts and commentators believed that punitive damages served a punishment function without actually realizing the compensatory function that the damages truly served. Such an argument is not implausible, but it is difficult to disprove. In the face of such uncertainty, the only thing we can do is weigh what the courts actually said they were doing then against what they actually are doing now. On both these counts, the law follows function argument lacks obvious support.

In my opinion, the leading judicial opinions in the mid-nineteenth century reveal a range of rationales for punitive damages, and while it would be difficult to say that the weight of opinion clearly falls to one side or another, it would be even more difficult to say that

126. This is not to say that Greenleaf was wrong. He was not arguing that the law would reclassify the damages awarded under punitive damages as compensatory damages. That is the law follows function argument. It presumes that awarding damages conditioned on the wrongdoer's motive was just a fig-leaf for increasing the final measure of the victim's mental suffering. It is possible that Street, in fact, did hold the "fig leaf" position. I suspect that Greenleaf really did believe that damages conditioned on the wrongdoer's motive were compensatory, and that his dispute with Sedgwick, while merely verbal and nonoutcome determinative in most cases, had important theoretical and practical ramifications.

the weight of opinion supports the view that punitive damages functioned primarily to compensate emotional suffering. The cases can be placed into six categories: (1) compensation for emotional suffering; (2) compensation for insult; (3) personal vindication; (4) vindication of the state; (5) punishment to set an example; and (6) punishment to deter. While these categories overlap to some extent, and the decisions often suggest that more than one rationale is being adopted, the differences between the categories are worth noting.

1. Compensation for emotional suffering. This rationale for punitive damages has been discussed fully in Section II. It could include what today is described as pain and suffering or emotional distress. It is crucial to the argument of the Court in *Cooper* that punitive damages served primarily to secure damages for emotional suffering in the nineteenth century; this would explain why, for so long, courts viewed punitive damages as a matter of fact wholly within the jury's purview. Very few judicial opinions embraced this view. The only major decision was *Fay v. Parker*, discussed above. Furthermore, while it is true that contemporaneous treatises such as Street's promoted this view (as part of the law follows function argument), it is not clear to me that Greenleaf necessarily held this view.

2. Compensation for insult. One of Section II's purposes was to point out that it is possible to see punitive damages as compensatory and yet still reject the court's view in *Cooper* that punitive damages once provided compensation for something which is now recognized under conventional modern categories of compensable emotional distress. That is to say, even if punitive damages did (and still) provide compensation for *insult*, that function may be utterly different from the function of providing compensation for the sort of emotional distress that accompanies shock (in the case of negligent infliction of emotional distress) and extreme emotional distress (in the case of IIED). The loss one suffers when one is insulted may include a hedonic loss, such as embarrassment and humiliation, but not necessarily very much, and certainly not at the level that would rise to compensable emotional distress. One might still demand compensation for insult even if one did not experience a severe emotional or psychological feeling.[127] In both Germany and America

127. Theron Metcalf put it this way:

> The circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room. . . . [T]hat indignity and insult aggravate the accompanying injury; not that the injury, aside from the insult, is greater on account of the plaintiff's malice.

the same expression was used to capture the idea that insult and the feelings of wounded pride that accompany it is itself a loss: victims of insulting conduct would demand "satisfaction" or *Genugtuung* from the defendant. I have explored this idea in much greater detail elsewhere, and for present purposes I will merely note that regardless of whether one views "satisfaction" as a defensible rationale for punitive damages, it is not the same thing to which the Court in *Cooper* refers when it argues in footnote eleven that punitive damages served a compensatory function.[128]

A number of nineteenth-century courts cited compensation for insult as the rationale for the award of punitive damages. One of the clearest explanations for this conception of compensation is set out by the Supreme Court of Michigan in *Detroit Dailey Post v. McArthur.*[129] The case involved the award of punitive damages in a libel case.[130] The court argued that vindictive or exemplary damages (the expression at the time for punitive damages) were awarded by the jury in proportion to evidence of "evil motives," which instantiate the "moral guilt of the perpetrator."[131] The court acknowledged that, although punitive damages varied in direct proportion to the "blameworthiness chargeable on wrong-doers," it would be misleading to say that the damage award was therefore based on the "wrong intent" of the defendant: the award "is to make reparation for the injury to the feelings of the person injured."[132] The feelings to which the court refered were not, however, independent of the moral blameworthiness of the defendant's act.[133] The court argued that our "instincts of common humanity" recognize that an injury inflicted voluntarily is "often the greatest wrong that can be inflicted, and injured *pride and*

Theron Metcalf, *Damages in Actions ex Delicto*, 3 AM. JURIST & LAW MAG. 302–03 (1830) (quoting 3 Wils. 19).

