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Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs

Thomas B. Colby[†]

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INTRODUCTION

In many, and perhaps most, modern punitive damages¹

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cases—including those involving mass torts, product liability, consumer fraud, and insurance bad faith—the defendant stands accused of committing an act or engaging in a course of conduct that harmed a large number of people. In recent decades, as this type of litigation has grown more prevalent,² a curious phenomenon has emerged. The plaintiff's attorney, although she usually represents only one (or, at most, a few) of the many victims, will typically ask the jury to impose punitive damages in an amount sufficient to punish the defendant not only for harming the plaintiff, but also for the full scope of harm that its conduct caused to all victims and all of society. As one court has noted, "plaintiffs' lawyers argue[] to the jury in summation . . . that punitive damages should take into account the totality of [the] defendant's wrongful conduct as to all plaintiffs and potential plaintiffs," and that the defendant should be punished for injuring or "kill[ing] thousands of people."³ Along these lines, the attorney will often ask the jury

Article. All errors are, of course, my own.

1. The term "punitive damages" typically refers to damages in excess of the amount necessary to make the plaintiff whole. According to most courts, punitive damages are imposed to punish the defendant for its wrongdoing and to deter the defendant and others from engaging in similar conduct in the future. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Throughout their history, these damages have also been referred to as "exemplary damages," "punitory damages," "vindictive damages," and "smart money," *see* 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* § 2.1(A) (4th ed. 2000), and they have been employed to serve a number of purposes, *see Kemezy v. Peters*, 79 F.3d 33, 34-35 (7th Cir. 1996).

2. For a discussion of the recent upsurge in punitive damages claims in cases of this sort, *see, for example*, David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1261 (1976); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 48-49 (1983); Note, *Developments in the Law, The Paths of Civil Litigation: Problems and Proposals in Punitive Damages Reform*, 113 HARV. L. REV. 1783, 1783 (2000).

3. *In re Joint E. & S. Dists. Asbestos Litig.*, No. CV-87-0537, 1991 WL 4420, at *3 (S.D.N.Y. Jan. 11, 1991) (reviewing and quoting plaintiffs' closing arguments in various asbestos cases); *see also, e.g.*, *Gore*, 517 U.S. at 564 (noting plaintiffs' attorney's argument that the jury should render punitive damages in an amount that would "provide an appropriate penalty" for harming approximately 1000 people); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 (D.N.J. 1989) ("[E]ach jury is told how many persons have been injured or have died or are likely to do so as the result of the defendant's conduct. Those statistics undoubtedly play a substantial role in the jury's . . . determining the amount [of punitive damages] to be imposed."), *vacated in part on reconsideration*, 718 F. Supp. 1233, 1234 (D.N.J. 1989) ("The court abides by its ruling that multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due

to take away all of the defendant's profits from the entire course of wrongful conduct, not just the profit that the defendant derived from wrong done to the plaintiff. To take but one example, in the notorious Ford Pinto case, "[p]laintiffs' attorneys . . . asked for a punitive award of \$100 million, the amount they estimated Ford had saved by retaining the allegedly defective design on Pintos and other small-car models from the time they were introduced until the federally mandated standards took effect on 1977 cars."⁴

Process Clause, but concludes that equitable and practical concerns prevent it from fashioning a fair and effective remedy."); *Ripa v. Owens-Corning Fiberglas Corp.*, 660 A.2d 521, 535 (N.J. Super. Ct. App. Div. 1995) (noting that, "in numerous other Kaylo cases, where permitted by local law, juries have been requested to punish defendant for its alleged entire course of conduct"); C. Delos Putz, Jr. & Peter M. Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.S.F. L. REV. 1, 13 (1981) ("[E]ach plaintiff is normally permitted to prove that the defendant's conduct affected numerous persons other than the plaintiff, and each jury is urged to award punitives in an amount sufficient to deter the defendant from the entire course of conduct."); Gordon Fairclough, *California May Be Hazardous to Big Tobacco's Health*, WALL ST. J., June 8, 2001, at B1 (quoting a member of the jury that awarded \$3 billion in punitive damages to a single smoker saying that he "thought about how many people these guys have killed" and that he "thought \$3 billion doesn't even begin to do justice for all the evil they've done"); George Jonas, *Just What Were They Smoking?*, NATIONAL POST, July 15, 2000, at A1 (noting that, in a class action on behalf of Florida smokers, "the plaintiffs asked for an additional US\$196 billion from the tobacco companies as punitive damages" because "[a]fter all, they argued, the product kills 430,000 Americans a year"); Myron Levin & Dalondo Moultrie, *L.A. Jury Awards \$3 Billion to Smoker Courts: Panel Orders Philip Morris to Pay Record Damages to Man with Incurable Cancer, Saying Firm Hid Risks*, L.A. TIMES, June 7, 2001, at A1 (quoting Richard Daynard, head of the anti-tobacco industry Tobacco Products Liability Project, as suggesting that the \$3 billion award to a single smoker "shows what happens when a jury tries to . . . punish companies that are responsible for killing hundreds of thousands of their customers each year. . . . I mean, what is the proper punishment for that behavior?"); Rafael A. Olmeda, *Foreman Recalls Duty, Friendships Forged Lost Lives Guided Verdict, He Says*, SUN-SENTINEL (Ft. Lauderdale), July 16, 2000, at 15A, available at 2000 WL 22185376 (quoting a member of the jury that awarded \$145 billion in punitive damages in Florida class action as saying that "[p]eople will focus on the billions of dollars we think they should pay . . . [b]ut they'll forget the millions of lives that have been lost because of this product").

4. Roy J. Harris, Jr., *Why the Pinto Jury Felt Ford Deserved \$125 Million Penalty*, WALL ST. J., Feb. 14, 1978, at 1 (discussing *Grimshaw v. Ford Motor Co.*, No. 197761-199397, 1978 WL 74251 (Cal. Super. Ct. Feb. 14, 1978)). Similarly, plaintiff's counsel in another case against Ford Motor Company based his argument for a \$58 million punitive award on the following calculations:

[T]ake that number, that Eighty-three Dollars (\$83.00) a unit that we know they saved, that two and a half percent of that additional profit

As this form of jury argument has grown commonplace, many courts—giving the matter little or no thought—have explicitly endorsed the principle that the defendant should be punished not only for the harm that it caused to the plaintiff, but also for the harm that it caused to others,⁵ and that the punitive “award should not only take away any profit realized from the single sale to the plaintiff, but also the profits realized from other such sales of the defective product to others.”⁶

that Ford made, and multiply it times the 468,000 units they anticipated. And I did the math last night and it is Thirty-eight Million Nine Hundred and Forty-Four Thousand dollars (\$38,944,000) . . . The other way [to compute punitive damages] is to take that same number times the number of vehicles that they actually sold and say to Ford Motor Company, “we are going to take away from you this time, so you never do this again, the profit that you should not have earned on the Bronco II. We’re going to take it away from you.” [sic] Fifty-eight Million One Hundred Thousand Dollars (\$58,100,000).

Ford Motor Co. v. Ammerman, 705 N.E.2d 539, 561 n.22 (Ind. Ct. App. 1999); see also Sturm, Ruger & Co. v. Day, 594 P.2d 38, 50 (Alaska 1979) (Burke, J., dissenting) (concluding that the jury’s award was designed to take away the defendant’s profits from all sales of its defective product), *on reh’g*, 615 P.2d 621 (Alaska 1980); Andrew C. Clausen & Annette M. Carwie, *Problems Applying the Life of Georgia v. Johnson Case in the Product Liability Setting*, 58 ALA. LAW. 46, 49 (1997) (noting that, in product liability cases, plaintiffs’ lawyers will typically argue that the punitive award must be large enough to take away the profit gained from all sales of the defective product).

5. See, e.g., *Gore*, 517 U.S. at 584 (indicating that the state may punish the defendant for the harm that it caused to all in-state consumers); *Kirkland v. Midland Mortgage Co.*, 243 F.3d 1277, 1280 (11th Cir. 2001) (declaring that “punitive damages serve the collective good by deterring a public wrong and punishing egregious wrongdoing on the part of the defendant; the award is measured to reflect, not the wrong done to a single individual, but the wrongfulness of the conduct as a whole”); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996) (indicating that, in many circumstances, a plaintiff’s “potential punitive damages would be to punish and deter the course of conduct as a whole”), *overruled on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333-34 (5th Cir. 1995) (noting that each victim has a right to punitive damages designed to punish the total harm to society), *overruled on other grounds by H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000); *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2001 WL 1246676, at *11 (Utah 2001) (upholding \$145 million punitive verdict on the ground that “[e]ven if the harm to the [plaintiffs] can be appropriately characterized as minimal, the trial court’s assessment of the situation is on target: ‘The harm is minor to the individual but massive in the aggregate’” (quoting the trial court)), *cert. granted*, 122 S. Ct. 2326 (2002).

6. *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983); see also, e.g., *Gore*, 517 U.S. at 591 (Breyer, J., concurring) (noting that a goal of punitive damages is to remove the profit derived from the full scope of the

This practice of punishing the defendant, in a single case brought by a single victim, for the full scope of societal harm caused by its entire course of wrongful conduct—which I will refer to as awarding “total harm” punitive damages—has led countless judges and commentators to worry about the potential for excessive multiple punishment: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment. Thus, numerous cases and articles have wrestled with the question of whether and in what circumstances a state may subject a defendant to multiple punitive damages awards for the same conduct.⁷ Ever since Judge Friendly first identified this problem in a landmark 1967 opinion,⁸ it is fair to say that it has been the single most discussed and debated issue in the law of punitive damages (and indeed one of the most hotly contested issues in all of tort law), spawning scores of cases and law review articles, along with numerous congressional hearings and proposals for legislative reform.⁹ Most commentators (though not yet most courts¹⁰) agree that it

illegal activity); *BMW of N. Am. Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997) (examining whether the award removed all of the defendant's profit, and whether the award was in excess of the profit so that the defendant realized a loss); *Thompson v. Dalton*, 520 P.2d 240, 245 (Idaho 1974) (holding that, in “cases involving deceptive business schemes operated for profit and often victimizing numerous members of the public aside from the plaintiff,” the punitive damages award should “serve[] to remove the profit factor from the whole scheme”); *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 941 (Utah 1993) (discussing the propriety of awarding punitive damages designed to remove the profit from the entire wrongful scheme).

7. See *infra* Part VI.A.

8. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-41 (2d Cir. 1967).

9. See *infra* Part VI.A.

10. See *Dunn v. Hovic*, 1 F.3d 1371, 1385-86 (3d Cir. 1993) (en banc) (collecting cases rejecting the constitutional claim and summarizing their reasoning); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 48-50 (Tex. 1998) (same); Andrea G. Nadel, Annotation, *Propriety of Awarding Punitive Damages to Separate Plaintiffs Bringing Successive Actions Arising Out of Common Incident or Circumstances Against Common Defendant or Defendants (“One Bite” or “First Comer” Doctrine)*, 11 A.L.R.4th 1261, 1262 (1982) (noting that courts “have generally held that no principle exists which prohibits a plaintiff from recovering punitive damages against a defendant or defendants simply because punitive damages have previously been awarded against the same defendant or defendants for the same conduct”). *But see Malone*, 972 S.W.2d at 50-51 (collecting cases holding and suggesting, in dicta, that the multiple punishment problem is of constitutional dimension, at least where the total amount of punitive damages exceeds the amount necessary to

would be unconstitutional—or at least very bad¹¹—to subject a defendant to multiple punitive damages awards for the same course of conduct where those awards, in combination, exceed the amount necessary to vindicate the state's legitimate interest in punishing and deterring the entire course of tortious activity.¹² These commentators have proposed a litany of possible reforms to our tort system aimed at preventing excessive multiple punishment.¹³

In my opinion, however, courts and commentators have been asking the wrong question altogether. The better question—one that has, to this point, been ignored in the literature and the case law—is a more fundamental one. We should be asking not whether the practice of awarding “total harm” punitive damages in each individual case *can sometimes lead to unconstitutional results*, but rather whether the practice *is itself unconstitutional*. That is, we should ask whether it is *ever* permissible, in circumstances in which the defendant's

achieve the state's legitimate interests in punishment and deterrence); *infra* note 257.

11. Quoting a trial judge, one commentator noted, “Perhaps this would not be unconstitutional. It would be worse than that. It would be unjust.” Alan Schulkin, Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1799 n.10 (1979) (quoting *Ostopowitz v. Wm. S. Merrell Co.*, No. 5879-1963 (N.Y. Sup. Ct. Westchester County Jan. 11, 1967)); *see also*, e.g., *Roginsky*, 378 F.2d at 840-41 (arguing that excessive multiple punishment “may not add up to a denial of due process,” but may “do more harm than good”).

12. *See, e.g.*, John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) (suggesting that multiple punishment is “arguably unconstitutional”); Dennis N. Jones et al., *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1, 3-4 (1991) (“[A]t some point the aggregate amount of multiple punitive damages becomes fundamentally unfair, in violation of the Due Process Clause.” (citations omitted)); Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415, 422-23 (1994) (arguing that, with regard to multiple punitive damages awards, the core principle of double jeopardy is included in the Due Process guarantee). *But see* Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433, 437-38 (1994) (arguing that “there is no inherent due process problem arising out of multiple punitive damages awards for the same course of conduct, because each of the claimants has been separately injured and, therefore, each may justly claim retribution from the defendant”). Phillips's assertion is true, but misleading. The problem with multiple punitive damages awards for the same course of conduct is not that more than one plaintiff can recover punitive damages awards for harm directed at a large number of people; it is that more than one plaintiff can recover punitive damages calculated by reference to the entire scope of the harm, not merely the harm caused to the plaintiff.

13. *See infra* Part VI.A.

conduct harmed more than one person, to award in a case brought by a single victim punitive damages in an amount that is intended to punish the defendant's entire course of conduct, or whether, instead, the law limits each plaintiff's recovery to the amount necessary to punish the defendant only for the harm done to the individual plaintiff. If the latter is true, then the question that has consumed the literature and the judiciary—whether and in what circumstances it is permissible to allow *more than one* award designed to punish the entire course of conduct—is essentially moot.

This Article seeks to answer the deeper question. In the course of doing so, it delves into the history and theoretical underpinnings of the punitive damages doctrine, and ultimately rejects not only the practice of awarding “total harm” punitive damages, but also the entire modern understanding of punitive damages as punishment for public wrongs upon which that practice is based.

In Part I, I use the facts of *BMW of North America, Inc. v. Gore*¹⁴—the Supreme Court's leading punitive damages decision—to illustrate the proposition that the practice of awarding “total harm” punitive damages, even in a single case, is potentially unfair to the defendant in a number of significant ways. Remarkably, however, this unfairness has escaped the notice of courts and commentators, who have instead expressed concern with “total harm” punitive damages only to the extent that more than one such award presents the possibility of unjust multiple punishment for the same course of conduct.

Part II offers an explanation for the absence of these arguments from the case law and the literature: They are obscured by the conventional theoretical account of punitive damages. That account—which prevails in both the judicial and the academic arenas—treats punitive damages as punishment for public, societal wrongs, as a sort of anomalous, privately enforced form of criminal law that stands as a unique exception to the general rule that the courts may not punish public wrongs without affording criminal procedural safeguards.¹⁵ In this conceptual light, “total harm” punitive damages—which are measured by the extent of the harm to society—make perfect sense. Because the Supreme Court has

14. 517 U.S. 559 (1996). The issue of multiple punishment was raised but not decided in *Gore*. See *id.* at 612 n.4 (Ginsburg, J., dissenting).

15. See *infra* text accompanying notes 62-71.

repeatedly rejected the argument that punitive damages are *per se* unconstitutional,¹⁶ there would seem to be no room left to challenge any form of unfairness that inheres in them.

Part II goes on to explain that, although this modern conception of punitive damages as punishment for public wrongs is ubiquitous, it is strikingly inadequate as a descriptive matter. Many of the bedrock principles of punitive damages law—such as the rule that the plaintiff must prevail on an underlying civil cause of action in order to recover punitive damages, the requirement that the amount of punitive damages must bear a reasonable relationship to the amount of compensatory damages, and the fact that the punitive damages are paid to the plaintiff—are impossible to reconcile with an understanding of punitive damages as punishment for public wrongs.

In Part III, I challenge the historical accuracy of the modern theoretical account of punitive damages as punishment for a wrong to society. In fact, historically, courts understood punitive damages to be punishment not for the wrongful act (and all societal consequences thereof), but rather for the distinct legal wrong done to the individual plaintiff. Although the multiple punishment problem rarely came up—in the days before mass torts, the vast majority of punitive damages cases involved acts that harmed only a single person¹⁷—in the occasional instances in which the issue did arise, the courts resolved it not by precluding the second victim from receiving punitive damages or by placing a limit on the total amount of punitive damages awarded to the two victims, but rather by ensuring that each punitive damages award was designed to punish only the wrong done to the plaintiff, not the harm that the same act may have caused to other persons not before the court.¹⁸ Part III further contends that this historical understanding of punitive damages provides an explanation for the aspects of modern punitive damages doctrine that seem irreconcilable with the modern conception of punitive damages as punishment for public wrongs.

In Part IV, I explain that punitive damages owe their tenuous constitutionality exclusively to their historical pedigree. Courts avoided early constitutional challenges to the

16. See *infra* Part IV; *infra* note 72.

17. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.3d 832, 838 (2d Cir. 1967).

18. See *infra* text accompanying notes 136-62.

institution of punitive damages only by pointing to its long history of judicial acceptance, and by explicitly relying on the fact that punitive damages punish only private wrongs; the courts recognized that punishment for *public* wrongs could not be imposed in the absence of criminal procedural safeguards.¹⁹ Thus, to reconceptualize punitive damages as punishment for the harm to society (as courts have uncritically done in recent years) is to all but concede their unconstitutionality.

Part V argues that “total harm” punitive damages are unconstitutional under the constitutionally mandated historical conception of punitive damages as punishment for individual wrongs. Indeed, “total harm” punitive damages owe their entire existence to the (mistaken) notion that punitive damages are intended to punish the wrong done to society, rather than the wrong to the individual victim. If punitive damages must instead be understood as punishment for private wrongs, due process generally forbids their imposition for the wrongs done to third parties. Rather, to withstand constitutional scrutiny, all punitive damages awards must be designed (and limited to the amount necessary) to punish the defendant only for the wrong done, and the harm caused, to the individual plaintiff or plaintiffs before the court.

Finally, Part VI offers a means of curing this constitutional infirmity by ensuring that each punitive damages award punishes only the individual, private wrong. To be sure, this principle cannot be vindicated without working a significant change in modern punitive damages practice. Unlike most tort reform proposals that have been advanced by commentators seeking to solve the multiple punishment problem—many of whom are seemingly motivated more by base politics than by a genuine concern for constitutional rights—this change does not require legislation or a radical restructuring of the tort system. Nor does it constitute a revolutionary break from traditional practices. In fact, the exact opposite is true; the constitutional solution to the problems presented by the practice of awarding punitive damages in cases where the defendant’s conduct harmed more than one person lies in a return to the traditional understanding of punitive damages as punishment for individual wrongs.

19. See *infra* text accompanying notes 247-53.

I. THE POTENTIAL UNFAIRNESS OF AWARDING "TOTAL HARM" PUNITIVE DAMAGES TO A SINGLE VICTIM— MULTIPLE PUNISHMENT AND BEYOND

The facts of *BMW of North America, Inc. v. Gore*, the Supreme Court's leading punitive damages decision, provide a useful means of illustrating the proposition that there are serious questions about the fairness of awarding "total harm" punitive damages in even a single case—questions that are significant enough that it is surprising to find the courts routinely awarding these damages without reflection.²⁰

In *Gore*, the plaintiff, Dr. Gore, purchased a new BMW sports sedan that, unbeknownst to him, had suffered paint damage during transport to the United States and therefore had to be repainted in America prior to sale.²¹ When Dr. Gore discovered the undisclosed repainting, he brought suit against

20. Of course, the term "fairness" can refer to a number of different concepts. Some writers define the term primarily in procedural terms, focusing on the necessity of affording the defendant the opportunity to present an adequate defense. See, e.g., Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646 (1985). Others take a more substantive view of fairness in tort law, focusing, for instance, on the necessity of producing results that accord with traditional conceptions of corrective justice—a concept that in its most crude form can be reduced to ensuring that all victims are fully compensated by the injurer for their losses. See, e.g., Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15-27 (1995); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 191-206 (1981); Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 627 (1992). Still others concern themselves with the substantive notion of retributive justice—ensuring that wrongdoers are punished and that the punishment fits the crime. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1228 (2001) ("The central notion of fairness that is employed as a justification for punishment is usually referred to as retributive justice."); *id.* at 1228-36 (summarizing the literature of retributive justice). Finally, some writers view the fairness of punitive damages in terms of substantive distributive justice, a term that they are using not in the Aristotelian sense of ensuring a fair distribution of resources throughout all of society (rather than among a limited number of people as the result of a specific transaction), see Wright, *supra*, at 691-92, 702, or in the Rawlsian sense of proceeding from distributively fair first principles, see JOHN RAWLS, A THEORY OF JUSTICE 60-65 (1971), but rather in the less theorized sense of ensuring a fair division of punitive damages awards among victims, see, e.g., Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889, 896 (2001); Joan Steinman, *Managing Punitive Damages: A Role for Mandatory "Limited Generosity" Classes and Anti-Suit Injunctions?*, 36 WAKE FOREST L. REV. 1043, 1065 (2001). Whatever conception of fairness one chooses, "total harm" punitive damages pose legitimate questions.

21. See 517 U.S. at 563 & n.1.

BMW for fraud, ultimately recovering \$4000 in compensatory damages—the difference in value between a repainted BMW and a new vehicle with its original paint job intact²²—and \$4 million in punitive damages. The jury arrived at the latter figure by multiplying the actual harm associated with repainting a BMW (\$4000) by the approximate number of repainted vehicles that BMW had resold nationwide (1000). As the Supreme Court explained, “Using the actual damage estimate of \$4,000 per vehicle, Dr. Gore argued that a punitive award of \$4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.”²³

Dr. Gore was not the first BMW purchaser to bring suit on these grounds,²⁴ but he was the first to win a punitive damages award, and quite a sizable one at that. In the aftermath of the jury’s verdict, many of the owners of the other 1000 repainted BMWs brought their own lawsuits,²⁵ motivated, one speculates, less by outrage over what BMW had done to them than by the enticing prospect of obtaining their own multi-million dollar punitive damages awards. Although there is no indication that any of those cases proceeded to judgment, it is surely worth asking what would have happened if a jury had found BMW liable to another purchaser. That second purchaser would likely have made a similar demand for \$4 million in punitive damages, notwithstanding the fact that the first punitive award was explicitly calculated to provide adequate punishment for BMW’s entire course of conduct in failing to disclose its repainting. In addition, if there were a third and fourth successful purchaser plaintiff, they too would have sought \$4 million each in punitive damages. All told, if all 1000 BMW owners had brought successful suits, each owner demanding and receiving punitive damages designed to punish BMW for “selling approximately 1,000 cars for more than they were worth,”²⁶ BMW would have faced punitive judgments totaling a staggering \$4 billion, even though each jury had agreed that a comparatively meager \$4 million was adequate to punish BMW in full for its wrongdoing and to completely deter

22. *See id.* at 563-64.

23. *Id.* at 564.

24. *See BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 626 & n.4 (Ala. 1994).

25. *See id.*

26. *Gore*, 517 U.S. at 564.

it from making the same mistake again.²⁷ Numerous commentators have bemoaned this risk of unfair piling on, dubbing it the "multiple punishment" problem.²⁸

There is a simple and obvious remedy for this injustice: Whenever a punitive damages award is calculated by reference to the total harm caused by the defendant's actions, the law could preclude subsequent plaintiffs from receiving additional punitive damages awards. More than a handful of courts and commentators have advocated the adoption of a rule such as this.²⁹

In propounding this tantalizingly simple solution, however, these courts and commentators have failed to recognize that there may be more to the unfairness of "total harm" punitive damages awards than just the multiple punishment problem.

To begin with, this solution might often be unfair to many potential plaintiffs. It may not seem inherently unjust to preclude some plaintiffs from receiving punitive damages—after all, because these damages exceed the amount necessary to achieve full compensation, it is universally recognized that a plaintiff has no entitlement to them.³⁰ There *is*, however, something unfair about awarding all of the punitive damages to a single victim,³¹ especially in circumstances in which each

27. Such a result would be unfair as a matter of retributive justice (*see supra* note 20): The total punishment would be 1000 times greater than the amount deemed appropriate by each of the jurors and would be far in excess of *anyone's* notion of a fitting sanction. What is more, even if none of these other cases proceeded to judgment, it is possible that this unfairness still manifested itself in the form of higher settlements to the plaintiffs, who no doubt wielded the *Gore* punitive damages award in settlement negotiations.

28. *See infra* Part VI.A.

29. *See infra* Part VI.A.

30. *See, e.g.,* *Smith v. Wade*, 461 U.S. 30, 52 (1983). The *Smith* Court explained that, under common law tort principles,

punitive damages . . . are never awarded as of right, no matter how egregious the defendant's conduct. "If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award." Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.

Id. (quoting DAN B. DOBBS, *LAW OF REMEDIES* 204 (1973)) (citations and footnotes omitted).

31. Because there is no entitlement to punitive damages, and because these damages by definition exceed the amount necessary to fully compensate the plaintiff, allowing only one plaintiff to recover all of the punitive damages does not inherently violate notions of corrective justice. Still, it may be unfair

victim's potential compensatory damages are probably too low to justify bringing legal action. Consider *Gore*. If the simple solution were adopted, once Dr. Gore received his verdict, there would be no incentive for any of the other plaintiffs to pursue their cases. No rational attorney would be willing to file a costly and complex lawsuit against a large corporation that could yield no punitive damages and only minimal compensatory damages (and hence a nominal award of attorney's fees). As such, the other victims of BMW's conduct would not only be denied a piece of the punitive pie, they would also end up without any compensation at all for their injuries. It may be difficult to feel sorry for a bunch of barely wronged BMW owners, but the fact remains that the simple solution would have the practical effect of leaving hundreds of victims wholly uncompensated while making one lucky victim (who suffered only \$4000 worth of actual damages) a multi-millionaire. This hardly seems like a fair and sensible allocation of damages.³²

More significantly, at the other end of the damages spectrum, where the degree of harm is enormous (and the plaintiffs much more worthy of sympathy), the simple solution would again run the risk of leaving most victims uncompensated. Consider, for instance, a mass toxic tort—perhaps a wanton decision by a cut-rate chemical company to ignore federal safety rules, resulting in the contamination of a local water table and the deaths of thousands of people. In those circumstances, the first plaintiff (or first several plaintiffs), if allowed to receive punitive damages calculated by reference to the full scope of the harm visited upon all of the victims, might well recover so much money in punitive damages as to bankrupt the defendant, thus once again denying subsequent plaintiffs not only punitive damages, but also the opportunity to receive any compensation whatsoever for their injuries.³³

as a matter of distributive justice. *See supra* note 20.

32. Indeed, it would seem to violate principles of both corrective and distributive justice. *See supra* note 20.

33. Numerous courts and commentators have recognized this problem. *See, e.g.,* *Dunn v. Hovic*, 1 F.3d 1371, 1398-99 (3d Cir. 1993) (Wies, J., dissenting); Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1607 (1997). Some writers have argued that this claim is overstated—that the prospect of bankruptcy as a result of excessive punitive damages awards is more theoretical than real. *See, e.g.,* *Acosta v. Honda Motor Co.*, 717 F.2d 828, 838

More importantly for present purposes, this simple solution may also be unfair to defendants, insofar as it would do nothing to ameliorate a deeper potential unfairness in our current system of awarding punitive damages—that which inheres in the practice of punishing defendants for the harm allegedly caused to an entire mass of people in a lawsuit brought by only one person. When a defendant engages in a course of conduct that allegedly harms a large number of people, many of the alleged victims, if they bring their own lawsuits, will not prevail, or perhaps will be unable to convince the jury that the defendant's conduct was sufficiently malicious to warrant the imposition of punitive damages.³⁴ Imagine, for instance, a trumped-up product liability case allegedly affecting 1000 victims in which the question of liability (or of liability for punitive damages) is extremely tenuous, perhaps because of highly questionable evidence regarding inadequate warnings, causation, or knowledge. The defendant, who may indeed be innocent of actual wrongdoing, might prevail in the first fifty, or even 950 lawsuits, but lose a single case to a very sympathetic plaintiff with an unusually gifted attorney, and still be forced to pay a crippling sum as punishment for the harm done to all 1000 alleged victims, most of whom had already been unable to prevail in their own lawsuits.³⁵

n.15 (3d Cir. 1983); Cynthia R. Mabry, *Warning! The Manufacturer of This Product May Have Engaged in Cover-Ups, Lies, and Concealment: Making the Case for Limitless Punitive Awards in Product Liability Lawsuits*, 73 IND. L.J. 187, 203 (1997); Owen, *supra* note 2, at 1324-25. This concern may often be overstated, but it is not entirely invalid; it is a fact that a number of companies have entered into bankruptcy in the midst of mass tort litigation. See Margaret M. Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 287 n.41 (1999).

34. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9-10 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Prosser and Keeton explain that

[s]omething more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.

Id. (footnotes omitted).

35. This is potentially unfair in the procedural sense—it forces the defendant to defend over and over again against allegations seeking the same "total harm" punitive damages for the wrong done to all 1000 victims—and also in the substantive, retributive sense—it greatly increases the chances that the defendant will be punished for harms for which it was not legally responsible. See *supra* note 20.

In the criminal context, this unfairness is obviated by the law of double jeopardy. The Double Jeopardy Clause "serves the function of preventing both successive punishment and successive prosecution."³⁶ It "protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being *twice put in jeopardy* for such punishment."³⁷ In the civil law, where the Double Jeopardy Clause has no application to litigation between private parties,³⁸ the fear of unfair multiple bites at the same apple generally finds expression in the doctrine of *res judicata*.³⁹ Among "the policies underlying *res judicata*" is "the defendant's interest in avoiding the burdens of twice defending a suit."⁴⁰

Of course, because it can only be applied to bind litigants that were actually parties to the prior dispute,⁴¹ *res judicata* has no direct role to play where different plaintiffs are seeking the same punitive damages. Still, the Supreme Court has noted that, even where "the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform" judicial decision making, because the principle that a defendant should be spared "the expense and vexation attending multiple lawsuits" is "a fundamental precept of common-law adjudication."⁴² Where a second plaintiff seeks to recover *the exact same "total harm" punitive damages* that were unsuccessfully sought by the first plaintiff (as opposed to each plaintiff seeking only damages sufficient to punish the wrong done to the individual victim), from the point

36. *Witte v. United States*, 515 U.S. 389, 395-96 (1995).

37. *Id.* at 396.

38. See *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.21 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation between private parties." (quoting *United States v. Halper*, 490 U.S. 435, 451 (1989))).

39. See *Kennedy v. Washington*, 986 F.2d 1129, 1133 (7th Cir. 1993) (Posner, J.) ("[D]ouble jeopardy is the criminal counterpart of the civil doctrine of *res judicata* . . .").

40. *Arizona v. California*, 530 U.S. 392, 412 (2000) (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting) (citations omitted)); see also, e.g., *Jackson v. N. Bank Towing Corp.*, 213 F.3d 885, 889 (5th Cir. 2000) ("The purpose [of *res judicata*] is to 'foster judicial efficiency and protect the defendants from multiple lawsuits.'" (quoting *Fine v. Reg'l Transit Auth.*, 676 So. 2d 1134, 1136 (La. Ct. App. 1996))).

41. See *Richards v. Jefferson County*, 517 U.S. 793, 800-01 (1996).

42. *Arizona v. California*, 460 U.S. 605, 619 (1983) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

of view of the defendant, the situation is no different from the same plaintiff bringing two successive causes of action—the very essence of the unfairness sought to be remedied by *res judicata*.⁴³

Indeed, the Court has refused to allow precisely this type of unfairness in developing the law of collateral estoppel, “an aspect of the broader doctrine of *res judicata*.”⁴⁴ In *Parklane Hosiery Co. v. Shore*,⁴⁵ the Court considered the viability of the doctrine of non-mutual offensive collateral estoppel, pursuant to which a plaintiff who was not a party to a prior lawsuit may nonetheless use the judgment in the earlier suit to prevent the defendant from re-litigating issues that were resolved against it in the prior proceeding. The Court held that a plaintiff may not bind the defendant in this way whenever doing so “would be unfair to a defendant.”⁴⁶ Such unfairness would be present if, *inter alia*, “the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.”⁴⁷ The Court explained,

In Professor Currie’s familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. . . . [O]ffensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover.⁴⁸

Even if it were the first plaintiff that was successful, it still arguably would be unfair to allow subsequent plaintiffs to invoke collateral estoppel. The landmark article upon which the Court principally relied in delineating the boundaries of fairness in this situation explains that

[i]f we are unwilling to treat the judgment against the railroad as *res judicata* when it is the last of a series, all of which except the last

43. *Cf. Wieberg v. GTE Southwest, Inc.*, 272 F.3d 302, 306 (5th Cir. 2001) (noting that Fed. R. Civ. P. 17(a), which requires that “[e]very action shall be prosecuted in the name of the real party in interest”—that is, in the name of the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery—is intended “to assure a defendant that a judgment will be final and that *res judicata* will protect it from having to twice defend an action, once against an ultimate beneficiary of a right and then against the actual holder of the substantive right” (quoting *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 150 (5th Cir. 1990))).

44. *Hoag v. New Jersey*, 356 U.S. 464, 470 (1958) (emphasis omitted).

45. 439 U.S. 322 (1979).

46. *Id.* at 331.

47. *Id.* at 330.

48. *Id.* at 330-31 n.14 (citing Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 304 (1957)).

were favorable to the railroad, it must follow that we should also be unwilling to treat an adverse judgment as *res judicata* even though it was rendered in the first action brought, and is the only one of record. Our aversion to the twenty-sixth judgment as a conclusive adjudication stems largely from the feeling that such a judgment in such a series must be an aberration, but we have no warrant for assuming that the aberrational judgment will not come as the first in the series. Indeed, [because the plaintiff's attorneys will tend to bring the most sympathetic case first, and do so in the forum most hostile to the defendant,] the judgment first rendered will be the one least likely to represent an unprejudiced finding after a full and fair hearing.⁴⁹

Again, from the point of view of the defendant, there is no difference between allowing subsequent plaintiffs to preclude the defendant from re-litigating the issue of liability for punitive damages and allowing the first successful plaintiff to collect punitive damages for the harm caused to all of the victims. Either way, the defendant is punished for the harm allegedly done to all of the victims in circumstances in which most of the other alleged victims, had they been given the opportunity to pursue their own punitive damages claims, would have been unsuccessful.

BMW of North America, Inc. v. Gore is illustrative of these points as well. When BMW sold its repainted vehicle to Dr. Gore, approximately half of the states had enacted statutes defining the obligations of automobile manufacturers to disclose pre-sale repairs.⁵⁰ Those statutes required a manufacturer to disclose such repairs only if their cost exceeded a certain percentage—which varied from state to state—of the manufacturer's suggested retail price.⁵¹ Relying on these laws, BMW adopted a national policy pursuant to which it disclosed all pre-sale repairs with a cost exceeding three percent of the vehicle's suggested retail price—the most stringent of the state standards.⁵² Since the cost of repainting Dr. Gore's vehicle was significantly less than three percent of its retail price, BMW did not disclose the repair.⁵³ No statute anywhere in America required it to do so, and the practice of not doing so had, to that point, never been held to constitute fraud or otherwise been adjudged unlawful in a court of law.⁵⁴

49. Currie, *supra* note 48, at 289.

50. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 565 (1996).

51. *Id.*

52. *Id.* at 563-65.

53. *Id.* at 564.

54. *Id.* at 565.

Thus, BMW had an argument that, for better or for worse, might well have resonated with many jurors that its decision makers made every effort to comply with the law and had no idea that they were doing anything wrong.

In these circumstances, it would not be at all surprising for BMW to win some, perhaps even most, lawsuits brought by persons in Dr. Gore's position. Moreover, even in those cases in which BMW is found liable, the jury might well find that BMW's conduct was not so wanton or malicious as to warrant punitive damages. Indeed, a few months before Dr. Gore's trial, his attorney tried a case on behalf of another purchaser of a repainted BMW, one Dr. Yates, seeking essentially the same punitive damages.⁵⁵ The jury declined to award them.⁵⁶ Still, because a single plaintiff was able to prevail and to convince the jury of punitive liability in a single action, BMW was forced to pay punitive damages in an amount that, in the Supreme Court's words, "would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth."⁵⁷ Included in those 1000 punished sales was the sale to Dr. Yates, who had been unable to convince a jury to award punitive damages in his own case.

Finally, there is yet another aspect of unfairness to the defendant that arguably inheres in even a single "total harm" punitive damages award. Such an award fails to consider the possibility that many of the alleged victims might have been unable to prevail (or to recover punitive damages) due not to the tenuous nature of the general case against the defendant, but rather to the specific circumstances of their individual claims. For instance, it is often the case that the blameworthiness of the defendant's actions varies among particular victims. In product liability cases, for example, a defendant's conduct toward customers who purchased its product at a time when the defendant knew and concealed evidence that the product was defective is far more culpable than its conduct toward customers who purchased the product either before the company was aware of the defect or after the dangers associated with the product became common knowledge. Similarly, where a defendant is accused of engaging in a course of fraudulent conduct, its actions toward

55. *See id.* at 565 & n.8.

56. *See Yates v. BMW of N. Am., Inc.*, 642 So. 2d 937, 938 (Ala. Civ. App. 1993).

57. *Gore*, 517 U.S. at 564.

some victims may be far more reprehensible than its actions toward others. A bogus telephone psychic, for example, commits a much more culpable act by telling a desperate and exploitable victim of domestic violence that, according to the stars, her abuser will change his ways, than by telling a lovelorn college student that someday he will meet a tall, dark stranger. Thus, even if the defendant's conduct toward one plaintiff calls for punitive damages, it may not follow that the defendant should be punished (or punished to the same degree) for the wrongs done to all of those who were harmed by its actions.

What is more, even apart from the differences in the defendant's behavior and culpability toward individual victims, "total harm" punitive damages fail to account for the possibility that many of the victims may not have been able to establish specific elements—or that the defendant may have been able to establish unique affirmative defenses—related to their individual claims. That is to say, even if the defendant was guilty of wrongdoing, many of the potential plaintiffs may not have been legal "victims" at all. Perhaps they suffered no actual injury,⁵⁸ or their injuries were preexisting and were not caused by the defendant, or they voluntarily and consciously assumed the risk of harm, or their injuries were predominantly their own fault, or they waited too long to pursue legal action, et cetera. By allowing the first plaintiff to receive "total harm" punitive damages, the court would be punishing the defendant for allegedly wronging all of these individuals without affording the defendant any opportunity to raise or prove victim-specific issues and defenses.⁵⁹

Here again, *Gore* is instructive. Even beyond the tenuous nature of the general case for fraud and punitive liability, it is quite possible that, for various reasons relating to the specifics of their individual cases, many of the 1000 alleged victims would have been unable to prevail in their underlying fraud actions. Maybe some of them were automobile aficionados who had been able to tell that their car had been repainted, and

58. To return to the telephone psychic example, many customers may have called up purely for kicks, or on a dare, without believing in the defendant's alleged psychic powers at all.

59. This is quintessentially unfair in the procedural sense of the term, and, by punishing the defendant for wrongs for which it was not legally responsible, it will likely produce substantive unfairness as well. See *supra* note 20.

therefore were not misled. Others might have suffered no damages—perhaps because they had already put their BMWs through so much wear and tear that the repainting no longer affected their resale value, or maybe they had already totaled them, or donated them to charity. Still others might have discovered the undisclosed painting several years earlier and chosen not to pursue legal action, so that they would be barred from filing suit by the statute of limitations. Still, because Dr. Gore happened to prevail in his action (in which the specifics of the other alleged victims' cases were not at issue), BMW was punished for all of these sales without being given the opportunity to show that many of them were not legally wrongful.

II. MODERN THEORETICAL (MIS)CONCEPTIONS OF PUNITIVE DAMAGES

Whether or not the foregoing fairness arguments would support a successful due process claim,⁶⁰ it is at least clear that there are substantial arguments against even a single award of "total harm" punitive damages, arguments with which one would expect the courts to be grappling. Yet the judiciary and the academy have not even acknowledged these arguments, let alone rejected them.⁶¹ The only potential unfairness in the practice of awarding "total harm" punitive damages that has provoked debate is the multiple punishment problem, which arises only upon a second or successive such award.

What explains the fact that these seemingly weighty concerns have flown under the judicial and academic radar screen? The answer, I believe, lies in the fact that they are obscured by the modern theoretical conception of punitive

60. *Cf. England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 429 (1964) (Douglas, J., concurring) ("But res judicata is not a constitutional principle; it has no higher dignity than the principle we announce today." (emphasis omitted)).