128. *See* Anthony J. Sebok, *Legal Culture and the Desire for Retribution: Punishment in German and American Law* (unpublished manuscript on file with author); Whitman, *supra* note 104, at 1319–24.

129. 16 Mich. 447 (1868).

130. *Id.* at 450.

131. *Id.* at 452.

132. *Id.* at 452–53.

133. For this reason, the Michigan Supreme Court believed that it followed from their view that if the plaintiff was morally blameworthy for having provoked the defendant's intentional tort, the plaintiff could not claim compensation for wounded feelings *even if* the defendant's conduct was nonetheless tortuous and extremely insulting. The plaintiff would be limited to compensation for bodily pain and suffering only. *See* Johnson v. McKee, 27 Mich. 471 (1873).

affection may, under some circumstances, justify very heavy damages."[134]

The reasoning offered by the Michigan Supreme Court reflected a response to the challenge, raised in a number of jurisdictions, that punitive damages were a form of double punishment. Other states followed Michigan's view that the function of punitive damages was to compensate for the losses resulting from insult. Minnesota, for example, explicitly adopted the expression "insult" to explain the source of the wounded feelings for which "punitory" or "exemplary damages" could be awarded.[135] Under the "compensation for insult" conception of punitive damages, punitive damages were not punishment, so there was no double counting. The Court of Appeals of Kentucky noted that nothing barred a widow from suing for the death of her husband, even though the killer might be indicted for a felony: "[t]he recovery, in one case, is for the private injury, and in the other, the punishment is inflicted for the public wrong."[136] The court defended the jury's punitive damage award against the defendant's argument that the jury instructions did not follow the principle that punitive damages were not supposed to compensate.[137] The judge had charged the jury thus: "by punitive damages is meant exemplary damages, by way of smart money, as well as those given by way of compensation."[138] The court argued that there was nothing inconsistent with this charge and its view that punitive damages were compensatory, since:

> The [first set] of damages are allowed as compensation for the loss sustained, but the jury are permitted to give exemplary damages on account of the *nature* of the injury. It is therefore the increase of the damages *resulting from the character of the defendant's conduct* that is denominated punitive or vindictive. [139]

134. *Detroit Daily Post Co.*, 16 Mich. at 453–54 (emphasis added).

135. Minnesota, for example, explicitly adopted the expression "insult" to explain the source of the wounded feelings for which "punitory or "exemplary damages" could be awarded. Lynd v. Picket, 7 Minn. 184, 200–01(1862); McCarthy v. Niskern, 22 Minn. 90, 90–91 (1875).

136. Chiles v. Drake, 59 Ky. (2 Met.) 146, 151 (1859).

137. *Id.* at 153–154.

138. *Id.* at 153.

139. *Id.* at 153–154 (emphasis added). The words in italics contain the heart of the distinction: the court recognized that the "nature" of the injury (the injured feelings of the decedent) is controlled not by the force of the defendant's gunshot but by the immoral motive that led to the gunshot (its "character").

This view was also adopted by the Supreme Courts of Iowa and California.[140]

3. Personal vindication. One of the common expressions for punitive damages in the nineteenth century was "vindictive damages." Vindication is obviously not the same thing as compensation, although one could imagine how, under certain circumstances, the act of vindication might provide, at the same time, compensation for feelings wounded through insult.[141] From an etymological perspective, the word "vindicate" places the act of imposing punitive damages in a very different posture than the act of pursuing compensation. The Latin *vindicare* means to claim, to set free, or to punish.[142] The *Oxford English Dictionary* notes that early uses of the word "vindicate" include "to avenge," "to make or set free" or "rescue," and "to clear from censure."[143] All these senses of the word suggest that punitive damages, when used to "vindicate" the plaintiff, allowed the plaintiff to actively address the defendant, and in doing so, recover or "rescue" his or her honor. In this sense, punitive damages had a slightly different emphasis than in the sense of compensation. First, the implication in the word "vindicate" is that the money received does not replace a loss, but is a means by which the plaintiff's lost honor is returned. Second, it implies that the payment of the money *to* the plaintiff is less important than the imposition of the monetary penalty *on* the defendant. That is why, of course, punitive damages in their vindictive form seem to be as much about punishing the defendant as compensating the plaintiff.

The United States Supreme Court adopted the personal vindication rationale for punitive damages in *Day v. Woodworth* in 1851.[144] The case involved a trespass by a mill owner against the downstream dam erected by another mill owner.[145] There was no personal injury and, in modern terms, no credible claim for emotional distress. Yet the Court allowed the punitive damages.[146] The Court, after noting the controversy surrounding "what are called exemplary, punitive, or vindictive" damages, argued that it is the very intangibility of wrong

140. Wardrobe v. Cal. Stage Co., 7 Cal. 118 (1857); Hendrickson v. Kingsbury, 21 Iowa 379 (1866). *But see* Turner v. N. Beach & Mission R.R. Co., 34 Cal. 594 (1868).

141. I explore this possibility in Sebok, *supra* note 128.

142. 19 OXFORD ENGLISH DICTIONARY 641 (2d ed. 1989).

143. *Id.*

144. 54 U.S. (13 How.) 363 (1851).

145. *Id.* at 363.

146. *Id.* at 370.

that results from lawless action which explains why such damages are set apart from compensatory damages:

> The wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed . . . vindictive rather than compensatory.[147]

The Supreme Court of Illinois explained vindictive damages as awarded "for the malice and insult" attending the wrong where the "jury is not bound to adhere to a strict line of compensation."[148]

4. Vindication of the State. Closely related to personal vindication is the rationale that punitive damages were awarded to vindicate the insult to the state that the defendant expressed through his immoral and intentional tortuous conduct. The meanings and implications drawn from the etymology of the word "vindicate" are left undisturbed when one reads this rationale expressed by the courts, but the interest that is recovered by the act of imposing damages must naturally be restated. As this trial judge in San Francisco put it in his jury charge:

> Where a duty imposed by law is willfully and maliciously refused to be performed, or performed in such a way as to wound the feelings of the person to whom it is owing, the injury partakes more or less of a public character, and extends beyond the mere pecuniary damage sustained by the party against whom it has been committed.[149]

It would appear that the courts that raised the possibility that punitive damages could be awarded to vindicate a violation of the public's rights were not denying that sometimes punitive damages were properly awarded to secure purely private vindication. In fact, it seems that the problem of "public" vindication was raised as a way to limit punitive damages. In both Indiana and Nebraska the Supreme Courts of those states took the position that punitive damages could not be available for actions committed in violation of the criminal law. Thus, a jury instruction that asked for punitive damages to "vindicate the law and punish the outrage upon the person of the

147. *Id.* at 371. Similar reasoning was adopted by the Supreme Court of Louisiana in *Black v. Carrollton Railroad Co.*, 10 La. Ann. 33, 40 (1855).

148. City of Chic. v. Martin, 49 Ill. 241, 244 (1868). It should be noted that the court gave a mix of rationales for vindictive damages, including "to make an example to the community" and "to deter [the defendant] and others."

149. Turner v. N. Beach and Mission R.R. Co., 34 Cal. 594, 598 (1868) (quoting the trial judge). The California Supreme Court overturned the trial judge's instructions but only because the defendant was an employer, not the employee who did the act.

plaintiff" was overturned.[150] According to the Indiana Supreme Court, if a tort was not the subject of criminal punishment, "the various rights in community to personal security" could be protected through punitive damages, but where the criminal law reached, "the state has undertaken to vindicate her own wrongs" and there was no reason why private individuals should take it upon themselves to vindicate the same wrong.[151]

5. Punishment to set an example. Along with the term "vindictive," the other very popular expression for punitive damages in the nineteenth century was "exemplary" damages. The terms "vindictive" and "exemplary" are as different to each other as both are to the term "punitive." "Exemplary" is rooted in the Latin for "example," and according to the *Oxford English Dictionary*, the early usage of the word included both "serving for an illustration" as well as "a penalty such as may serve as a warning."[152] When used by courts, it is clear that exemplary damages were not designed to insure either compensation or vindication, although certainly either or both could have been benefits of exemplary damages. Exemplary damages were primarily designed for the instruction of the public.[153] In *Freidenheit v. Edmundson*, the Supreme Court of Missouri suggested that in a case of trespass to chattel, the court properly instructed the jury to give more than the value of the goods and interest, because "such [additional] damages as would be a good round compensation . . . such as might serve for a wholesome example to others in like cases."[154] The awarding of exemplary damages would of course comfort the plaintiff, but they were not necessarily portrayed as compensation for either emotional distress or insult: "[a]llowing damages for wounded feelings, humiliation, and the like is not equivalent to exemplary damages."[155]