61. The only exception is the insightful work of Andrew L. Frey and Evan M. Tager, veteran litigators of punitive damages issues in the Supreme Court. In a single page of discussion, which does not contain any historical or constitutional analysis, Frey and Tager briefly note one of the forms of unfairness discussed above—"the situation in which the defendant is exonerated in several cases, but punished for the full impact of its conduct in one or a few cases"—and for that reason propose the abolition of "total harm" punitive damages. Andrew L. Frey & Evan M. Tager, *Punitive Damages*, in 3 *BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS* 307, 322 (Robert L. Haig, ed., 1998).

damages as punishment for public wrongs.

A. PUNITIVE DAMAGES AS PUNISHMENT FOR PUBLIC WRONGS

The very existence of the multiple punishment problem as a topic for academic debate necessarily relies upon a fundamental, unspoken assumption. Take, for instance, this oft-quoted passage penned by Judge Weinstein in the course of certifying a nationwide punitive damages class action in the Agent Orange litigation:

It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction.⁶²

Judge Weinstein is assuming that the point of a punitive damages award is to fully punish the defendant for its wrongful conduct. He is assuming, in other words, that punitive damages are, by their very nature, intended to punish the defendant for the "total harm" that its actions caused.

That Judge Weinstein and others would make this uncritical assumption about the nature and purpose of punitive damages is not particularly surprising. The Supreme Court has repeatedly referred to punitive damages as punishment for "reprehensible conduct,"⁶³ which would seem to include all consequences thereof, and to stand in contrast to punishment for the harm to a particular individual. Indeed, in *BMW of North America, Inc. v. Gore*—which was brought by the purchaser of a single automobile—the jury punished BMW for selling 983 refinished cars as new.⁶⁴ Although the Supreme Court held that federalism concerns precluded the Alabama courts from punishing BMW for the 969 such sales that took place out of state,⁶⁵ the Court proceeded to evaluate whether

62. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983).

63. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (stating that punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *see also, e.g.*, *SCHLUETER & REDDEN, supra note 1*, § 2.2.

64. *See* 517 U.S. 559, 564-65 (1996).

65. *See id.* at 570-74. Relying on the well-established constitutional prohibition against one state "impos[ing] its own policy choice on neighboring States," *id.* at 571, the Court held that, in identifying the extent of the state's

the punitive award constituted excessive punishment for all fourteen of the in-state sales, thus implicitly endorsing the notion that a punitive damages award is intended to punish the defendant for the full scope of its wrongful conduct, rather than for the individual, private wrong to the plaintiff.⁶⁶

Other modern courts and commentators have been even more explicit in declaring that punitive damages are “punishments for public wrongs”⁶⁷—that is, that they “are

legitimate interests, federalism concerns dictate that “consideration [may be] given only to the interests of [the state’s own] consumers, rather than those of the entire Nation,” *id.* at 574. Thus, the Court held that “Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.” *Id.* at 572-73 (footnote omitted). The Court ostensibly left open the question whether a state may properly punish or deter out-of-state conduct that was *unlawful* where it occurred. *See id.* at 573 n.20. Its rhetoric and reasoning, however, which focused on the fact that a state can *never* give extraterritorial effect to laws and can *never* infringe on the policy choices of another state (including, presumably, the other state’s choices among the numerous standards and procedures that govern punitive damages awards), along with its case law emphasizing that no state may usurp another state’s right to enforce its punitive laws, strongly suggest that a state may not punish or deter out-of-state conduct even if that conduct was unlawful where it occurred. *Id.* at 568-74; *see also, e.g.,* *Cont’l Trend Res., Inc. v. OXY USA, Inc.*, 101 F.3d 634, 636-37 (10th Cir. 1996); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561 (Ind. Ct. App. 1999); Cordray, *supra* note 33, at 305-09; Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463, 490 n.133 (1998); *cf. W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (recognizing that it would deny due process to a defendant to force it to pay damages in a state court proceeding where the state court had no power to ensure that the defendant would not be held liable for the exact same damages in the courts of another state).

66. *See Gore*, 517 U.S. at 584 (“None of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty.”); *id.* at 584 n.35 (“Even assuming each repainted BMW suffers a diminution in value of approximately \$4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMW’s.”). To be sure, the *Gore* Court took a large bite out of “total harm” punitive damages by precluding their complete imposition in cases in which the defendant’s wrongful conduct affected victims in more than one state. Nonetheless, it did not address whether such damages are recoverable in circumstances in which all of the victims reside in the same state, or whether, in cases of multi-state harm, a single plaintiff may recover for the full amount of the harm that the defendant caused to all in-state victims. (Although, by addressing whether the punitive damages were an acceptable penalty for all fourteen in-state sales, the Court obviously assumed that the constitutional concerns stopped at the state border.)

67. *E.g., Tuel v. Hertz Corp.*, 296 So. 2d 597, 599 (Fla. Dist. Ct. App.

awarded to punish the wrongdoer for the wrong committed upon society.”⁶⁸ Thus, the prevailing modern conception of punitive damages is that they are an anomaly in the civil law.⁶⁹ They serve the very same goals as the criminal law; they just do so through the mechanism of civil tort suits.⁷⁰ In Prosser’s

1974).

68. *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1115 (Okla. 1992); *see also, e.g., Elizabeth J. Cabraser, Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 981 (2001) (“Punitive damages are not an entitlement of the victims, but of society: a punitive damages award is a civil punishment visited upon defendants to vindicate the public interest in deterrence, and to penalize conduct that violates the social contract and injures society.”); Theodore B. Olson & Theodore J. Boutrous, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPP. L. REV. 907, 918 (1990) (“[P]unitive damages are imposed for purposes of retribution and deterrence by a system which simultaneously compensates the victim for his injury, and punishes the defendant for the wrong done to society by his conduct.”); Daniel M. Weddle, *A Practitioner’s Guide to Litigating Punitive Damages After BMW of North America, Inc. v. Gore*, 47 DRAKE L. REV. 661, 662 (1999) (“[P]unitive damages are meant to provide a public remedy for a public wrong rather than an individual remedy.”).

69. *See, e.g., Jeffrey W. Grass, The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 242 (1985) (“The punitive damages doctrine is an anomaly in tort law.”).

70. The Second Restatement of Torts observes,

The purposes of awarding punitive damages, or “exemplary” damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future. Although the purposes are the same, the effect of a civil judgment for punitive damages is not the same at [sic] that of a fine imposed after a conviction of a crime, since the successful plaintiff and not the state is entitled to the money required to be paid by the defendant.

RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1977); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 281 (1994) (“The very labels given ‘punitive’ or ‘exemplary’ damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions.”); *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) (noting that “punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law”); *id.* at 287 (O’Connor, J., concurring in part and dissenting in part) (explaining that “this Court’s cases leave no doubt that punitive damages serve the same purposes—punishment and deterrence—as the criminal law”); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (noting that punitive damages “serve the same function as criminal penalties and are in effect private fines”); *Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, J.) (“Many legal systems do not permit awards of punitive damages at all, believing that such awards anomalously intrude the principles of criminal justice into civil cases. Even our cousins the English allow punitive damages only in an excruciatingly narrow category of cases.”). In a recent dissent, Justice Graves of the Kentucky Supreme Court summarizes the modern

words, "The idea of punishment, or of discouraging other offenses usually does not enter into tort law"; it is only in the "rather anomalous" area of punitive damages that "the ideas underlying the criminal law have invaded the field of torts."⁷¹

It is this understanding of the nature of punitive damages that prevents courts from recognizing and addressing the potential forms of unfairness identified above. If punitive damages are punishment for public, societal wrongs, then it makes sense to calibrate them by reference to the total harm done to all of society. As unfair as this may seem, however, the Supreme Court has routinely upheld the constitutionality of punitive damages against pleas of injustice,⁷² and therefore there is simply no room left for argument that there is a constitutional dimension to any form of unfairness that inheres in a single award of them, no matter how compelling such an argument may be. The modern consensus is that, although punitive damages serve criminal-law ends, they have—rightly or wrongly—been afforded a complete exemption from the special procedural rules designed to ensure fairness in the punishment of public wrongs.⁷³

theoretical conception of punitive damages:

Awards of punitive damages are an anomaly of our legal system. Although they are assessed in connection with the common-law tort system—which has as its overriding goal the compensation of private parties for actual injuries—punitive damages are imposed to serve the identical purposes of the criminal law: retribution and deterrence.

Farmland Mutual Insurance Co. v. Johnson, 36 S.W.3d 368, 386 (Ky. 2000) (Graves, J., dissenting).

71. PROSSER & KEETON, *supra* note 34, § 2, at 9.

72. See *infra* Part IV; see also, e.g., *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 159 (1967) (noting that "the Constitution presents no general bar to the assessment of punitive damages in a civil case" (citation omitted)).

73. See, e.g., *Rose Acre Farms, Inc. v. Cone*, 492 N.E.2d 61, 69 (Ind. Ct. App. 1986) (noting that punitive damages "are generally disfavored not only because they are a 'windfall' to the plaintiff, but also because they allow punishment without the safeguards of criminal procedure"). Justice Graves, dissenting in *Farmland Mutual Insurance*, lamented that

[p]unitive damages may be excessive and akin to a criminal punishment, especially when compared with criminal fines. If a civil defendant is to be exposed to such "criminal liability," the defendant should be entitled to criminal procedural protections: (1) a "beyond a reasonable doubt" burden of proof; (2) a unanimous jury; (3) an upper limit on the punishment; and (4) bifurcation of the liability and punitive damages portions of the trial.

36 S.W.3d at 388 (Graves, J., dissenting); see also, e.g., *G.J.D. by G.J.D. v. Johnson*, 713 A.2d 1127, 1134 (Pa. 1998) (Flaherty, C.J., dissenting) ("Punitive damages are quasi-criminal fines imposed upon civil defendants in a system which lacks the constitutional and procedural safeguards afforded criminal

This conception may be ubiquitous, but it is woefully inadequate to the task of explaining the fundamental principles of punitive damages law. For instance, if punitive damages truly were punishment for public wrongs (as opposed to punishment for individual, private wrongs) it should not be necessary for the plaintiff to prevail on an underlying civil cause of action in order to receive them. The wrong to society does not depend on the peculiarities of a civil tort suit, such as the contributory negligence of a single victim.⁷⁴ Under current law, however, a defendant cannot be made to pay punitive damages unless the plaintiff establishes an underlying civil cause of action; if the civil action fails for any reason, the defendant will escape liability for punitive damages.⁷⁵

Similarly, if punitive damages were punishment for the full scope of the wrong to society, rather than simply the wrong to the plaintiff, it would make no sense to require a reasonable relationship between the amount of punitive damages and the amount of the individual plaintiff's compensatory damages. Although a number of commentators have criticized this requirement on precisely these grounds,⁷⁶ and a few courts have rejected it,⁷⁷ it has long been a part of punitive damages

defendants."); Richard Adelstein, *Victims as Cost Bearers*, 3 BUFF. CRIM. L. REV. 131, 160 (1999) ("But punitive damages are controversial (and relatively rare) precisely because they blur the distinction between tort and crime and require juries to assess their magnitude without formal guidance or the procedural safeguards afforded defendants in criminal cases."); David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 382 (1994) ("Punitive damages are in the nature of criminal fines, yet defendants are not afforded the usual safeguards of criminal procedure, particularly the benefit of a higher burden of proof." (emphasis omitted)).

74. Compare 21 AM. JUR. 2D *Criminal Law* § 474 (1998) which notes, "Because a crime is by definition a public wrong, one against all the people of the state, it is ordinarily no defense that a person injured by the crime condoned the offense. Although condonation or settlement with the criminal may bar the victim from recovering damages in a civil action, it generally does not prevent the state from prosecuting the offender for the crime.

Id. (footnotes omitted).

75. See *infra* note 203 and text accompanying notes 260-61.

76. See, e.g., Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 140 n.242 (1993) ("Because punitive damages are designed to serve the public law function of punishment, deterrence, and retribution, there is no compelling reason why there should be any correlation between compensatory and punitive damages.")

77. See, e.g., *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1115 (Okla.

law—indeed, the Supreme Court has incorporated it into the constitutional test for determining whether a punitive award is excessive.⁷⁸

Nor does it make sense under the prevailing modern conception of punitive damages as punishment for the wrong to society to allow the plaintiff to keep the punitive damages award. Here again, a number of commentators have criticized the “plaintiff’s windfall” aspect of punitive damages on these very grounds,⁷⁹ and a few states have seized upon this point in enacting “split-recovery” statutes allocating a portion of each punitive award to the state, but the common law principle prevails in most jurisdictions.⁸⁰

Finally, if punitive damages serve the criminal law function of punishing societal wrongs, it is difficult to understand why it is that the defendant is not permitted to avail itself of the various criminal procedural safeguards that the Constitution affords to those accused of public wrongs.⁸¹ Yet punitive damages have weathered vehement attacks on this very ground for over a century,⁸² and they continue to be

1992) (“Because such damages are awarded to punish the wrongdoer for the wrong committed upon society, Oklahoma does not require the amount of punitive damages to be in a particular ratio to the amount of actual damages.” (footnote and citation omitted)).

78. See *infra* note 207 and text accompanying notes 206-09.

79. See, e.g., *Smith v. States Gen. Life Ins. Co.*, 592 So. 2d 1021, 1026 (Ala. 1992) (Shores, J., concurring in part and dissenting in part) (arguing against allowing the plaintiff to keep the punitive award because “the plaintiff seeks compensatory damages for his own injuries and punitive damages to redress society at large” (quoting Justice Janie L. Shore, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls* (1992) (unpublished LL.M. thesis, University of Virginia School of Law))); *Gen. Res. Org. v. Deadman*, 932 S.W.2d 485, 486 (Tex. 1996) (Gonzalez, J., concurring) (suggesting, in light of the fact that punitive damages punish the harm to society as a whole, “that the Legislature enact a law apportioning one-half of punitive damages to the State”).

80. See Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497, 502 (2002) (“[A]n increasing number of states have reaffirmed the penal role of punitive damages by appropriating a share of the plaintiff’s punitive award. Such shared recovery laws emphasize that punitive awards now vindicate ‘public wrongs,’ and so fulfill the historical purpose of penal laws.”).

81. See *infra* Part IV.

82. For a discussion of nineteenth-century critiques on this ground, see *infra* Part IV. For modern criticisms, see, for example, Thomas A. Ford, *The Constitutionality of Punitive Damages*, in *THE CASE AGAINST PUNITIVE DAMAGES* 15, 15-22 (Donald J. Hirsch & James G. Poulos eds., 1969); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 322-51 (1983); Note, *The Imposition of*

imposed in the complete absence of criminal procedural protections.

Clearly then, the modern theoretical account of punitive damages as punishment for public wrongs is deeply at odds with the actual doctrine of punitive damages. That dissonance should cause us to question the accuracy and validity of the prevailing conception.

B. PUNITIVE DAMAGES AS AN ENGINE OF OPTIMAL DETERRENCE

Indeed, some modern scholars have offered a different conception of punitive damages,⁸³ one that is based not on punishment, but on the economic principle of optimal deterrence: forcing the actor to internalize the costs of potentially harmful activity, thus ensuring that the actor will engage in that activity only to an economically efficient degree, but will not invest additional resources to avoid causing harm where the cost of avoiding the harm exceeds the cost of the harm itself.⁸⁴ This suggestion is purely normative, however; optimal deterrence is manifestly not the goal of current punitive damages doctrine.⁸⁵

To be sure, in judicial parlance, "deterrence," along with "punishment," is one of the oft-repeated twin goals of punitive damages.⁸⁶ By using the term "deterrence," however, the

Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. REV. 1158, 1177-84 (1966).

83. See, e.g., *Ciraolo v. City of New York*, 216 F.3d 236, 244 (2d Cir. 2000) (Calabresi, J., concurring) (arguing that in many cases, "compensatory damages are . . . an inaccurate measure of the true harm caused by an activity," and that "additional damages . . . may be an appropriate way of making the injurer bear all the costs associated with its activities in those cases"); Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 12 (1990) (discussing "augmented awards," designed not "to punish the defendant for otherwise evil behavior," but "to encourage actors to consider the costs of their action").

84. See Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421 (1998). Judge Calabresi has referred to this concept as "general deterrence." See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26-31, 73-75 (1970).

85. See *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439 (2001) (noting that juries do not impose punitive damages with the goal of optimal deterrence in mind).

86. Most courts refer to the twin purposes of punitive damages as "punishment" and "deterrence," rather than "retribution" and "deterrence." See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *Gertz v. Robert*

courts are referring not to the modern economic concept of "optimal deterrence," but rather to the classical, punitive concept of "complete deterrence":⁸⁷ ensuring that the defendant and others refrain entirely from committing similar harms in the future, regardless of the costs and benefits of the activity and the socially optimal level of investment in loss prevention.⁸⁸ Jurors are instructed to "punish the wrongdoer and to deter [the] wrongdoer from repeating such wrongful acts" altogether.⁸⁹ Thus, as the advocates of an optimal deterrence conception of punitive damages readily concede, the law does not, as of yet, reflect their prescription.⁹⁰

Welch, Inc., 418 U.S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."). *But see* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence."). As Judge Posner has explained, "This formulation is cryptic, since deterrence is a purpose of punishment, rather than, as the formulation implies, a parallel purpose, along with punishment itself, for imposing the specific form of punishment that is punitive damages." *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996). Indeed, in other contexts, the Supreme Court has defined the term "punishment" to include the concept of deterrence. *See, e.g.,* *United States v. Bajakajian*, 524 U.S. 321, 329 (1998) ("Deterrence . . . has traditionally been viewed as a goal of punishment . . ."); *Austin v. United States*, 509 U.S. 602, 610 (1993) ("[A] civil sanction that . . . serv[es] . . . deterrent purposes[] is punishment . . .") (emphasis added) (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)). When courts speak of the distinct goals of punishment and deterrence, they are using the term "punishment" in the more narrow sense of "retribution."

87. *See* Hylton, *supra* note 84, at 421. Judge Calabresi refers to this concept as "specific deterrence." *See* CALABRESI, *supra* note 84, at 68-69.

88. *See* *Ciraolo*, 216 F.3d at 246 n.8 (Calabresi, J., concurring) (stating that punitive damages are "analogous to criminal penalties that seek . . . to discourage or even eliminate a particular activity altogether"); Galligan, *supra* note 83, at 33 (noting that the current punitive damages doctrine is geared toward complete deterrence).

89. RONALD W. EADES, *JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS* 100 (4th ed. 1998); *see also, e.g.,* *Haslip*, 499 U.S. at 6 n.1 (upholding an instruction that informed the jury that punitive damages are imposed "by way of punishment to the defendant and for the added purpose of protecting the public by deterring [sic] the defendant and others from doing such wrong in the future" (emphasis omitted) (quoting App. to Pet. for Cert. A2, 105-06)).

90. *See* Galligan, *supra* note 83, at 7-14. Indeed, the very name "punitive" damages is inconsistent with the optimal deterrence conception; unlike complete deterrence, optimal deterrence is not a punitive concept at all, but rather is more akin to notions of enterprise liability. *Ciraolo*, 216 F.3d at 245-46 (Calabresi, J., concurring). Judge Calabresi has observed that

[a] more appropriate name for extracompensatory damages assessed in order to avoid underdeterrence might be "socially compensatory damages." For, while traditional compensatory damages are assessed to make the individual victim whole, socially compensatory damages

Indeed, a number of elements of current punitive damages doctrine are squarely inconsistent with the notion of punitive damages as a means of achieving optimal deterrence by ensuring that those who engage in risky activities are made to internalize the full cost of the harm caused by their conduct.⁹¹ For instance, on such a theory, there would be no need for the requirement that the plaintiff must prevail on an underlying cause of action as a predicate to an award of punitive damages.⁹² Indeed, it is the very fact that some plaintiffs or potential plaintiffs will *not* prevail—and therefore will not force the defendant to internalize the cost of the harm done to them—that drives the theory behind this conception.⁹³ Nor would it be appropriate to permit the plaintiff to keep the punitive damages award,⁹⁴ or to allow the jury to tailor the award to the defendant's wealth.⁹⁵ Finally, and most notably, a conception of punitive damages as a method of cost internalization, as opposed to a form of punishment, would be inconsistent with the universal rules that punitive damages may only be awarded where the defendant's conduct was wanton or malicious⁹⁶ and that the amount of the award depends on the degree of reprehensibility of the defendant's

are, in a sense, designed to make society whole by seeking to ensure that all of the costs of harmful acts are placed on the liable actor.

Id. at 245 (Calabresi, J., concurring) (footnote omitted); see also A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890-91 (1998) (“[T]he adjective ‘punitive’ may sometimes be misleading. . . . [E]xtracompensatory damages may be needed for deterrence purposes in circumstances in which the behavior of the defendant would not call for *punishment*.”).