There is some temptation to say that exemplary damages served a deterrence rationale, and obviously there is a great deal of overlap

150. Nossaman v. Rickert, 18. Ind. 350 (1862).

151. Taber v. Hutson, 5 Ind. 322 (1854); *see also* Boyer v. Barr, 8 Neb. 68, 74 (1878) (citing *Taber*).

152. 5 OXFORD ENGLISH DICTIONARY 525 (2d ed. 1989)

153. "[T]he jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489 (1875).

154. 36 Mo. 226, 230 (1865).

155. 3 THOMAS G. SHERMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 1949 (6th ed. 1913).

between the concept of general deterrence and punishment for example's sake. But this would be too crude and hasty a picture of the meaning of exemplary damages. For example, in the 1791 case *Coryell v. Colbaugh* (a case of seduction), the defendant argued that the punitive damages assessed against him (if any) should be very small since he was poor, and, presumably, the compensatory damages alone would be enough to punish and deter him.[156] The court rejected this reasoning, arguing that because the reason to give exemplary damages was to "prevent such offences in [the] future," the jury was "bound to no certain damages, but might give such a sum as would mark [its] disapprobation, and be an example to others" regardless of the defendant's wealth.[157] Not only is this use of exemplary damages clearly a rejection of *specific* deterrence, it suggests that the point of such damages was not to prevent similar acts by allowing future wrongdoers to weigh the cost of their wrongdoing, but to use the past wrongdoing as an opportunity for the community to frame a norm. Making an example of Colbaugh does not prevent future wrongdoing by setting a price but by clearly establishing the seriousness with which the community rejected the conduct in question. One might even describe the phenomenon of exemplary damages as a concrete example of the expressive use of punishment, where punishment is not inflicted to alter criminals' cost-benefit analysis but to alter criminals' sense of what would be tolerated by the communities in which they live every day.[158]

6. Punishment to deter. Given the ubiquity of deterrence as an explicit rationale for punitive damages in contemporary doctrine and scholarship, it is a little surprising that it does not appear more often in the nineteenth century cases. It is perhaps for this reason that the Court in *Cooper* jumped to the conclusion that punitive damages compensated pain and suffering in the early cases. Despite the availability (as described above) of other rationales for awarding punitive damages other than just compensation for mental distress, some courts did in fact adopt deterrence as the rationale for punitive damages. In Maine, for example, both the majority and the dissent in *Goddard v. Grand Trunk Railway of Canada* agreed that the purpose

156. 1 N.J.L. 77 (1791).

157. *Id.* at 78.

158. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

of awarding punitive damages was deterrence.[159] The majority thought that this explained why punitive damages should be awarded against a railway for the intentional torts of its employee: "[w]hen it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before."[160] New York held the same view: "[i]t is only in cases of moral wrong, recklessness or malice that this public consideration applies. In such cases the law uses the suit of a private party as an instrument of public protection, not for the sake of the suitor but for that of the public."[161]

The New York court's rationale was very far from the view that punitive damages were in any way compensatory. It is also very far from the view that they were designed to vindicate. It is difficult to quantify how many courts and commentators actively adopted the deterrence rationale, but it is clear that it was well established by the middle of the nineteenth century, and it was quite prevalent by the beginning of the twentieth century.[162] In any event, its presence in the New York, Maine, and Rhode Island decisions indicates that it would be a great mistake to suggest that punitive damages were serving a primarily compensatory function (of any sort) in the United States in the nineteenth century.

CONCLUSION

In this Article I demonstrated that punitive damages have never served the compensatory function attributed to them by the Court in *Cooper*. In footnote eleven of the decision the Court relied on a claim about the history of punitive damages that is at best misleading and at worst dangerous. While it is true that punitive damages may have served a compensatory function in the early cases, it is misleading to describe that function as directed towards the compensation of the sort of emotional distress which is today captured by categories of

159. 57 Me. 202 (1869).

160. *Id.* at 224. The dissent agreed with the goal of general deterrence but disagreed with its application in the case of respondeat superior. *Id.* at 266. The dissent's view is consistent with the view of the majority in *Hagen v. Providence and Worcester R.R. Co.*, 3 R.I. 88, 91 (1854), which held that, because the purpose of exemplary damages was to "teach the lesson of caution to prevent a repetition of criminality," an employer cannot be held liable in punitive damages for the actions of a servant.

161. Hamilton v. Third Avenue R.R. Co., 53 N.Y. 25, 30 (1873).

162. According to Rustad and Koenig, "[d]uring the initial decades of the twentieth century, punitive damages gained an expanded role in consumer protection." Rustad & Koenig, *supra* note 75, at 1303.

compensation for mental suffering associated with shock or IIED. If punitive damages served a compensatory function, it would have been for a category of injury that is still not considered compensable by contemporary tort law, namely the injury of insult that wounds or dishonors. If these are interests worth protecting—and I believe they may be—there is nothing to be gained by promoting the misleading idea that they are protected today by contemporary damages for emotional distress. Such a claim stretches the doctrine of damages to the point of breakage.

The only reason to ignore the obvious, and to insist on claiming that the interest that punitive damages once did and perhaps still today compensate is "just like" emotional distress, is to provide a historical basis for the claim that the rationale for punitive damages has changed in the last 200 years. The Supreme Court's reason for wanting to believe that the rationale for punitive damages has changed was that it needed to explain what otherwise would be seen as a surprising reversal: for over a century courts and commentators treated punitive damages as if they were properly a matter of factual judgment only. In *Cooper* the Court seemed to reverse that state of affairs and announce that punitive damages require the jury to make a moral, not a factual, judgment.

On the one hand, since I approve of the Court's procedural conclusion—appellate courts should review trial court judgments concerning the constitutionality of juries' punitive damages awards de novo—it should not matter how the Court defends its holding. But I would like to suggest that the historical argument it used to reach its holding is more than misleading, it is dangerous. The implication of the historical claim presented in footnote eleven is that there have been two distinct periods of punitive damages: the early, in which punitive damages served as compensation for emotional distress, and the later, in which punitive damages shorn of their old function found a new role in American law by becoming a device for punishment.

It is dangerous for the Court to promote this view not only because it is false, but because it limits our understanding of what it might mean for punitive damages to punish and compensate. As demonstrated in the previous sections, punishment and vindication were always understood to be two of the primary purposes of punitive damages. But it is even more important to recognize that the courts and commentators who defended punitive damages in the nineteenth century did not see a sharp break between punishment and compen-

sation in private law. As I suggest above, the "compensation for insult" rationale and the "personal vindication" rationale are very closely linked. Juries who were asked to award exemplary damages in order to vindicate the plaintiff were attempting, in my opinion, to give satisfaction to victims in order to help construct their community's moral norms. Any analysis that tries to draw sharp distinctions between the private and public functions of punitive damages will end up mischaracterizing them.

It is no accident, in my opinion, that the *Cooper* decision presents only two choices for how to understand punitive damages. In the Court's eyes the phrase *punitive damages* is a homonym—a written expression with two unrelated meanings. On the one hand, to say that a jury awarded punitive damages in 1850 is to suggest that it awarded compensation for pain and suffering, while on the other hand, to say that a jury awarded punitive damages in 1950 is to say that it punished the defendant in order to deter future wrongdoing. The first use of the term describes a purely factual, backward-looking exercise in private redress, while the second describes a purely normative, forward-looking exercise in public policy. Not only are both caricatures, but the projection of the first as part of a distant past legitimates the free use of the second today. Ironically, although the Court claimed in *Cooper* that its discovery that punitive damages are today about morality, not compensation, it is most likely that in doing so it has promoted a slightly different view. Instead of being about compensation and "looking backwards," the Court has reinforced the idea that courts and juries should feel free to use punitive damages as an instrument of public policy. The public policy that will thus result from modern courts will not be concerned primarily with individual rights or even punishment for the sake of retribution. The public policy guiding the application of punitive damages will be purely forward-looking and dominated by the theory of efficient deterrence. I view this as a dangerous development, although certainly those who think that the only justification for private law is efficiency would welcome it. But for those who believe that tort law has some justification and point other than to serve the end of promoting welfare, the decision in *Cooper* is a step in the wrong direction.