91. See Galligan, *supra* note 83, at 62 (conceding this point).

92. See *infra* note 203 and text accompanying notes 260-61.

93. See, e.g., *Ciraolo*, 216 F.3d at 243-44 (Calabresi, J., concurring).

94. See *id.* at 246-47 (“And there is no good reason why socially compensatory damages should be paid to the individual plaintiff, at least beyond a relatively small part sufficient to induce the victim to undertake the expense of pleading and proving them.”).

95. See Galligan, *supra* note 83, at 65 (noting that wealth is irrelevant to optimal deterrence); Hylton, *supra* note 84, at 458 (concluding that “the financial position or wealth of the defendant generally should not matter”); Polinsky & Shavell, *supra* note 90, at 911 (noting that wealth should not be considered with respect to corporate defendants and should only be considered with respect to individual defendants under certain circumstances). Under current law, however, the defendant's wealth is a relevant consideration in fixing the amount of punitive damages. See, e.g., *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1990).

96. See *supra* note 34.

conduct.⁹⁷

Unlike the prevailing modern conception of punitive damages as punishment for public wrongs, the economic conception of punitive damages as a vehicle for internalizing costs raises some concerns about "total harm" punitive damages. These damages, even if awarded in only one case, will usually be excessive from an optimal deterrence standpoint.⁹⁸ Because the proponents of this conception freely

97. See *Ciraolo*, 216 F.3d at 246 (Calabresi, J., concurring) (noting that damages imposed to achieve optimal deterrence should be permissible regardless "of whether or not the defendant's conduct was particularly blameworthy"); Galligan, *supra* note 83, at 62-63 (noting that optimal deterrence does not depend on reprehensibility and that extra-compensatory damages awarded for these purposes should be available even for simple negligence); Polinsky & Shavell, *supra* note 90, at 905-06 (suggesting that "making punitive damages depend on reprehensibility... distort[s] deterrence"). In *BMW of North America, Inc. v. Gore*, however, the Supreme Court held that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. 559, 575 (1996).

98. "Total harm" punitive damages have an inherent tendency to force the defendant to pay damages in an amount greater than the harm that it actually caused. This results in over-deterrence because "wasteful precautions may be taken, product prices may be inappropriately high, and risky but socially beneficial activities may be undesirably curtailed." Polinsky & Shavell, *supra* note 90, at 873. "Total harm" punitive damages will tend to have this effect for a number of reasons. First, plaintiffs' lawyers ask the jury not only to deter future wrongs, but also to *punish* the defendant for harming so many people. Thus, in most cases, the jury's award of "total harm" punitive damages is grounded in both retribution and deterrence. Indeed, in many cases, the jury will focus much more on notions of retribution than deterrence. See *supra* note 3 (highlighting juror outrage and the desire to punish wrongdoing). Moreover, even when the jury emphasizes deterrence concerns, it will still often go beyond the amount that it considers to be appropriate to achieve complete deterrence (which itself is often greater than the amount necessary to achieve optimal deterrence, see Hylton, *supra* note 84, at 433-34), so as to include an element of retribution for the entire course of conduct. For instance, in the Ford Pinto case, in which the plaintiff's attorney had sought punitive damages of \$100 million based on the defendant's profits, the jury awarded \$125 million. See *supra* note 4 and accompanying text. One juror "recalls bringing up the \$125 million figure himself. He reasoned that if Ford had saved \$100 million by not installing safe tanks, an award matching that wouldn't really be punitive. So he added \$25 million." Harris, *supra* note 4.

Second, an award of "total harm" punitive damages in an amount sufficient, in itself, to achieve complete deterrence over-deters by failing to consider the additional deterrent effect of compensatory damages that have been or will likely be awarded in other cases arising out of the same course of conduct. See, e.g., Polinsky & Shavell, *supra* note 90, at 890-906 (explaining that the failure to consider the awards of compensatory damages in the instant case and other cases will result in over-deterrence); cf. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986) ("[D]amages that compensate

admit that it is inconsistent with the prevailing law, however, there is no basis to suggest, based on this literature, that there is a constitutional problem with total harm punitive damages.

III. THE HISTORICAL CONCEPTION OF PUNITIVE DAMAGES—PUNISHMENT FOR PRIVATE WRONGS

In addressing the problems associated with awarding punitive damages for acts affecting more than one victim, courts and commentators have taken as a given the modern conception of punitive damages as punishment for public wrongs (or have employed the economic conception of punitive damages as a means of achieving optimal deterrence, while recognizing that the law presently conceives of punitive damages differently). In light of the significant logical discord between the modern understanding of the nature of punitive damages and the actual black letter rules of punitive damages law, however, that uncritical acceptance is troubling. It would be wise to inquire whether there is more to the nature of punitive damages than meets the modern eye.

In fact, there is. An exploration of the historical origins and early conceptions of the doctrine of punitive damages,⁹⁹

for actual harm ordinarily suffice to deter . . .”).

Finally, by generalizing from the facts of a single case, “total harm” punitive damages awards can over-deter by overestimating the actual harm caused by the defendant’s conduct. As explained in Part I, *supra*, in some cases, the jury’s conclusion that the defendant was guilty of wrongdoing and should be subjected to punitive damages will be incorrect altogether. Of course, litigation always carries a risk of erroneous results, but punishing an entire course of conduct on the basis of a single potentially wrongful decision inflates that risk—and therefore increases the prospect that the defendant will be deterred from engaging in socially beneficial activities—especially when the defendant has already been exonerated in other proceedings. *Cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (overturning a class certification order on these grounds). In addition, even if the jury’s assessment of the defendant’s culpability is accurate (and even if the defendant’s conduct was equally culpable as to all victims, which, as explained above, may not be the case), the jury’s assessment of the global harm caused by the defendant’s conduct may still be inflated for two reasons. *See supra* Part I. First, “total harm” punitive damages deprive the defendant of the opportunity to establish that many of the alleged victims were not victims at all. *Supra* Part I. Second, because rational attorneys will try to bring the most sympathetic and compelling cases first, the jury that seeks to punish the whole course of conduct on the basis of its knowledge of the wrong suffered by the plaintiff may inflate the total harm by wrongly assuming that all other victims are identically situated and have as compelling a case for punitive damages as does the victim before the court. *Supra* Part I.

99. On the topic of the historical origins of punitive damages, see, for

and, in particular, of the ways in which the early courts confronted the problem of punishing acts that harmed more than one victim, reveals a very different understanding of the nature and role of punitive damages—one with important ramifications for the constitutionality of “total harm” punitive damages today.

A. HISTORY

Punitive damages existed in some form in many ancient legal systems,¹⁰⁰ and were authorized by medieval English statutes,¹⁰¹ but did not appear in the English common law until the eighteenth century.¹⁰² In the early part of that century, the English courts began to assume the power to review damage awards for excessiveness.¹⁰³ Soon thereafter, in the face of what one commentator has dubbed “inexorable pressure to find some rational basis for awards of hundreds or thousands of pounds in cases in which no tangible loss had occurred,”¹⁰⁴ courts recognized punitive damages as a means of justifying damage awards in excess of the plaintiff’s tangible harm.¹⁰⁵

Because the doctrine of punitive damages was not created by the courts to serve an expressed purpose, but rather arose as an after-the-fact effort to justify unreasoned and seemingly dubious practices, the English courts struggled to articulate the actual basis for its existence. Frequently, the courts spoke of punitive damages as serving the now familiar extra-

example, 22 AM. JUR. 2D *Damages* § 732 (1988); 1 JAMES D. GHIARDI & JOHN J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE* §§ 1:01-:02 (1994); SCHLUETER & REDDEN, *supra* note 1, § 1; Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-19 (1982); Owen, *supra* note 2, at 1262-64; Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518-20 (1957).

100. See SCHLUETER & REDDEN, *supra* note 1, § 1.1 (citing examples from ancient Greek and Egyptian law); Owen, *supra* note 2, at 1262 n.17 (citing additional examples from ancient Babylonian, Hittite, Hebrew, Hindu, and Roman law);

101. See Owen, *supra* note 2, at 1263 n.18.

102. See GHIARDI & KIRCHER, *supra* note 99, § 1.01; Ellis, *supra* note 99, at 12; Owen, *supra* note 2, at 1263 n.19; Note, *supra* note 99, at 518-19. The earliest cases to make explicit mention of punitive damages are *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), and *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763).

103. See Ellis, *supra* note 99, at 13; Note, *supra* note 99, at 518-19.

104. Ellis, *supra* note 99, at 14.

105. See Note, *supra* note 99, at 519-20.

compensatory goals of punishment and deterrence.¹⁰⁶ Just as frequently, however, the courts justified punitive damages as additional compensation for mental suffering, wounded dignity, and injured feelings¹⁰⁷—harms that were otherwise not legally compensable at common law.¹⁰⁸ Thus, punitive damages were initially awarded exclusively in cases that involved insult to the honor and dignity of the victim,¹⁰⁹ and their amount depended not only on the wealth of the defendant and the degree of wantonness exhibited by him, but also on the social status of the plaintiff and the degree of insult that he suffered. Indeed, the English courts were quite explicit in explaining that “the state, degree, quality, trade or profession of the party injured . . . must be, and generally are, considered by a jury in giving [punitive] damages.”¹¹⁰ For instance, the Court of Common Pleas upheld a large punitive damages award in 1779 because “the plaintiff is a man of family, a baronet, an officer in the army, and a member of Parliament; all of them respectable situations, and which may render the value of an injury done to him” greater.¹¹¹ Along similar lines, the courts explained that “the circumstances of time and place, when and where the insult is given, require different [punitive] damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room.”¹¹²

As punitive damages made their way across the Atlantic Ocean, courts continued to speak of them as serving not only as punishment, but also as compensation for otherwise non-compensable harms.¹¹³ The Texas Supreme Court, for instance, declared in 1851,

When the ordinary rules of compensation are dispensed with the damages may be denominated exemplary, for the reason that if high they deter from the commission of similar offenses; but they also

106. See, e.g., *Wilkes*, 98 Eng. Rep. at 498-99.

107. See Note, *supra* note 99, at 519; see also 22 AM. JUR. 2D *Damages* § 732 (1988) (noting that punitive damages “originated as a means of giving damages for wounded feelings, as distinguished from damages for an injury to person or property”); Ellis, *supra* note 99, at 14-16 (commenting that some early courts treated punitive damages as compensation for insult).

108. See SCHLUETER & REDDEN, *supra* note 1, at 7-8.

109. See Ellis, *supra* note 99, at 15.

110. *Huckle v. Money*, 95 Eng. Rep. 768, 768 (K.B. 1763).

111. *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C.P. 1779).

112. *Tullidge v. Wade*, 95 Eng. Rep. 909, 910 (C.P. 1769); see also *id.* at 909 (stating that high punitive damages were justified, “the plaintiff having received this insult in his own house”).

113. See Note, *supra* note 99, at 519-20.

effect the purpose of compensation, and may therefore be regarded as the damages sustained from the wanton and aggravated outrage.¹¹⁴

Nineteenth-century American judges and commentators made frequent references to the compensatory elements and origins of punitive damages. For instance, the Texas Supreme Court noted, this time in 1885, that "[i]t may be, and is, most likely, true that the whole doctrine of punitive or exemplary damages has its foundation in a failure to recognize as elements upon which compensation may be given many things which ought to be classed as injuries entitling the injured person to compensation."¹¹⁵

Thus, the American courts continued the English tradition of fixing the amount of punitive damages by reference not only to the degree of wantonness exhibited by the defendant, but also to the gravity and extent of the injury.¹¹⁶ Like the English courts, they tied the amount of punitive damages to the social status of the insulted plaintiff.¹¹⁷ As the Illinois Supreme Court memorably remarked in 1869,

If a rich man, presuming upon his wealth, shall causelessly injure a

114. *Cole v. Tucker*, 6 Tex. 266, 271 (1851); see also, e.g., *Beckwith v. Bean*, 98 U.S. 266, 305 (1878) (Field, J., dissenting) ("[The jury] may well have supposed that the amount awarded was at best but poor compensation. Few, indeed, would consider the verdict given as sufficient for the disgrace, humiliation, and suffering wantonly inflicted upon the plaintiff. As punitive damages, the verdict was not at all excessive."); *Smith v. Bagwell*, 19 Fla. 117, 120 (1882) ("[T]he personal indignity [and] the wounded feelings . . . enter into punitive damages."); *Morse v. Auburn & Syracuse R.R.*, 10 Barb. 621, 625 (N.Y. Gen. Term 1851) (noting that the imposition of punitive damages, which "are given by way of punishment" and "operate as an example to others," includes consideration of "the mental suffering, the injured feelings, the sense of injustice, of wrong, or insult on the part of the sufferer"); *Welborn v. Dixon*, 49 S.E. 232, 237-38 (S.C. 1904) (Woods, J., dissenting) ("In this state punitive damages are regarded as made up of two elements—punishment of wrong, and vindication of private right, by requiring payment for outrage, oppression, or indignity, which it is felt should be atoned for by compensation, but which cannot be expressed by computation.").

115. *Stuart v. W. Union Tel. Co.*, 18 S.W. 351, 353 (Tex. 1885); see also Edward C. Eliot, *Exemplary Damages*, 29 AM. L. REG. 570, 572 (1881) (presently entitled U. PA. L. REV.) ("The difficulty of estimating compensation for intangible injuries, was the cause of the rise of this doctrine [W]hen the early judges allowed the jury discretion to assess beyond the *pecuniary* damage, there being no apparent computation, it was natural to suppose that the excess was imposed as punishment."); *Bixby v. Dunlap*, 56 N.H. 456, 463 (1876) (noting that punitive damages arose in an "endeavor to bring . . . considerations within the grasp of the law" of "compensation for the wounded feelings, the offended pride, [and] the outraged sense of decency").

116. See, e.g., *Fleet v. Hollenkemp*, 52 Ky. (13 B. Mon.) 219, 225-26 (1852).

117. See, e.g., *Tillotson v. Cheetham*, 3 Johns. 56, 64 (N.Y. Sup. Ct. 1808).

poor man, by personal violence toward him, or by any malicious proceeding, he ought to be visited by vindictive damages, but, at the same time, they must bear some sort of proportion to the injury done, and the victim should have a good standing in society. It is not expected of a jury that, for a mere personal wrong, such as this case presents, if done to a vagrant, or to a person of but little character in community, they should award to him the same damages they would give a man whose station and respectability were unquestioned.¹¹⁸

So strong, in fact, were the compensatory roots of punitive damages that, in the mid-nineteenth century, many courts and scholars rejected the notion that punitive damages served any punitive purpose at all. To these authors, punitive damages, despite their misleading name, were in fact nothing more than additional compensation for wounded feelings and insult. Leading the charge was Harvard Law School's Simon Greenleaf. Greenleaf argued that, notwithstanding widespread dicta in the decisions of numerous American and English courts recounting the principle that punitive damages may be assessed to punish and deter the defendant, such damages had, in practice, been imposed only as a means of ensuring that the plaintiff was fully compensated for his tangible and intangible losses.¹¹⁹ Many courts followed Greenleaf's lead and held that "in all cases it is to be distinctly borne in mind that compensation to the plaintiff is the purpose in view, and any

118. *Walker v. Martin*, 52 Ill. 347, 351 (1869).

119. See 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 240 n.2 (16th ed. 1899); Simon Greenleaf, *The Rule of Damages in Actions Ex Delicto*, 5 W.L.J. 289, 290-96 (1848). Other commentators, writing both before and after Greenleaf, agreed. One noted,

If [courts endorsing punitive damages] mean that it is allowable for a jury to give damages beyond the amount of what the law regards as *actionable injury to the plaintiff*, by way of gratifying his resentment, or *punishing* the defendant for the purpose of public example, it is submitted that they are not true; that there is nothing punitive in civil actions. . . . [Rather, this doctrine] means nothing more, when truly understood, than this, viz. that damages may be given for insult, contumely, and abuse, not in themselves actionable, when they accompany an actionable injury.

A Reading on Damages in Actions Ex Delicto, 3 AM. JURIST 287, 305-06 (1830) [hereinafter *Reading*]. Another commentator argued that

[t]he true foundation of the doctrine of exemplary and punitive damages is that in the case of wilful and malicious wrongs which have actually injured the plaintiff beyond the domain of pecuniarily computable damage, the jury may allow, not by way of vindictive punishment in addition to damages, but as a just and proper part of actual damages, such a reasonable sum as the plaintiff is fairly entitled to receive make full amends, and as the defendant justly deserves to be required to pay.

Exemplary Damages, 13 WASH. L. REP. 652, 652 (1885).

instruction which is calculated to lead [the jurors] to suppose that besides compensating the plaintiff they may punish the defendant is erroneous."¹²⁰

In opposition to Greenleaf's crusade, Theodore Sedgwick, a prominent and highly respected treatise author,¹²¹ argued that the holdings, and not just the dicta, of the cases commanded the conclusion that the law of punitive damages "blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender."¹²² Many courts joined ranks with Sedgwick, expressing the view that "[t]he true theory of exemplary damages is that of punishment, involving the ideas of retribution for willful misconduct, and an example to deter from its repetition."¹²³

During the nineteenth century, a fierce battle raged between the followers of Greenleaf and the followers of Sedgwick. It is, in the broadest of terms, no mystery how this struggle ultimately turned out. It is well recognized that

throughout the nineteenth century, both in the United States and in England, the concept of actual damages was being broadened to include intangible harm. As a result, the original compensatory function of exemplary damages came to be filled by actual damages, and courts today are led to speak of exemplary damages exclusively in terms punishment and deterrence.¹²⁴

120. *Stillson v. Gibbs*, 18 N.W. 815, 817 (Mich. 1884). The most thorough explication of this position can be found in *Fay v. Parker*, 53 N.H. 342, 379-84 (1872).

121. Sedgwick has been called "the seminal American scholar on damages." Galligan, *supra* note 83, at 30 n.110. According to Morton Horwitz, Sedgwick's treatise on damages is "the most brilliant and boldly innovative American antebellum legal treatise." MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 83 (1977).

122. Theodore Sedgwick, *The Rule of Damages in Actions Ex Delicto*, 5 W.L.J. 193, 194 (1848) (emphasis omitted); see also THEODORE SEDGWICK, *A TREATISE ON THE MEASURE OF DAMAGES* 515-40 (5th ed. 1869).

123. *Ala. G.S.R. Co. v. Sellers*, 9 So. 375, 377 (Ala. 1891).

124. Note, *supra* note 99, at 520 (footnotes omitted). The Supreme Court noted this point in *Cooper Industries v. Leatherman Tool Group, Inc.*, remarking that

[u]ntil 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. As the types of compensatory damages available to plaintiffs have broadened, the theory behind punitive damages has shifted toward a more purely punitive . . . understanding.

532 U.S. 424, 438 n.11 (2001) (citations omitted).

In determining what, exactly, was being punished, however, the courts did not let go completely of the compensatory roots of the doctrine.

As noted above, the early focus of punitive damages awards was on the degree of insult to the victim, and thus the courts tailored the amount of the punitive award to the victim's social status and to the circumstances of the insult. As courts gradually moved away from viewing punitive damages as compensation for non-compensable harms and toward viewing punitive damages as punishment, they steadfastly maintained their focus on the insult to the individual victim. Thus, the judicial rhetoric drifted from notions of compensating the insult to notions of punishing the insult,¹²⁵ or more generally punishing the injury, but remained centered throughout on the insult or injury to the plaintiff.¹²⁶ As such, although the courts eventually settled upon an understanding of punitive damages as punishment rather than compensation, they did not conceive of them as punishment for some amorphous wrong to society, or as punishment for the malicious act in the abstract; rather, they conceived of them as punishment for the private legal wrong—the insult—done to the individual plaintiff.

125. See, e.g., *Chi., St. Louis & New Orleans R.R. v. Scurr*, 59 Miss. 456, 465 (1882) (speaking of "exemplary punishment for . . . insult"); *Duncan v. Stalcup*, 18 N.C. 440, 442 (1836) ("[T]he jury are [sic] permitted to punish insult by exemplary damages."); *Merest v. Harvey*, 128 Eng. Rep. 761, 761 (C.P. 1814) ("[J]uries are permitted to punish insult by exemplary damages.").

126. See, e.g., *Harrison v. Ely*, 11 N.E. 334, 335 (Ill. 1887) ("Where an injury is wantonly and willfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrong-doer vindictive or punitive damages by the way of punishment for such willful injury."); *Foote v. Nichols*, 28 Ill. 486, 488 (1862) (holding that the jury "may give exemplary damages not only to compensate the plaintiff, but to punish the defendant for such wanton injury"); *Louisville & Nashville R.R. v. Berry*, 111 S.W. 370, 371 (Ky. 1908) (noting that punitive damages may be awarded "by way of punishment for the wrongs and injuries done the plaintiff"); *Callahan v. Caffarata*, 39 Mo. 136, 137 (1866) ("[T]he jury may add such further sum, by way of smart money, as in their opinion will sufficiently punish the defendant Caffarata for the wrong and injury done to plaintiff."); *McGarry v. Mo. Pac. Ry.*, 36 Mo. App. 340, 352 (1889) (finding that a jury may award "such further sum by way of exemplary damages" as it thinks "to be right and just to punish the defendant for the injury complained of"); *Robison v. Fetterman*, 9 Sadler 604, 610 (Pa. 1888) (noting jury instructions defining punitive damages as "punishment for the injury done"); *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 7 (S.C. 1784) ("[A] very serious injury to the plaintiff . . . entitled him to very exemplary damages . . ."); *Hamilton v. Marsh*, 2 Tyl. 403, 405 (Vt. 1803) ("[T]he plaintiff ought to be recompensed for the injury he may have sustained with exemplary damages . . .").

That conception is most clearly manifested in the cases confronting the argument that, to avoid unconstitutional double punishment, punitive damages should not be allowed where the defendant's conduct is also punishable as a crime.¹²⁷ Initially, the broad divide in the courts over the true purpose and nature of punitive damages led to a split of authority on this issue.¹²⁸ To some courts that viewed punitive damages as purely compensatory, any argument that allowing punitive damages would amount to double punishment was "based on a misconception of the meaning of the expression punitive damages," the true object of which "is not to inflict a penalty, but to remunerate for the loss sustained."¹²⁹ To those courts that viewed punitive damages as true punishment, however, the principle that "a man shall not be twice punished for the same offence" dictated that "punishment-damages," as distinct from "compensation-damages," cannot be awarded where the wrongful act is also a crime.¹³⁰

127. See generally Annotation, *Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages*, 98 A.L.R.3d 870, 879 (1980).

128. See *Boyer v. Barr*, 8 Neb. 68, 71 (1878). Whatever its actual views, the *Boyer* court noted,

[I]t will be a hopeless task to endeavor to reconcile them either with the adjudicated cases, or the conclusions of eminent text writers of either this country or England, for as far as we have been able to examine them they are pretty evenly divided both in numbers and weight of authority.

Id.; see also *Ala. Power Co. v. Goodwin*, 99 So. 158, 159 (Ala. 1923) (noting that the split in authority is due "to divergent theories of the nature and purpose of punitive damages in civil cases"), *overruled in part by Morrison v. State*, 100 So. 2d 744 (Ala. 1957).

129. *Chiles v. Drake*, 59 Ky. (2 Met.) 146, 151-52 (1859) (emphasis omitted).

130. *Cherry v. McCall*, 23 Ga. 193, 199 (1857); see also *Taber v. Hutson*, 5 Ind. 322, 325-26 (1854) (precluding punitive damages because, although the double jeopardy doctrine technically applies only to criminal prosecutions, "still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, *viz.*, that each violation of the law should be certainly followed by one appropriate punishment and no more" (emphasis added)); *Austin v. Wilson*, 58 Mass. (4 Cush.) 273, 275 (1849) (precluding punitive damages because "the defendant might be punished twice for the same act"). One reason advanced by Professor Greenleaf in support of the theory that punitive damages must be considered as purely compensatory was that

[i]f more than this was intended, how is the party to be protected from a double punishment? For, after the jury shall have considered the injury to the public, in assessing damages for an aggravated assault, or for obtaining goods by false pretences, or the like, the wrong-doers are still liable to indictment and fine as well as imprisonment, for the same offence.

Neither of these positions ultimately prevailed. Instead, the majority rule arose from the decisions of courts that took a more nuanced stance: Punitive damages do not implicate double jeopardy concerns, not because they are not intended as punishment at all, but rather because they are intended as punishment for the wrong to the individual victim.¹³¹ To these courts, "the damages allowed in a civil case by way of punishment[] have no necessary relation to the *penalty* incurred for the *wrong done to the public*," but rather are imposed "as a punishment for the *wrong done to the individual*."¹³² "In this view, the awarding of punitive damages can in no just sense be said to be in conflict with the constitutional or common law inhibition against inflicting two punishments for the same offense."¹³³ As the Wisconsin Supreme Court explained,

[J]udgment for the criminal offense is for the offense against the public; judgment for the tort is for the offense against the private sufferer; . . . though punitive damages go in the right of the public for example, they do not go by way of public punishment, but by way of private damages; for the act as a tort and not as a crime, to the private sufferer and not to the state. Though they are allowed beyond compensation of the private sufferer, they still go to him for himself, as damages allowed to him by law in addition to his actual damages; like the double and treble damages sometimes allowed by statute. Considered as strictly punitive, the damages are for the punishment of the private tort, not of the public crime.¹³⁴

Greenleaf, *supra* note 119, at 296.

131. See *infra* notes 132-34.

132. *Hendrickson v. Kingsbury*, 21 Iowa 379, 391 (1866).

133. *Id.* *Hendrickson* "makes the distinction between the punishment for the wrong done the public, for which the punishment is inflicted in the criminal action, and that done to the individual, for which punishment may be imposed by the jury in the civil action." *Hauser v. Griffith*, 71 N.W. 223, 223 (Iowa 1897).

134. *Brown v. Swineford*, 44 Wis. 282, 287-88 (1878); see also, e.g., *Smith v. Bagwell*, 19 Fla. 117, 127 (1882) (rejecting the argument that a jury cannot award punitive damages in a civil tort action when the defendant's conduct is also punishable criminally); *Baldwin v. Fries*, 46 Mo. App. 288, 296 (1891) (asserting that "such damages are [punishment] for the wrong done to the individual, and have no relation to the wrongs done to the public"); *Zick v. Smith*, 112 A. 846, 846 (N.J. Sup. Ct. 1921) (arguing that the double jeopardy argument "is illogical" because the "criminal action is a punishment for the wrong done to the public" whereas the "punitive damages [award] is a punishment for the wrong done to the individual"), *aff'd*, 116 A. 927 (N.J. 1922); *Barr v. Moore*, 87 Pa. 385, 393-94 (1878) ("When the act is both a public and private wrong, the public and the person aggrieved, each has a distinct and concurrent remedy. . . . [The private right to] vindictive damages . . . cannot be defeated by the fact that the [defendants] may be punished for an

Thus, the courts avoided the double jeopardy problem by holding that punitive damages are punishment, not for the improper act in the abstract, or the wrong that the defendant caused to society, but for the legal wrong to the individual plaintiff.¹³⁵

Just as the law recognized that the wrong to the public stemming from an illicit act is legally distinct from the private wrong to the victim arising from the same act, it also recognized that a single illicit act that harms more than one person constitutes a number of legally distinct private wrongs. Indeed, it is axiomatic that

a wrong cannot, in a legal sense, be a violation of more than one right. The same act may violate any number of rights, but each such violation would constitute a different wrong. If such violations or wrongs are distinct and separate, even though resulting from the same act, they would give rise to different causes of action; but from a single wrong but one cause of action can arise.¹³⁶

injury to the public." (citations omitted)).

135. The court in *Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895), declared that the just rule of exemplary damages to be as follows: If, after the jury has assessed damages to fully compensate the plaintiff for the injury, such damages are still not sufficient in amount to *punish the defendant for the maliciousness of the private wrong of which he is found guilty*, and to hold him up as a public example and warning, to prevent the repetition of the same or the commission of similar wrongs, they may add such further sum, in their judgment, as may be necessary for this purpose.

Id. at 63 (emphasis added); *see also* *Mo. Pac. Ry. v. Humes*, 115 U.S. 512, 521 (1885) (noting that punitive damages are imposed to punish private wrongs); *Edmunds v. Atchison, Topeka & Santa Fe Ry.*, 162 P. 1038, 1039-40 (Cal. 1917) (suggesting that punitive damages are "punishment for the wrong which the jurors believe[] [has] been inflicted upon plaintiff"); *Winans v. Cong. Hotel Co.*, 227 Ill. App. 276, 285 (1922) (arguing that "exemplary damages are such damages as will punish the defendant for the wrong done, if any, to the plaintiff"); *Miller v. Hammers*, 61 N.W. 1087, 1088 (Iowa 1895) ("[E]xemplary damages are given as a punishment for the wrong done to plaintiff . . .") (quoting the trial court's jury instructions); *Beaulieu v. Great N. Ry.*, 114 N.W. 353, 355 (Minn. 1907) (arguing that punitive damages are "imposed in the nature of punishment for the wrong complained of"); *N. Ohio Trac. & L. Co. v. Peterson*, 33 Ohio Cir. Dec. 14, 15 (Cir. Ct. 1908) (authorizing a jury to "award to plaintiff punitive or exemplary damages; that is, damages in addition to compensatory damages, for the purpose of punishing the defendant for the wrong done to plaintiff"); *see also* sources cited *supra* note 126.

136. *City of Columbus v. Anglin*, 48 S.E. 318, 320 (Ga. 1904); *see also, e.g.,* *People v. Israel*, 109 N.E. 969, 970 (Ill. 1915) ("Where articles of property are stolen at one and the same time and at the same place, from several separate owners, there are as many wrongs committed against private citizens as there are separate owners . . ."); *Ill. Cent. R.R. v. Slater*, 39 Ill. App. 69, 81 (1890) (insisting that it is "well settled that many causes of action may grow out of a single act . . . to as many individuals as suffer damages by the wrongful act");

Thus, in the earliest cases to confront the multiple punishment problem, the courts allowed awards of punitive damages to more than one victim of the defendant's act on the theory that, properly understood, each punitive damages award was designed to punish the defendant only for the wrong done to the individual victim. For instance, in *Alabama Power Co. v. Goodwin*¹³⁷—in which the plaintiff sued for injuries resulting from a street car collision—the court rejected the argument that the jury should have been informed “that punitive damages were assessed against this defendant in another suit by another passenger, based upon this same collision and this same alleged act of wanton negligence.”¹³⁸ The court explained its reasoning,

The vice of appellant's contention, as it seems to us, lies in the assumption that a single act of wanton negligence, which simultaneously injures a number of individuals, is a single wrong. . . . But in its civil aspects the single act or omission forms as many distinct and unrelated wrongs as there are individuals injured by it.¹³⁹

Multiple punitive awards are permissible because each award serves as punishment only for the legal wrong that is actually before the court—the wrong done to the individual plaintiff.

Of course, if that is so, it follows that each punitive damages award must be fixed in an amount designed to punish only the individual wrong. It must not punish other legal wrongs—wrong to other victims—that stemmed from the same act or course of conduct but were not directly at issue.

The courts recognized that very principle in the earliest decisions to raise the specter of multiple punishment: those addressing the question whether, in cases involving seduction and breach of a promise to marry, it was permissible for both the seduced woman and her father to obtain punitive damages from the seducer for the same wrongful conduct.¹⁴⁰ In the first

Bennett v. Strow, 220 N.Y.S.2d 806, 807 (Sup. Ct. 1961) (“It is elemental that each person induced by fraudulent misrepresentations to make a purchase has suffered a separate wrong and has a separate cause of action.” (citing *Brenner v. Title Guarantee & Trust Co.*, 11 N.E.2d 890, 891 (N.Y. 1937))).

137. 99 So. 158 (Ala. 1923).

138. *Id.* at 159.

139. *Id.* at 160 (citations omitted).

140. At common law, seduction was a cause of action available only to the father, usually when his daughter had become pregnant. See *Lea VanderVelle*, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 821-22, 826 n.33 (1996). The only cause of action available to the daughter was for breach

such decision—the 1769 case of *Tullidge v. Wade*¹⁴¹—the Court of Common Pleas sustained a judgment of punitive damages in favor of the father of a seduced daughter. Dismissing concerns about unfair multiple punishment, Lord Chief Justice Wilmot remarked that, if the daughter “brings another action against defendant for the breach of promise of marriage, so much the better; he ought to be punished twice.”¹⁴² Crucially, however, the court explained that it surely would have been improper in the instant case (brought by the father) for the jury to have also punished the defendant for the harm that his acts caused to the daughter.¹⁴³ It was only because the jury was properly instructed not to do so,¹⁴⁴ and because the comparatively low amount of the judgment suggested that the jury followed its instructions, that there was no ground for reversal.¹⁴⁵ In other words, the defendant “ought to be punished twice,” but only once for each distinct legal wrong.

The American courts agreed. As the justification for punitive damages was in flux in the early part of the nineteenth century, American courts employed differing rationales for allowing multiple punitive damages awards in seduction and breach of promise to marry cases. Some courts appeared to treat punitive damages primarily as compensation for the non-pecuniary injury and insult suffered by the victims.¹⁴⁶ Because the father and the daughter each suffered serious, yet distinct, injuries, these courts had no problem

of a promise to marry. *Id.* at 840 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *142 n.30). Although breach of a promise to marry sounded in contract, the courts treated it like a tort, and allowed awards of punitive damages. See Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 222-23 (1977). Throughout the nineteenth century, however, courts and legislatures began to grant standing to women to sue on their own behalf for seduction. See VanderVelde, *supra*, at 891-94.

141. 95 Eng. Rep. 909 (C.P. 1769).

142. *Id.* at 909 (Wilmot, C.J.).

143. See *id.* at 910 (Bathurst, J.).

144. The court noted,

Upon summing up the evidence to the jury, the Judge (Gould) was pleased to say, that he told them over and over again, that, in giving damages in this action, they must not consider the injury done to A.B. as to the promise of marriage, but must leave that matter quite out of the question, because A.B. might have her action for breach of that promise

Id. at 909.

145. See *id.* at 909-10.

146. See *infra* note 149.

allowing both victims to recover exemplary damage awards for the same wrongful conduct.¹⁴⁷ As the Illinois Supreme Court explained, the exemplary damages awarded to the father "are only such as he may have sustained in the disgrace brought upon his family, in his wounded feelings, or otherwise, and nothing is allowed on account of the suffering and disgrace of the daughter."¹⁴⁸ As such,

[i]t does not follow . . . that the seducer will be made to pay double damages for the same injury. He pays to the father for the injury done him; if the daughter is permitted to recover, it is for the injury done her, and it often happens that by one act, a wrong may be done several persons, for which, each has a right of action.¹⁴⁹

Other early American courts, however—like the English court in *Tullidge v. Wade*—treated punitive damages in these cases not only as compensation, but also as a punishment and deterrent. Still, because each punitive damages award served to punish a different injury, those courts saw no unfairness in allowing awards to both the father and the daughter in separate actions. For instance, in *Stevenson v. Belknap*,¹⁵⁰ decided by the Iowa Supreme Court in 1858, the court noted that, to resolve the question of whether both the father and the daughter may recover punitive damages for seduction,¹⁵¹ it was

147. See *infra* notes 148-49.

148. *Tubbs v. Van Kleek*, 12 Ill. 446, 448 (1851).

149. *Id.* In 1834, the Missouri Supreme Court argued,

[N]or is it a reason why the daughter should not be permitted to recover on the breach of a marriage contract for a seduction procured under cover of the contract, that the father may give it in evidence and recover in his action for the same seduction. Money at most can afford but a paltry and inadequate recompense for the loss of virtue and character to the child; or for the loss of the child's society, and the peace and happiness of the family, to the parent. They each sustain injuries peculiar to themselves, and for which each should have redress.

Green v. Spencer, 3 Mo. 225, 227 (1834). The Virginia Supreme Court reiterated in 1856,

That such promise is an independent cause of action by the daughter, is no good reason why it should not be proved in aggravation of [exemplary] damages in the father's action for seduction. . . . Each has a perfect right to recover damages to the full extent of the wrong done to each; and in order to do so, may prove whatever may reasonably serve to show the measure of damages sustained by each.

White v. Campbell, 54 Va. (13 Gratt.) 573, 574 (1856); cf. *Paul v. Frazier*, 3 Mass. 71, 73 (1807) ("[D]amages are recoverable for a breach of promise of marriage; and if seduction has been practised under color of that promise, the jury will undoubtedly consider it as an aggravation of damages.").

150. 6 Iowa 96 (1858).

151. In derogation of the common law, Iowa afforded a statutory cause of

necessary to determine "for what exemplary damages may be given."¹⁵² The court recognized the principle that punitive damages serve to punish the wrongdoer,¹⁵³ but rejected the argument that the father should not be permitted to recover punitive damages because the "defendant is still liable to an action for seduction by the daughter; and if the father may recover exemplary damages, it may result in their being twice claimed against him in a civil suit, and the defendant is in danger of being twice punished for the same injury."¹⁵⁴ That argument missed the mark because it failed to recognize that the "injury to the father is distinct from the injury, to the daughter. They are different in character, and there is nothing incompatible or inconsistent in the idea of both resulting from the one wrongful act of defendant."¹⁵⁵ "If actions are brought by both the father and the daughter, . . . the jury may consider every fact which goes to the injury of the plaintiff . . . and may give damages commensurate with the injury sustained," that is, "damages resulting to the plaintiff alone, and not to another."¹⁵⁶

To the same effect is *Phelin v. Kenderdine*,¹⁵⁷ decided by the Pennsylvania Supreme Court in 1853, in which the court allowed the father in a seduction case to introduce evidence of a breach of promise of marriage as proof of the aggravated nature of his own injury, notwithstanding the fact that the daughter could bring her own action based on that breach.¹⁵⁸ Recognizing that punitive damages exist in part as "punishment of the wrongdoer,"¹⁵⁹ the court explained,

So far as the promise of marriage tends to show *the nature of the injury to the parent, or the means by which it was accomplished*, the evidence is as pertinent as any other circumstance which gives character to the transaction; and the only instruction which the defendant has a right to require in regard to such evidence is, that the jury must not award *to the father* any part of the damages which belong to the daughter, by reason of the breach of the contract of marriage. It is written that "the way of the transgressor is hard;" but there is no unjust hardship in two punishments where there are two

action to a seduced woman to sue on her own behalf. *See id.* at 101.

152. *Id.* at 100.

153. *See id.* at 104.

154. *Id.* at 101.

155. *Id.* at 102.

156. *Id.* at 101.

157. 20 Pa. 354 (1853).

158. *Id.* at 362.

159. *Id.* at 361.

offences. It is proper that the daughter should have her action on the contract of marriage for the damages which she has sustained; and it is equally just that the contract should be given in evidence in the action by the father, where the defendant himself has made use of it as the means of deceiving and injuring the parent.¹⁶⁰

"The seducer who commits two offences, has no better right to escape with a single punishment, than the burglar who murders the servant in order that he may rob the house of the master without opposition."¹⁶¹

Thus, the courts rejected the double jeopardy argument by holding that, in any given case, the defendant may be punished with an award of punitive damages only for the wrong done, and the harm caused, to the individual plaintiff.¹⁶²

That was also the conclusion reached by the Michigan Supreme Court in a different context in *Ganssly v. Perkins*,¹⁶³ a

160. *Id.* at 362.

161. *Id.* at 363.

162. See *Coil v. Wallace*, 24 N.J.L. 291, 314-15 (1854) (rejecting the argument that allowing punitive damages to both the father and the daughter would mean that the defendant would "be twice mulcted in damages for the same violation of duty" because each victim is entitled to punitive damages "not flagrantly excessive or disproportionate to [his or her] injury"); *Coryell v. Colbaugh*, 1 N.J.L. 90, 91 (1791) (upholding award of punitive damages in a breach of promise to marry case despite the fact that the father had previously received an award of punitive damages in a seduction case in which the fact of the breach of promise had entered into the punitive calculation); *Brownell v. McEwen*, 5 Denio 367, 369 (N.Y. Sup. Ct. 1848) (indicating that, where the jury in a seduction case brought by the father also heard evidence of a possible breach of a promise to marry, reversal would be appropriate only if it could be established that the jury actually attempted to punish both the wrong to the father and the wrong to the daughter); *Luther v. Shaw*, 147 N.W. 18, 20 (Wis. 1914) (upholding a punitive damages award to the father in a seduction suit despite the fact that the daughter had already recovered punitive damages in a breach of promise to marry suit and rejecting the argument that "because . . . the same act . . . constituted a wrong against two different persons the defendant may . . . not be subject to exemplary damages at the suit of each"). In an effort to prevent multiple punishment for the same injury, a distinct minority of courts refused to allow evidence of the seduction to be introduced in the breach of promise to marry case at all, and vice versa. See, e.g., *Foster v. Scoffield*, 1 Johns. 297, 299 (N.Y. Sup. Ct. 1806); *Weaver v. Bachert*, 2 Pa. 80, 82 (1845). But those courts still allowed both victims to pursue their own causes of action for punitive damages arising out of the same wrongful conduct. *Foster*, 1 Johns. at 299; *Weaver*, 2 Pa. at 82.

163. 30 Mich. 492, 494-95 (1874). Michigan is one of a few states that today treats exemplary damages as purely compensatory in nature. See *Kerwin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) ("In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment for the defendant."). In *Ganssly*, however, the court clearly treated them at least in part as punishment. See 30 Mich. at 494-95. In fact, the court cited its recent decision in *Kreiter v. Nichols*, 28

case involving the interpretation of a statute that provided that "every wife, child, parent, guardian, husband, or other person, who shall be injured in person, property, means of support, or otherwise, by any intoxicated person, or by reason of the intoxication of any person" shall have an action against the alcohol vendor, and may recover "actual and exemplary damages."¹⁶⁴ The *Ganssly* court sought to determine to whom punitive damages may be given under the statute, and in what amount. Noting that "[t]here is nothing in these cases to exempt them from the rules applied in any other cases of actionable wrongs,"¹⁶⁵ the court held that

exemplary damages should be given in those cases, and only in those cases, where the plaintiff has some personal right to complain of a wanton and willful wrong, which the wrong-doer, when he committed it, must be regarded as having committed against the plaintiff herself, in spite of the injury he must have known she was likely to suffer by it.¹⁶⁶

The court explained,

The foundation of exemplary damages . . . rests on the wrong done willfully to the complaining party, and not to wrong done without reference to that party. Otherwise, every one entitled under the statute to bring an action might bring his or her separate action for the same wrong, and while each would recover as his own actual damages no more than his own injury, the same exemplary damages would be multiplied and recoverable in addition to actual damages in every one of those actions. No such consequence can have been intended.¹⁶⁷

Historically, then, punitive damages, even when regarded as punishment, were consciously limited to the amount necessary to punish the defendant for the wrong done, and the harm caused, to the individual plaintiff only.¹⁶⁸ Although they

Mich. 495 (1874), for an explanation of the "foundation of exemplary damages." *Ganssly*, 30 Mich. at 495. In *Kreiter*, the court articulated "the grounds on which such damages are allowed": They may be imposed "by way of punishment" and should go "beyond what could be measured by way of compensation." 28 Mich. at 499-500.

164. 30 Mich. at 494 (citing MICH. COMP. LAWS § 2137 (1871)).

165. *Id.*

166. *Id.* at 494-95.

167. *Id.* at 495.

168. This principle can also be distilled from the decision of New York's highest court in *Tillotson v. Cheetham*, 3 Johns. 56 (N.Y. Sup. Ct. 1808). The question in *Tillotson*, a libel case, was whether the trial court erred in refusing to allow the defendant to inform the jury that he had already paid to the plaintiff a large punitive damages award for publishing essentially the same libelous allegations in the very same newspaper just two weeks before the publication of the libel at issue. *Id.* at 61-62. The court upheld the decision of

ultimately served the public good, they were punishment not for the public wrong, but for the private wrong to the plaintiff.

B. EXPLORING THE HISTORICAL CONCEPTION

Historically, the law did not recognize a concrete distinction between the civil and the criminal law.¹⁶⁹ In the time of Glanvill, in the twelfth century, all wrongs were considered "criminal," and their prosecution in a single proceeding, whether initiated by the government or the victim, usually led to remedies of both punishment and

the trial court to exclude the evidence, holding that the two libels were separate legal wrongs, calling for entirely separate awards of compensatory and punitive damages. *Id.* at 62. In rejecting the notion that prior punitive damages awards for separate but related legal wrongs should serve to mitigate future awards, the court noted that it would obviously be inappropriate to consider, in determining the proper amount of punitive damages, "a former recovery, in favour of a different plaintiff" for the libel. *Id.* at 63.

It is also interesting to note (and it appears that, to date, no one has done so), that the very first reported punitive damages cases—*Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), and *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763)—involved multiple punishment for the same course of conduct: the invasion and rummaging by the King's messengers under the authority of an invalid general warrant of the homes of persons suspected of publishing a particular libelous pamphlet. *Wilkes*, 98 Eng. Rep. at 490; *Huckle*, 95 Eng. Rep. at 768. In *Wilkes*, the jury rendered a punitive award of 1,000£. *Wilkes*, 98 Eng. Rep. at 499. In *Huckle*, the jury awarded 300£. *Huckle*, 95 Eng. Rep. at 768. Declaring that "[t]o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject," *Huckle*, 95 Eng. Rep. at 769, the courts allowed the awards in the name of punishment and deterrence. *Wilkes*, 98 Eng. Rep. at 498-99; *Huckle*, 95 Eng. Rep. at 768-69. In addition, one of the judges in *Huckle* noted that the appeal in that case was "a motion to set aside 15 verdicts in effect; for all the other persons who have brought actions against these messengers have had [punitive] verdicts for 200£ in each cause by consent, after two of the actions were fully heard and tried." *Id.* at 769 (Bathurst, J.). The evidence in each case was limited to the invasion of the individual plaintiff's home, and none of the judges thought even to mention the possibility of excessive or impermissible multiple punishment. *See id.* at 768-69; *see also* *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793-94 (K.B. 1764) (noting that, in deciding whether the punitive damages were excessive in these cases, "the Court must consider [all of the] damages as given against Lord Halifax," the official who authorized every one of the invalid searches).

169. *See, e.g.*, Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1091 (1989); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (noting that "only in the nineteenth century was the public/private distinction brought to the center of the stage in American legal and political theory").

compensation.¹⁷⁰ For centuries after that, much of the business of prosecuting crimes was undertaken by victims, rather than the crown.¹⁷¹ Thus, at the time of the earliest punitive damages decisions in England, it did not seem particularly incongruous to speak of punishment in a privately initiated action.

During the eighteenth century, just as the doctrine of punitive damages was emerging, legal thinkers were beginning to articulate a distinction between public and private wrongs.¹⁷² Blackstone explained in 1769,

The distinction of public wrongs from private . . . seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity.¹⁷³

Blackstone recognized that a single odious act can constitute both a public and a private wrong: "In all cases, the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community."¹⁷⁴ He saw no reason why each victim—the individual and the state—could not have a separate remedy at law.¹⁷⁵

The permissible content of the private remedy soon became the subject of some dispute, however. Once the courts embraced a clear divide between wrongs to the state and wrongs to the individual, they began to see each type of wrong as calling for an entirely different type of remedy. Thus, during the following century, the distinction between public and

170. See S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 285, 403-04 (2d ed. 1981).

171. See, e.g., Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359-72 (1986); see also Note, *supra* note 99, at 523 ("The common-law appeal of felony, a criminal proceeding prosecuted by the victim or his relatives, survived into the nineteenth century. A civil action of trespass as late as 1694 could result in criminal sanctions against the defendant." (footnotes omitted)); William F. McDonald, *The Role of the Victim in America*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS* 295 (Randy E. Barnett & John Hagel III eds., 1977) (noting that criminal prosecutions in colonial America were perceived as redressing an individual injury and were privately prosecuted).

172. See generally Harris, *supra* note 169, at 1079-99.

173. 4 BLACKSTONE, *supra* note 140, at *5.

174. *Id.* at *6.

175. *Id.*

private wrongs blossomed, in America, into a full-blown distinction between public and private law.¹⁷⁶ Public law—which was concerned exclusively with public wrongs—was the sole business of the criminal courts.¹⁷⁷ The proper remedy for a public wrong was punishment which sought to regulate conduct.¹⁷⁸ Private law, on the other hand, was concerned only with private wrongs and was the exclusive province of the civil courts.¹⁷⁹ The proper remedy for private wrongs was compensation, which sought to make victims whole, but did not concern itself with the public law business of regulation. There was no room for compensation in the public law and no room for punishment in the private law.¹⁸⁰

176. See generally Harris, *supra* note 169, at 1079-99; Horwitz, *supra* note 169, *passim*.

177. See Harris, *supra* note 169, at 1090.

178. See *id.*; Horwitz, *supra* note 169, at 1425-26.

179. See Harris, *supra* note 169, at 1090; Horwitz, *supra* note 169, at 1425-26.

180. See Horwitz, *supra* note 169, at 1424-26. The triumph of the rigid distinction between public and private law was short-lived. See Harris, *supra* note 169, at 1093-96. The distinction originally emerged in an "effort of orthodox judges and jurists to create a legal science that would sharply separate law from politics." Horwitz, *supra* note 169, at 1425. Public law alone was concerned with regulating conduct; private law was simply "a neutral system for facilitating voluntary market transactions and vindicating injuries to private rights." *Id.* at 1426. But by the late nineteenth century, just as the distinction was beginning to enjoy widespread acceptance in the courts, critics were already setting out to debunk it. Thus, Professor Austin declared in 1869 that "*public law* and *private law* are names which should be banished [from] the science; for since each will apply indifferently to every department of the law, neither can be used conveniently to the purpose of signifying any." 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 68 (5th ed., photo. reprint 1911); see also 2 *id.* at 750. Austin rejected the notion that there was a distinction between public and private law that could sensibly be expressed in terms of the difference between the ends sought by civil proceedings (compensation) and those sought by criminal proceedings (punishment and deterrence), because civil sanctions also serve the goal of preventing future misconduct. See 1 *id.* at 503-05. A dozen years later, Holmes famously announced that "the general principles of criminal and civil liability are the same." OLIVER W. HOLMES, THE COMMON LAW 44 (35th prt. 1943). In the decades that followed, nearly every significant American legal thinker followed suit,

devot[ing] themselves to attacking the premises behind the public/private distinction. Paralleling arguments then current in political economy, they ridiculed the invisible-hand premise behind any assumption that private law could be neutral and apolitical. All law was coercive and had distributive consequences, they argued. It must therefore be understood as a delegation of coercive public power to individuals, and could only be justified by public policies.

Horwitz, *supra* note 169, at 1426. Thus, "[b]y 1940, it was a sign of legal

On this reading, the doctrine of punitive damages no longer made sense. For that reason, it endured progressively more and more criticism throughout the nineteenth century, as the public/private distinction took root in American legal thought. As one mid-century commentator explained, "The principal force of the argument against vindictive damages, lies in the notion that the sole object of a civil suit is to give exact compensation to a plaintiff."¹⁸¹ Although Greenleaf and his followers had focused their early critique on the simple ground that, as punishment, punitive damages lacked precedential support—that the entire doctrine "seems to have arisen under a mistaken idea, and as a result of unadvised dicta and incompetent reasoning"¹⁸²—their criticisms soon ran deeper, to an argument that the existence of the doctrine, whether or not it had been sanctioned by the courts, was an indefensible blight on the symmetry of the law. By allowing punishment (a public law remedy) in a civil lawsuit (a private law action), punitive damages impermissibly blurred the fundamental line between public and private law.¹⁸³ As one writer put it, "the mingling of the criminal principles with the civil, which the doctrine necessitates, is altogether wrong."¹⁸⁴

sophistication to understand the arbitrariness of the division of law into public and private realms." *Id.* Today, of course, the law continues to hang on to a distinction between public and private wrongs, and between civil and criminal law, but it understands that all legal rules serve to regulate conduct. Indeed, the central thrust of the last thirty years of tort scholarship has focused on the potential for compensatory tort liability to regulate behavior and to maximize social welfare. See, e.g., CALABRESI, *supra* note 84, at 3-16. See generally A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989).

181. *Vindictive Damages*, 11 AM. L.J. 61, 62 (1852).

182. Eliot, *supra* note 115, at 571.

183. This objection continues to form the basis of many modern critiques of the punitive damages doctrine. See Harris, *supra* note 169, at 1089-90.

184. Eliot, *supra* note 115, at 573; see also, e.g., *id.* at 574 ("[A] civil court in matters of civil injury is a bad corrector of morals; it has only to do with the rights of the parties" (quoting Lord Commissioner Adam of Scotland in *Beattie v. Bryson*, 1 Murr. R. 317)); Reading, *supra* note 119, at 306. Professor Horwitz has noted that

[a] final example of the persistent effort of late nineteenth-century legal thinkers to create a sharp distinction between public and private law was the movement to eliminate punitive damages in tort. Because the purpose of punitive damages was to use the tort law to regulate conduct, not merely to compensate individuals for injuries, their imposition was regarded as a usurpation of the public law functions of the criminal law.

Horowitz, *supra* note 169, at 1425; see also MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 113-15 (1992) (discussing

Those nineteenth-century courts that struck down the punitive damages doctrine did so in large part on these grounds. In the memorable words of the New Hampshire Supreme Court,

[T]he idea of punishment is wholly confined to the criminal law, and expressed in its forms of indictments, complaints, and penal actions. What is a civil remedy but *reparation* for a wrong inflicted, to the injury of the party seeking redress,—compensation for damage sustained by the plaintiff? How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.¹⁸⁵

Despite this criticism, however, punitive damages persevered in the vast majority of jurisdictions. By allowing considerations of punishment and deterrence in a civil case, they may have sullied the imaginary, pristine line between public and private law, but they did not, in the eyes of the courts, obliterate that distinction altogether by treating a public wrong in a private setting. They did not, in other words, fall on the wrong side of the emerging distinction between public and private law; rather, they fell in between the cracks of that distinction.

The contemporary critics charged that punitive damages usurped the role of the criminal courts by serving a purely public law end in a private law setting—“using a purely private action to redress a public wrong”¹⁸⁶—but that characterization was unfair. The courts conceived of punitive damages as punishment for the *private* wrong.¹⁸⁷ Thus, as the courts understood them, punitive damages existed as a unique hybrid.

the nineteenth-century debate over punitive damages).

185. *Fay v. Parker*, 53 N.H. 342, 382 (1872); *see also, e.g.,* *Murphy v. Hobbs*, 5 P. 119, 125-26 (Colo. 1884) (criticizing the anomalous nature of punitive damages on these grounds); *Spokane Truck & Dray Co. v. Hoefer*, 25 P. 1072, 1073-75 (Wash. 1891) (same).

186. *Murphy*, 5 P. at 125; *see also, e.g.,* Greenleaf, *supra* note 119, at 296 (charging that punitive damages redress “the injury to the public”).

187. *See, e.g.,* *City of Charleston v. Beller*, 30 S.E. 152, 152 (W. Va. 1898) (“The true definition of the word ‘criminal,’ . . . as distinguished from the word ‘civil,’ . . . is a violation of any law or ordinance of man subjecting the offender to public punishment, including fine or imprisonment, and excluding redress for private injury, *punitive or compensatory*.” (emphasis added)); *supra* Part III.A.

The goal that they served—punishing the private wrong to the individual—was distinct from pure private law in that it *punished* the private wrong, rather than merely providing compensation for it, but it was also distinct from pure public law in that it punished the *private* wrong, rather than the public one.

This was a goal that, under contemporary legal taxonomy, could not be served by the criminal law. The criminal law was concerned only with public wrongs; the private harm to individuals was irrelevant. In Blackstone's words, "[T]he king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community . . ."¹⁸⁸ In America, of course, that role was played by the state. A crime was, by definition, a wrong done to the state alone, as the representative of the community. Thus, as one commentator has explained,

The late nineteenth century position was that crimes were no business of any "private" party, including the victim: "We must remember that a criminal offense is: an offense against the sovereign state, and not against an individual, and that no individual, not even the complaining witness, has the power or authority to control the action of his sovereign, whose dignity, alone, is sought to be vindicated."¹⁸⁹

As such, punitive damages were intended to achieve an interest that would otherwise have fallen by the wayside in a legal system that was rigidly bifurcated along public and private lines. Purely private law could compensate the wrong to individuals, and purely public law could punish the wrong to society, but neither could punish the defendant for the private wrong to the individual—to vindicate the dignity not of the sovereign, but of the individual victim. That was where punitive damages fit in. The vindication of the dignity of the victim was the whole point of punitive damages, which, it will be recalled, were initially imposed only in cases involving insult

188. 4 BLACKSTONE, *supra* note 140, at *2.

189. Harris, *supra* note 169, at 1095 (quoting *Ex parte Galbreath*, 139 N.W. 1050, 1051 (N.D. 1913)); see also, e.g., *Middlebrook v. State*, 43 Conn. 257, 262 (1876) (noting counsel's argument that "the definition of a criminal cause" is "an offense against the public"); *People ex rel. Schmittiel v. Bd. of Auditors*, 13 Mich. 233, 234 (1865) (contending that "the enforcement of criminal law" is concerned with "offenders charged with violating the peace and dignity of the state"); *Legette v. Smith*, 85 S.E.2d 576, 580 (S.C. 1955) ("In the criminal law, where the issue is between the accused and the State, . . . the offense is against the peace and dignity of the State.").

or affront to the honor and dignity of the victim.¹⁹⁰

To the extent that it can be attributed to anything more than *stare decisis*,¹⁹¹ the survival of the punitive damages doctrine in the face of vicious nineteenth-century criticism may have reflected the judges' inability to stomach the full consequences of the emerging public/private distinction. In most instances, nineteenth-century judges were willing to limit the individual victim's stake in a wrong to her right to full compensation, and to treat retribution and deterrence as interests of the state alone. When the wrong was deeply personal, and constituted an affront to the honor and dignity of the victim, however, the courts hung on to the notion that the victim had a right to seek punishment as well: to demand that the perpetrator be made to suffer for the wrong that he had visited upon her.¹⁹² In this regard, the punitive damages doctrine can be thought of as an intellectual precursor to the modern victims' rights movement in the criminal law, which also seeks to recognize "the crime victim's privity of interest in exacting justice for the harm committed,"¹⁹³ and refuses to

190. See *supra* text accompanying notes 116-119; see also, e.g., *Barry v. Edmunds*, 116 U.S. 550, 562 (1886) (noting that "exemplary damages [are] calculated to vindicate [the plaintiff's] right[s]"); *The Golden Gate*, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856) (No. 8815) ("In an action against the perpetrator of the wrong, the aggrieved party would be entitled to recover not only actual damages but exemplary,—such as would vindicate his wrongs, and teach the tortfeasor the necessity of reform.").

191. See *infra* Part IV.

192. In fact, one of the early justifications for punitive damages was that their availability would prevent insulted victims from seeking private revenge. See, e.g., *Merest v. Harvey*, 128 Eng. Rep. 761, 761 (C.P. 1814) (Heath, J.) ("It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages."); SCHLUETER & REDDEN, *supra* note 1, at 10; Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931). For instance, in *Alcorn v. Mitchell*, 63 Ill. 553 (1872), the Illinois Supreme Court stated,

The act in question [spitting in the plaintiff's face in open court] was one of the greatest indignity, highly provocative of retaliation by force, and the law, as far as it may, should afford substantial protection against such outrages, in the way of liberal damages, that the public tranquillity may be preserved by saving the necessity of resort to personal violence as the only means of redress.

Id. at 554.

193. Cardenas, *supra* note 171, at 390; see also, e.g., Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 140-42 (1984) (symposium issue) (arguing that the victim has a retributive interest in seeing that the defendant is punished); McDonald, *supra* note 171, at 295-96 (criticizing the criminal law notion that, because crime is an offense against the state alone, the victim has

accept the notion that the individual victim has no right to vindication, as distinct from compensation.

Although, under the historical conception, punitive damages ostensibly addressed a purely private interest, the courts understood that the ends that they served—punishment and deterrence—were beneficial not only to the individual victim, but also to society. To capture this concept, the American courts adopted the descriptive device employed by Theodore Sedgwick: the doctrine of punitive damages “blends together the interest of society and the aggrieved individual.”¹⁹⁴ Thus, numerous courts endorsed the principle that “[e]xemplary, vindictive, or punitive damages are such as blend together the interests of society and of the aggrieved individual, and are not only a recompense to the suffering, but also a punishment to the offender and an example to the community.”¹⁹⁵ The historical understanding of punitive damages was that they punish the purely private wrong to the victim and, in so doing, also benefit the public, but the public benefit is, in a sense, a welcome incidental effect of the private punishment.¹⁹⁶

no right to vindication); Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, 7 SOC. PHIL. & POLY, Spring 1990, at 209, 210 (issue entitled CRIME, CULPABILITY, AND REMEDY) (explaining that the victims' rights movement is premised on the notion that the desire for revenge is a legitimate value in the criminal law); Doug Janicik, Note, *Allowing Victims' Families to View Executions: The Eighth Amendment and Society's Justifications for Punishment*, 61 OHIO ST. L.J. 935, 937-38 (2000) (explaining that the recent wave of statutes affording victims' families the right to attend executions are a product of the victims' rights movement, and are motivated by the family's perceived need to know that justice has been done and that the perpetrator has been made to pay); Note, *Responding to Terrorism: Crime, Punishment and War*, 115 HARV. L. REV. 1217, 1232 (2002) (“The crime victim, in current American understanding, has a tangible interest in seeing the criminal punished and in ensuring that he can do no further harm. The development of these normative theories is particularly visible in three areas: preventive detention, the death penalty, and the victims' rights amendment.”).

194. Sedgwick, *supra* note 122, at 194.

195. Fla. Cent. & Peninsular R.R. v. Mooney, 24 So. 148, 150 (Fla. 1898); see also, e.g., Mo. Pac. Ry. v. Humes, 115 U.S. 512, 521 (1885); Yerian v. Linkletter, 22 P. 70, 70 (Cal. 1889); Holmes v. Holmes, 64 Ill. 294, 297-98 (1872); Stacy v. Portland Publ'g Co., 68 Me. 279, 287 (1878) (“It is said, in vindication of the theory of punitive damages, that the interests of the individual injured and of the society are blended.”); Osmun v. Winters, 46 P. 780, 782 (Or. 1896) (“[P]unitive or vindictive damages . . . may operate as a punishment in the interest of society as well as for the doing of a willful personal injury to a fellow mortal.”).

196. See, e.g., Ward v. Ward, 41 Iowa 686, 688 (1875) (noting that “vindictive damages are never allowed alone for the purpose of public good

C. THE HISTORICAL ROOTS OF THE CURRENT DOCTRINE

Many commentators have lamented that the hornbook rules of punitive damages law do not accord with the standard modern conception of punitive damages as punishment for socially wrongful conduct (or with the recent economics-inspired conception of punitive damages as an engine of cost internalization).¹⁹⁷ Rules that appear random and unprincipled under the modern conception, however, suddenly make sense when viewed through the lens of the historical understanding of punitive damages as punishment for a private wrong. Since punitive damages are—under this conception—punishment, it is appropriate to require a culpable mental state on the part of the defendant,¹⁹⁸ and to tailor the amount of the penalty both to the defendant's wealth¹⁹⁹ and to the degree of reprehensibility of its conduct.²⁰⁰ Similarly, since punitive damages are punishment for a purely private wrong, it makes sense to give

through the example given in their assessment," rather "[t]he effect upon the public is but an incident"). In 1901, the South Carolina Supreme Court noted that

punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and, indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others.

Watts v. S. Bound R.R., 38 S.E. 240, 242 (S.C. 1901); see also *infra* note 319.

197. See *supra* Part II.

198. See, e.g., *Staples v. United States*, 511 U.S. 600, 616-17 (1994) (noting that our legal system generally does not permit harsh punishment in the absence of a culpable *mens rea*); HOLMES, *supra* note 180, at 3 ("Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked.").

199. In *BMW of North America, Inc. v. Gore*, Justice Breyer, concurring, explained that

[s]ince a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives).

517 U.S. 559, 591 (1996) (Breyer, J., concurring).

200. See, e.g., U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch.1, pt. A, at 3 (1995) ("Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms.").

them to the plaintiff, rather than to the government or to society at large, neither of which were the victim of the wrong being punished,²⁰¹ and it is at least understandable, if still a bit disquieting, that the defendant is deprived of criminal procedural safeguards, as the Supreme Court has historically required those protections only when the courts seek to punish public wrongs.²⁰²

In fact, some of the principles of punitive damages law that cannot be squared with the prevailing modern conception of punitive damages were demonstrably born of the historical conception. For instance, the universal rule that a plaintiff must prevail on an underlying cause of action and establish an entitlement to actual damages in order to receive punitive damages²⁰³ is an outgrowth of the principle that punitive damages operate to punish the defendant only for the legal wrong committed against the plaintiff. If the plaintiff cannot establish the underlying tort, then there is no private legal wrong to be punished. As the South Carolina Supreme Court

201. Cf. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998) (noting that penalties that are paid to the state must be intended to redress the public interest, rather than the interest of the individual); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 207 (1996) (noting that criminal fines are paid to the state because they redress wrongs to society).

202. See *infra* Part IV.

203. See *infra* note 260 and accompanying text; see also Richard C. Tinney, Annotation, *Sufficiency of Showing of Actual Damages to Support Award of Punitive Damages—Modern Cases*, 40 A.L.R.4th 11, § 2(a), at 18 (1985) (“The general rule that punitive damages may not be awarded unless the party seeking them has sustained actual damage is accepted universally . . .”). The courts are, however, divided on the subsidiary questions: first, whether proof that the plaintiff *sustained* actual damages is sufficient to support punitive damages in circumstances in which, for whatever reason, the jury chose not to *award* any compensatory damages; and second, whether punitive damages may be awarded in a case in which the plaintiff recovered only nominal damages by way of compensation. See *id.* at 19. Historically, the courts that refused to allow punitive damages when the compensatory damages were only nominal were motivated by the fact that punitive damages punish the defendant only for the harm to the individual plaintiff. For example, in 1878 the Maine Supreme Court asserted that

[s]uch damages are to be awarded against a defendant for punishment. But, if all the individual injury is merely technical and theoretical, what is the punishment to be inflicted for? If a plaintiff, upon all such elements of injury as were open to him, is entitled to recover but nominal damages, shall he be the recipient of penalties awarded on account of an injury or a supposed injury to others beside himself?

Stacy v. Portland Publ'g Co., 68 Me. 279, 287-88 (1878).

explained in 1901, the reason that punitive damages “can only be awarded to vindicate the right of the plaintiff, and only in case actual injury has been inflicted” is that, “in the absence of actual injury to plaintiff, such damages cannot be given merely in punishment for a wrong to the public.”²⁰⁴ This is so because

punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and, indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others.²⁰⁵

The rule that the amount of punitive damages must bear a reasonable relationship to the amount of compensatory damages is also a direct remnant of the historical conception of punitive damages. As the Supreme Court acknowledged in *BMW of North America, Inc. v. Gore*, the “principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages has a long pedigree.”²⁰⁶ It is reflected in dozens of cases going back to the earliest days of punitive damages.²⁰⁷ This principle explicitly arose from the notion that the proper amount of punitive damages depends on the severity of the injury to the plaintiff. As one court explained, “[E]xemplary damages should bear some reasonable proportion to the actual damages sustained, and what we mean by that expression is that the character of the injury inflicted should in some degree be considered by the jury in measuring the

204. *Watts v. S. Bound R.R.*, 38 S.E. 240, 242 (S.C. 1901).

205. *Id.*

206. 517 U.S. 559, 580 (1996).

207. *See, e.g.*, *Mobile & Montgomery R.R. v. Ashcraft*, 48 Ala. 15, 33 (1872) (“The punitive damage ought also to bear proportion to the actual damages sustained.”); *Flannery v. Balt. & Ohio R.R.*, 15 D.C. (4 Mackey) 111, 125 (1885) (stating that when the punitive damages award “is out of all proportion to the injuries received, we feel it our duty to interfere”); *Hennies v. Vogel*, 87 Ill. 242, 245 (1877) (reversing where punitive damages were “out of all proportion to the injury inflicted”); *Saunders v. Mullen*, 24 N.W. 529, 529 (Iowa 1885) (“When the actual damages are so small, the amount allowed as exemplary damages should not be so large.”); *Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) (“[E]xemplary damages allowed should bear some proportion to the real damage sustained”); *McCarthy v. Niskern*, 22 Minn. 90, 91-92 (1875) (declaring that punitive damages “enormously in excess of what may justly be regarded as compensation” for the injury must be set aside “to prevent injustice”). Indeed, so well established is this pedigree that the *Gore* Court made the ratio of punitive damages to compensatory damages an integral part of the federal due process excessiveness inquiry. *See* 517 U.S. at 580-83.

punishment to be meted out.”²⁰⁸ In focusing on “the actual harm inflicted on the plaintiff,”²⁰⁹ rather than on the harm to society and all of the victims,²¹⁰ this principle—like the rule that a plaintiff must sustain actual damages in order to recover punitive damages—is a modern day reflection of the historical conception of punitive damages as punishment for individual wrongs.

Indeed, in the 1970s, a few courts seized upon these black letter rules as grounds for rejecting the emerging modern conception of punitive damages, and thus rejecting the nascent practice of awarding “total harm” punitive damages. For instance, in *Hoffman v. Sterling Drug, Inc.*,²¹¹ the plaintiff, an

208. *Pendleton v. Norfolk & W. Ry.*, 95 S.E. 941, 944 (W. Va. 1918); *see also, e.g.*, *Walker v. Martin*, 52 Ill. 347, 351 (1869) (holding that “vindictive damages . . . must bear some sort of proportion to the injury done” and noting that a wrong “if done to a vagrant, or to a person of but little character in community” does not warrant “the same damages [the jury] would give a man whose station and respectability were unquestioned”).

209. *Gore*, 517 U.S. at 580.

210. It is true that modern courts applying the ratio requirement sometimes compare the punitive damages to the *potential* harm that the defendant’s actions may have caused. *See id.* at 581 (discussing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (plurality opinion)). In so doing, however, the courts are examining the potential “harm to the victim that would have ensued if the tortious plan had succeeded.” *Id.* (emphasis added); *see also TXO*, 509 U.S. at 462 (speaking of “potential harm” to respondents). In other words, punitive damages must bear a reasonable relationship to the actual and potential harm to the plaintiff, not the actual and potential harm to others. This has always been the law, and it is merely a reflection of the fact that sometimes the measure of the legal wrong done to the individual victim is greater than the actual harm that the victim suffered. *See, e.g.*, *Hildreth v. Hancock*, 55 Ill. App. 572, 574-75 (1894) (“[E]xemplary damages may well be proportioned to the extent of the injury intended rather than to that actually done . . .”), *affd.*, 156 Ill. 618 (1895); *Gilreath v. Allen*, 32 N.C. (10 Ired.) 67, 70 (1849) (asserting that damages “should not be restricted to a mere compensation for the injury actually done, however short it may be of the injury intended, and which would have been suffered, had not the plaintiff’s character been too high to be reached by the tongue of slander”); *Benson v. Frederick*, 97 Eng. Rep. 1130, 1130 (K.B. 1766) (noting, in a case in which the defendant ordered the public flogging of the innocent plaintiff, that the punitive “damages were very great, and beyond the proportion of what the man had suffered,” but explaining “that it was rather owing to the lenity of the drummers than of the colonel, that the man did not suffer more”). When the Supreme Court does refer to potential harm to other victims, it speaks of “the possible harm to other victims that might have resulted if similar future behavior were not deterred.” *TXO*, 509 U.S. at 460 (plurality opinion) (emphasis added). This is a reflection of the deterrent purpose of punitive damages, discussed *infra*.

211. 374 F. Supp. 850, 852 (M.D. Pa. 1974).

individual, brought suit alleging that he suffered a serious impairment to his vision as a result of using Aralen, a drug manufactured by the defendant. The plaintiff sought "total harm" punitive damages on the theory that "punitive damages are imposed to punish an outrage to society" and therefore can be based on "the impact of Aralen on the whole of society."²¹² The plaintiff intended to "argue to the jury that punitive damages should be assessed against Sterling in an amount reflecting the wrong perpetrated against [him] and all like consumers of Aralen."²¹³

The court rejected the plaintiff's theory, noting that "Pennsylvania has consistently required that the plaintiff secure a verdict for compensatory damages as a prerequisite to punitive damages" and that "Pennsylvania requires a reasonable relationship between compensatory and punitive damages."²¹⁴ In light of these limitations, and of the prospect of multiple punishment,²¹⁵ the court refused to "allow the plaintiff to argue that he should receive punitive damages in a sum computed by the size of Sterling's affront to society," labeling that argument "folly" and "ludicrous."²¹⁶ Instead, the court held that "the computation of the punitive damage verdict, if any, must be a reasonable sum in relation to the defendant's conduct vis-a-vis the plaintiff."²¹⁷ That is to say, "[E]ach Aralen consumer showing a bona fide injury may, if the evidence warrants, collect his reasonable proportion of the punitive damages the defendant owes to 'society.'"²¹⁸

Aside from an endorsement from another judge in a neighboring federal district court²¹⁹ and a favorable mention in

212. *Id.* at 856.

213. *Id.*

214. *Id.*

215. The court declared that

[i]n the context of the instant case, the plaintiff's argument creates a genuine opportunity for multiple recovery at the defendants' expense. We note that this is not the only personal injury suit involving Aralen directed against Sterling. Applying the plaintiff's rationale, each injured consumer of Aralen, using identical evidence regarding testing, notice, etc., could individually recover on behalf of "society" to punish the affront.

Id. at 857.

216. *Id.* at 856-57.

217. *Id.* at 856.

218. *Id.* at 857.

219. See *Thomas v. Am. Cystoscope Makers, Inc.*, 414 F. Supp. 255, 264 (E.D. Pa. 1976).

a footnote in a single law review article,²²⁰ this decision went largely unnoticed and quickly passed into obscurity.²²¹ That is a shame, because the court was on to something.

So too was the Alaska Supreme Court in *Sturm, Ruger & Co. v. Day*.²²² In that case, the jury determined the appropriate amount of punishment by seeking to completely remove the profits from the defendant's sales of defective handguns. The jurors multiplied the number of defective revolvers that the defendant had sold by the amount of additional manufacturing cost per revolver that the defendant would have incurred had it cured the defect, thus rendering an award "roughly equal to the profit directly attributable to Sturm, Ruger's callous disregard for the safety of its customers."²²³ The court struck down the award because it was

so out of proportion to the amount of actual damages as to suggest that the jury's award was the result of passion or prejudice. The jurors apparently responded to an invitation to punish Sturm, Ruger for all wrongs committed against all purchasers and users of its products, rather than for the wrong done to this particular plaintiff.²²⁴

220. See David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 51 n.243 (1982). Professor Owen endorsed the district court's reasoning on the grounds that "[t]his view probably is correct in that it relates the punitive award to the plaintiff's injury consistent with traditional doctrine, reduces substantially the incentive to race to the courthouse, and anticipates a multiplicity of similar actions that together will result in many smaller 'stings' to the manufacturer." *Id.* Thus, Professor Owen concluded that "the defendant should [not] be forced to redress the totality of its wrong to the public in a single action and a single punitive damages award." *Id.*

221. One notable exception is 3 HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 17.31, at 17-98 (3d ed. 1992). This treatise cites the case for the proposition that

[p]unitive damages may not be awarded for the benefit of parties not before the court directly or indirectly (e.g., class members who have not opted out of the class) because defendants are not being punished for the same wrongful conduct in related claims. Rather, in any particular case, defendants are being punished solely for their violation of their duty to named (or properly represented) claimants, and the punitive damages are appropriately limited.

Id.

222. 594 P.2d 38 (Alaska 1979), *on reh'g*, 615 P.2d 621 (Alaska 1980).

223. *Id.* at 50 (Burke, J., dissenting in part).

224. *Id.* at 48 (majority opinion). On rehearing, however, the court seems to have backed off of this reasoning. See *Sturm*, 615 P.2d at 624 & n.3 (concluding that the jury verdict was excessive, but not the result of passion and prejudice, and noting that, while "a comparison of actual damages with the punitive damages is a factor which may enter into the determination of excessiveness[,] . . . there may be cases in which it is of only slight value or is totally inapplicable").

Although these decisions have been drowned out by contrary cases, they serve to illustrate that the black letter rules of modern punitive damages law accord with a conception of punitive damages as punishment for individual private wrongs, not with a conception of punitive damages as punishment for the wrong to society. Indeed, the only aspect of modern punitive damages practice that does not conform to the historical conception is the practice of awarding "total harm" punitive damages—a practice that emerged only recently, and without substantial analysis or explanation.

IV. THE IMPORTANCE OF THE HISTORICAL CONCEPTION TO THE CONSTITUTIONALITY OF THE DOCTRINE

Although an examination of the historical origins of common law doctrines is usually interesting, and often compelling, it is rarely dispositive; the law can and does evolve over time. In this regard, it might, at first glance, seem more sensible to bridge the logical discord between the modern conception of punitive damages and traditional punitive damages doctrine by updating the outdated doctrine to fit the current conception, rather than reverting to the historical understanding. Given the unique circumstances of punitive damages, however, I do not believe that such a path is available. Punitive damages owe their constitutionality solely to their history. To abandon the historical conception of punitive damages in favor of the modern notion of punitive damages as punishment for public wrongs is, I believe, to all but concede their unconstitutionality.²²⁵

From their earliest days, punitive damages have skated on the thinnest of constitutional ice. Their nineteenth-century critics, like Greenleaf, attacked them not only on the grounds of precedent and legal symmetry, but also on constitutional and fairness grounds. The critics argued that

even if it be allowable to fine the defendants in a civil court, there seems no reason why the plaintiff should be the recipient. . . . If the plaintiff is entitled to damages as a matter of right, let him receive them in their proper character of indemnity; if he is not so entitled, there is no power in any government which can justly deprive another of his property for plaintiff's benefit. Judicial procedure ought not to

225. This is so because of the *punitive* aspect of punitive damages. I express no opinion here on the reconceptualization of punitive damages as an engine of optimal deterrence. See *supra* Part II.B.

be made a cover for the confiscation of private property.²²⁶

What is more, contended the critics, the fusion of civil and criminal principles unconstitutionally tramples upon the rights of the defendant. "[T]he unfortunate defendant is not only not permitted to ask to have this anomalous crime, for such it amounts to, proved beyond a reasonable doubt, but is denied many other rights accorded to the lowest criminal."²²⁷

Perhaps the most blistering nineteenth-century assault upon the constitutionality of punitive damages came from the pen of Judge Foster of the New Hampshire Supreme Court:

Why longer tolerate a false doctrine, which, in its practical exemplification, deprives a defendant of his constitutional right of indictment or complaint on oath before being called into court? deprives him of the right of meeting the witnesses against him face to face? deprives him of the right of not being compelled to testify against himself? deprives him of the right of being acquitted, unless the proof of his offence is established beyond all reasonable doubt? deprives him of the right of not being punished twice for the same offence?

Punitive damages destroy every constitutional safeguard within their reach. And what is to be gained by this annihilation and obliteration of fundamental law? The sole object, in its practical results, seems to be, to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff required the destruction of the constitution, there would be some pretext for wishing the constitution were destroyed. But why demolish the plainest guaranties of that instrument, and explode the very foundation upon which constitutional guaranties are based, for no other purpose than to perpetuate false theories and develop unwholesome fruits?²²⁸

226. Eliot, *supra* note 115, at 573-74.

227. Lewis L. Smith, *Punitive Damages*, 32 AM. L. REG. & REV. 517, 518 (1893) (presently entitled U. PA. L. REV.). As another nineteenth-century critic put it,

One of the greatest objections . . . to the doctrine of punitive damages, in my opinion, consists in this. When a man is fined for the commission of an offense, at least where the fine is a heavy one, the accusation against him is, as a general rule in the United States, first submitted to a grand jury, which is supposed to carefully examine the evidence against him before they find an indictment. Upon indictment found his case is submitted to a jury. He enjoys, as a rule, a large privilege of peremptory challenge, and is surrounded by a great many safeguards denied to him in a civil action. A mere preponderance of testimony does not convict; his guilt has to be proved beyond a reasonable doubt.

Gustave Koerner, *Punitive Damages*, 4 WISC. LEGAL NEWS 380, 380 (1882).

228. *Fay v. Parker*, 53 N.H. 342, 397 (1872). One nineteenth-century commentator referred to this opinion as "a perfect legal fusilade regarding the subject" of punitive damages. *Exemplary Damages*, 8 WASH. L. REP. 49, 50

This criticism was as widespread as it was bilious. It would be difficult to overestimate the extent to which these critiques pervaded the judicial and academic discourse on punitive damages in the nineteenth century.

In the face of these vehement attacks, about the only thing that most courts could say in defense of punitive damages was that they had been around for a long time—and it was that fact alone that preserved their existence against constitutional attack. For instance, the chief justice of the Wisconsin Supreme Court, whose opinion was shared by all members of the court,²²⁹ declared in 1877 that “[i]n the controversy between Prof. Greenleaf and Mr. Sedgwick, I cannot but think that the former was right in principle, though the weight of authority may be with the latter.”²³⁰ Still, because “the rule was adopted . . . long ago . . . and has been repeatedly affirmed since,” it was “too late to overturn it by judicial decision.”²³¹ A “rule so long and so generally established is a sin against sound judicial principle, not against the constitution.”²³²

The same conclusion was reached by the South Carolina Supreme Court in 1891. The court was “disposed to think that the weight of the argument is in favor of the view contended for by Greenleaf,—that in no case should damages be awarded against a defendant, in a civil action, by way of punishment.”²³³ Thus, “if the question were an entirely open one,” the court “would be disposed to adopt that view.”²³⁴ Since “the doctrine [was] settled[] by a long line of unbroken authority” in South Carolina, however, the court refused to reconsider the issue.²³⁵

(1881).

229. See *Brown v. Swineford*, 44 Wis. 282, 286 (1878) (“[The Chief Justice] believes that his views of punitory damages, as an original question, are sanctioned by every present member of the court.”).

230. *Bass v. Chi. & Northwestern Ry.*, 42 Wis. 654, 672 (1877) (Ryan, C.J.).

231. *Id.* at 673.

232. *Brown*, 44 Wis. at 288.

233. *Duckett v. Pool*, 13 S.E. 542, 547 (S.C. 1891).

234. *Id.*

235. *Id.*; see also, e.g., *The Harriet Newhall*, 11 F. Cas. 598, 598 (D. Mass. 1856) (No. 6102) (noting that it is “quite clear in theory that Mr. Greenleaf maintains the true principle,” but that it is doubtful whether the case law supports his position); *Malone v. Murphy*, 2 Kan. 245, 257 (1864) (“Mr. Greenleaf thinks the damages should be limited to compensation only. Logically, we [think] he is right, and were the question an open one, we should be inclined to adopt his view of the subject.”); *Cincinnati & Springfield Ry. v. Sleeper*, 3 Am. L. Rec. 464, 471 (Ohio. Super. Ct. 1874), available at 1874 WL 5363, at *6 (noting the writings of Greenleaf, but proclaiming that “[i]t is now

Similarly, the Pennsylvania Supreme Court upheld the doctrine in 1892, over a vigorous dissent proclaiming its unconstitutionality,²³⁶ on the sole ground "that it is the settled rule of this state."²³⁷ Maine's Supreme Judicial Court also endorsed the doctrine in 1861 because it was the settled "law in nearly all the States of the Union" and England,²³⁸ notwithstanding a heated dissent bemoaning "its inconsistency with the universally recognized principles of natural justice" and declaring it to "smack of barbarism."²³⁹

Indeed, the United States Supreme Court has repeatedly upheld punitive damages solely on the basis of their historical pedigree. As early as 1851, the Court wrote, "We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."²⁴⁰ Some years later, the Court expressed sympathy with the Greenleaf theory, remarking that

[a]s the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea, that

too late to question the right, in a proper case, to recover such damages"); *Dougherty v. Shown*, 48 Tenn. 302, 306 (1870) (stating that punitive damages have been "too often construed by this Court[] to be now disturbed"). As one attorney argued in 1866,

If this were a new question, it would seem that the doctrine of Greenleaf would be most consistent with true principle and legal analogies. But a different rule has been so frequently laid down and acted upon, both by the English and American courts, that an attempt now to shake it would be an act of vain labor.

New Orleans, Jackson & Great Northern Railroad v. Bailey, 40 Miss. 395, 406 (1866).

236. See *Cornelius v. Hambay*, 24 A. 515, 517 (Pa. 1892) (Williams, J., concurring in the judgment).

237. *Id.* at 515 (majority opinion).

238. *Pike v. Dilling*, 48 Me. 539, 543 (1861).

239. *Id.* at 544-45 (Rice, J., dissenting). In 1884, the Colorado Supreme Court, confronting the doctrine for the first time, found it unconstitutional because it punishes the defendant without affording him the procedural protections offered by the criminal law. See *Murphy v. Hobbs*, 5 P. 119, 120-21 (Colo. 1884). The court surmised that "[w]ere this subject now presented to the various courts of the country for the first time, we have little doubt as to what the verdict would be." *Id.* at 120.

240. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851).

compensation alone is the true measure of redress.²⁴¹

Nonetheless, explained the Court,

[J]urists have chosen to place this doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; and, although some text-writers and courts have questioned its soundness, it has been accepted as the general rule in England and in most of the States of this country.²⁴²

After the ratification of the Fourteenth Amendment, the Court based its holding that “[t]he imposition of punitive or exemplary damages in [tort] cases cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law” and “cannot therefore be justly assailed as infringing upon the Fourteenth Amendment of the Constitution of the United States” solely on the ground that the “propriety and legality [of punitive damages] have been recognized . . . by repeated judicial decisions for more than a century.”²⁴³ When the Court revisited the question in 1991, it explained that “the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted” and “[n]othing in that Amendment’s text or history indicates an intention on the part of its drafters to overturn the prevailing method.”²⁴⁴ It was because of “this consistent history”—because “[t]he Fourteenth Amendment has not displaced the procedure of the ages”—that the Court found no due process violation: “If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.”²⁴⁵

Awarding punitive damages as punishment for public wrongs is *not* a practice that the courts have engaged in for 200 years, however. The fact that the historical institution of punitive damages has been around for centuries immunizes it from constitutional review, but it does not, of course, mean that any remedy that a modern court chooses to call “punitive damages” is automatically constitutional. If the courts completely change the fundamental nature of the institution of punitive damages, slapping the old label on them will not avoid all questions of constitutional infirmity.

241. *Milwaukee & St. Paul Ry. v. Arms*, 91 U.S. 489, 492 (1875).

242. *Id.* at 492-93.

243. *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26, 36 (1889).

244. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17-18 (1991).

245. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 111 (1934); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988)).

Quite the opposite is true. Because the courts were uncomfortable with the fairness of punitive damages even under the historical conception, and indicated that, were it not for the sanction of history, they would reject the practice altogether, *any* reconceptualization would be constitutionally suspect.

That is especially true of an effort to reconceptualize punitive damages as punishment for public wrongs. To convert punitive damages from punishment for a private wrong—a goal that could not be accomplished by the criminal law—to punishment for a public wrong—the very *raison d'être* of the criminal law—would be to create a fundamentally different, and markedly less defensible, institution. Indeed, as explained above, it was the fact that punitive damages punish only the private wrong to the victim, rather than the public wrong, that led courts to uphold them against early double jeopardy and due process challenges.²⁴⁶

The Supreme Court has repeatedly held that criminal procedural safeguards must apply to all sanctions that are properly categorized as penal.²⁴⁷ As early as 1892, in

246. *See supra* Part III.A. Some of the cases that relied on the distinction between punishment for the public wrong and punishment for the private wrong in upholding the constitutionality of punitive damages were the very same cases in which the judges indicated that, were the issue an open one, they would reject the doctrine altogether. *See, e.g.*, *Brown v. Swineford*, 44 Wis. 282, 286-89 (1878).

247. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 166-69 (1963). The Court observed in 1946,

Those who wrote our Constitution . . . intended to safeguard the people of this country from punishment without trial by duly constituted courts. And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him.

United States v. Lovett, 328 U.S. 303, 317-18 (1946) (citation omitted); *see also, e.g.*, *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.) (holding that criminal procedural protections apply to any "infractions of the law, visited with punishment as such"); *cf. Hicks v. Feiock*, 485 U.S. 624, 631-32 (1988) (concluding that any sanction for contempt that operates in practice as punishment may not be imposed without full criminal procedural protections).

Huntington v. Attrill, the Court held that “[t]he test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone.”²⁴⁸ Subsequently, relying on that case, the Court held that punitive damages are not penal because, rather than addressing the public wrong, they are calibrated by reference to the private injury.²⁴⁹ That distinction between redressing public and private wrongs remains an important element in the Supreme Court’s current test for determining whether a sanction is sufficiently penal to require criminal procedural safeguards.²⁵⁰ Indeed, the law continues, in the tradition of Blackstone,²⁵¹ to treat the terms “crime” and “public wrong” as essentially synonymous.²⁵² Thus, a number of commentators (along with two Justices) have noted that punitive damages, under their modern conception, clearly appear to meet the test for requiring criminal procedural protections.²⁵³ The only way

248. 146 U.S. 657, 668 (1892); *see also, e.g.*, HENRY S. MAINE, ANCIENT LAW 359 (3d American ed. 1878) (noting that the salient characteristic of a tort is “that the person who suffers it, and not the State, is conceived to be wronged”); *id.* at 372 (noting that “the conception of *Crime*, as distinguished from that of *Wrong* or *Tort* and from that of *Sin*, involves the idea of injury to the state or collective community”).

249. *O’Sullivan v. Felix*, 233 U.S. 318, 324-25 (1914); *see also, e.g.*, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550-52 (1943) (noting that punitive damages redress a civil, rather than a criminal, injury); *Gruetter v. Cumberland Tel. & Tel. Co.*, 181 F. 248, 251-52 (C.C.W.D. Tenn. 1909) (stating that “[a]n action is ‘civil’ when it lies to enforce a private right, or redress a private wrong” even if it allows for punitive damages).

250. *See* 73 AM. JUR. 2D *Statutes* § 9 (2001); Grass, *supra* note 69, at 292-93; *cf.* *Bloom v. Illinois*, 391 U.S. 194, 201 (1968) (holding that a contempt sanction that operates as punishment for “a public wrong” is a criminal sanction).

251. *See supra* text accompanying notes 173-175.

252. *See, e.g.*, BLACK’S LAW DICTIONARY 377 (7th ed. 1999) (defining “crime” as “[a] social harm that the law makes punishable”); *id.* at 381 (defining “criminal law” as “[t]he body of law dealing with offenses against the community at large”); *see also* *Whitley v. State*, 336 S.E.2d 301, 303 (Ga. Ct. App. 1985) (noting that “[a] crime is by definition a public wrong against the sovereign, i.e., the state”); *State v. Fahlk*, 524 N.W.2d 39, 49 (Neb. 1994) (stating that “a crime is by definition a public wrong against the State” (quoting *Pratt v. State*, 307 S.E.2d 714, 715-16 (Ga. Ct. App. 1983))); 21 AM. JUR. 2D *Criminal Law* § 474 (1998) (noting that “a crime is by definition a public wrong, one against all the people of the state”).

253. *See, e.g.*, *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 298 (1989) (O’Connor, J., joined by Stevens, J., concurring in part and dissenting in part) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)); Ford, *supra* note 82, at 17-18. *See generally* Grass, *supra* note

to avoid this conclusion, and to take advantage of the historical shield against constitutional challenge, is to constrain punitive damages to their historical role as punishment for private wrongs.

In sum, if punitive damages were to be cut loose entirely from their historical moorings in the harm to the plaintiff, and set adrift in a sea of constitutional doubt, they could no longer lay claim to the only defense against constitutional challenge that has sustained them—their historical pedigree. That pedigree is fundamentally intertwined with the historical conception of punitive damages as punishment for private wrongs. Historically, the constitutionality of punitive damages was expressly dependent upon the fact that they punish private, not public, wrongs. Once stripped of their pedigree, and of the pretense that they punish only the private wrong done to the civil plaintiff, it would be a formidable challenge to anchor punitive damages in the need to punish the wrong to society. To do so would be to create an institution that is all but indistinguishable from criminal punishment, but does not afford any criminal procedural safeguards. It would be a tall task—indeed, likely an insurmountable one—to justify them.

V. THE UNCONSTITUTIONALITY OF “TOTAL HARM” PUNITIVE DAMAGES UNDER THE HISTORICAL CONCEPTION

As such, the constitutionality of punitive damages hinges on their conceptualization as punishment for individual, private wrongs. Under this conception, there is simply no room for “total harm” punitive damages. Indeed, these damages are a by-product of the mistaken notion that a punitive damages award punishes the wrong to society. A plaintiff seeking to recover “total harm” punitive damages does so on the ground that “punitive damages are imposed to punish an outrage to society” and therefore can be based on “the impact of [the defendant’s conduct] on the whole of society.”²⁵⁴

Still, it might be suggested that the modern practice of imposing “total harm” punitive damages can be reconciled with

69 (examining the question in exhaustive detail).

254. *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 856 (M.D. Pa. 1974); see also, e.g., *Kirkland v. Midland Mortgage Co.*, 243 F.3d 1277, 1280 (11th Cir. 2001) (declaring that “total harm” punitive damages are recoverable because punitive damages punish “a public wrong” and “not the wrong done to a single individual”).

the historical conception of punitive damages as punishment for individual wrongs on the theory that, rather than punishing the public wrong to society, modern law effectively punishes the defendant for all of the individual, private wrongs in a single case brought by a single victim. Even so conceived, however, I do not believe that the practice can withstand constitutional scrutiny.

As noted above, the early courts were careful to ensure that the defendant was *not* punished for the wrong done to other victims. If punitive damages are confined to punishment for purely private wrongs, imposed through private law tort suits, then they should conform to a private law, bilateral model of litigation. They should not be imposed for wrongs that were done to parties that are not before the court. Indeed, properly understood in reference to their historical roots, these damages are based in the victim's right to seek punishment for the private, individualized insult to her personal honor and dignity.²⁵⁵ That right—the interest sought to be protected by punitive damages—is intensely private.²⁵⁶ It would make no sense to allow a third party with no relationship to the victim to vindicate it.

In fact, if one agrees that the multiple punishment problem is of constitutional dimension—that, even if there is no constitutional problem with a single award of “total harm” punitive damages, there is a due process limit on the ability of multiple plaintiffs to each obtain such an award²⁵⁷—then

255. See *supra* Part III.

256. *But see, e.g., In re Paris Air Crash*, 622 F.2d 1315, 1319-20 (9th Cir. 1980) (employing the modern conception of punitive damages and noting that “[s]o far is this opportunity [to seek punitive damages] from being a fundamental personal right that it is an interest not truly personal in nature at all. It is rather a public interest”).

257. Although most courts have been slow to recognize this point, *see supra* note 10, the claim that the total amount of all punitive awards cannot exceed the amount necessary to achieve punishment and deterrence appears to follow inexorably from the Supreme Court's holding in *BMW of North America, Inc. v. Gore* that “[p]unitive damages may properly be imposed [only] to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition” and may not be excessive in relation to those interests. 517 U.S. 559, 568 (1996). It would seem to be a necessary corollary of this proposition that the state has no constitutional right to impose these damages when its legitimate interests in punishment and deterrence have already been fully vindicated by prior punitive damages awards. *See, e.g., Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 51 (Tex. 1998) (“[I]f a single punitive damages award becomes unconstitutional when it can fairly be categorized as ‘grossly excessive’ in relation to a state's legitimate interests in

allowing a third party to vindicate the victim's personal interest in seeking punishment might well preclude the victim from doing so herself, which would be a wholly nonsensical result under the historical conception of punitive damages.

What is more, allowing a single victim to receive punitive damages for the private wrongs done to other victims would present serious procedural due process concerns. Although the forms of potential unfairness identified in Part I of this article do not support a constitutional argument under the modern conception of punitive damages, they are, I believe, of constitutional dimension if punitive damages are treated as punishment for private wrongs.

Under the historical conception, punitive damages are punishment for the wrong done, and the harm caused, to a particular individual. Punitive damages for harming an individual are not, however, recoverable in every instance in which that individual suffered harm as a result of the defendant's wanton conduct.²⁵⁸ Rather, because they are punishment for the legal wrong—for the individual tort, and not for the wrongful conduct in the abstract—they remain to this day recoverable only when the plaintiff can successfully establish the underlying tort.²⁵⁹ That is to say, they are recoverable only when the plaintiff can prevail on an underlying cause of action for compensatory damages:

A claim for punitive damages must be based on some underlying cause of action, since, as a general rule, there is no separate and distinct cause of action for exemplary damages. A claim for punitive damages cannot stand as a separate cause of action, since it merely constitutes an element of recovery on the underlying cause of action. A party who has no cause of action independent of a supposed right to recover exemplary damages has no cause of action at all. This means that the sufficiency of the allegation and proof of complainant's cause of action is to be determined independently of the complainant's claim for exemplary damages. A complainant who has failed to properly plead or prove his cause of action is not to be allowed an award of exemplary damages, because he must establish his cause of action as a prerequisite to such an award.²⁶⁰

punishment and deterrence, it follows that the aggregate amount of multiple awards may also surpass a constitutional threshold.”).

258. See *infra* notes 260-61.

259. See *infra* notes 260-61.

260. 22 AM. JUR. 2D *Damages* § 741 (1988) (footnotes omitted); see, e.g., *Mejia v. Motel 6 O.L.P.*, No. CV-98-07134, 2001 WL 681782, at *16 (D. Nev. Jan. 24, 2001) (“Indeed, it is a basic legal principle that ‘there is no cause of action for punitive damages. Punitive or exemplary damages are remedies Punitive damages are merely incident to a cause of action, and

The recovery of punitive damages is contingent on the underlying cause of action, and it will be defeated in the absence of proof of an element of the underlying claim, such as individual causation, or in the presence of an affirmative defense, such as contributory negligence or expiration of the statute of limitations.²⁶¹ After all, in those circumstances, there is no legal wrong to punish.

Thus, if a court allows a single plaintiff to collect "total harm" punitive damages on the theory that the defendant should be punished for committing private legal wrongs against

can never be the basis thereof.") (quoting *Grievous v. Superior Court of Orange County*, 157 Cal. App. 3d 159, 163-64 (Cal. Ct. App. 1984)); *Hassoun v. Cimmino*, 126 F. Supp. 2d 353, 372 (D.N.J. 2000) ("Punitive damages are a remedy incidental to cause of action, not a substantive cause of action in and of themselves."); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 342 (Ohio 1994) ("[N]o civil action may be maintained simply for punitive damages. Rather, punitive damages are awarded as a mere incident of the cause of action in which they are sought." (citations omitted)). Indeed, as far back as 1888, the Kansas Supreme Court stated that

[n]o right of action for exemplary damages, however, is ever given to any private individual who has suffered no real or actual damages. He has no right to maintain an action merely to inflict punishment upon some supposed wrong-doer. If he has no cause of action independent of a supposed right to recover exemplary damages, he has no cause of action at all.

Schippel v. Norton, 16 P. 804, 807 (Kan. 1888). Even those states that have permitted a plaintiff to recover punitive damages in the absence of an actual award of compensatory damages, *see supra* note 203, have made clear that this rule "does not dispense with the requirement of proving a substantive cause of action," *Gautam v. De Luca*, 521 A.2d 1343, 1347 (N.J. Super. Ct. App. Div. 1987).

261. *See, e.g., Morris v. Mfrs. Life Ins. Co.*, No. EV 95-142-C H/H, 1997 WL 534156, at *9 (S.D. Ind. Aug. 6, 1997) ("The claim for punitive damages does not state an independent cause of action. . . . Accordingly, because relief is barred by the statute of limitations for all substantive causes of action, the additional prayer for punitive damages is also barred."); *Terry v. Tyler Pipe Indus.*, 645 F. Supp. 1194, 1198 (E.D. Tex. 1986) ("Since the plaintiff's underlying tort claim is time barred, plaintiff's claim for exemplary damages is likewise barred."); *Koenning v. Manco Corp.*, 521 S.W.2d 691, 703 (Tex. Civ. App. 1975) ("The trial court was correct in granting the motions for instructed verdict on the issue of exemplary damages, because the tort actions which form the basis of appellant's request for exemplary damages are barred by the two year statute of limitations."); *Tucker v. Marcus*, 418 N.W.2d 818, 823-29 (Wis. 1988) (holding that, where the plaintiff is more than fifty percent responsible for the accident, and therefore is barred from prevailing on the underlying action by the state's modified comparative negligence statute, the plaintiff may not recover punitive damages); *Cox v. Kansas Gas & Elec. Co.*, 630 F. Supp. 95, 101 (D. Kan. 1986) (same); *Williams v. Carr*, 565 S.W.2d 400, 402 (Ark. 1978) (same); *McDonald v. Int'l & G.N. Ry.*, 22 S.W. 939, 944 (Tex. 1893) (holding that, if the defendant can establish the affirmative defense of contributory negligence, the plaintiff cannot recover punitive damages).

numerous individuals, it must require the plaintiff to prove, and afford the defendant the opportunity to disprove, that the defendant committed an actionable legal wrong against all of the alleged victims. Because punitive damages are properly recoverable for each individual injury only if all of the elements of the underlying cause of action are present and there are no affirmative defenses, the defendant must be permitted to contest causation and other elements of the alleged tort on an individual basis with respect to each victim and to raise all affirmative defenses that it might have against particular victims.

In most circumstances, however, that will be impossible. In a case brought by a single victim, the evidence at trial will, of course, focus on the wrong done, and the harm caused, to the plaintiff. The other wrongs allegedly resulting from the same course of conduct will be treated only peripherally and painted with a very broad brush. The plaintiff will probably be permitted to introduce some very general, most likely statistical, evidence about these other wrongs, but, because the trial must necessarily center on the plaintiff's case, no evidence will be introduced regarding the specifics of any of them. In all likelihood, no effort will be made to determine, for instance, how many of the other acts were genuinely wrongful, or how many of the other supposed injuries were legitimate, and were in fact caused by the defendant. If the jury were given the opportunity to inquire into these allegations of peripheral harms, it might well find that many of them were not what they seemed. But, as a practical matter, no attempt can be made to do that in most cases without unacceptably fragmenting the proceeding into an endless series of "mini-trials," distracting the jury from the primary focus of the dispute.²⁶² Yet, even though the other harms will not (and cannot) be proven, the jury will be permitted to punish the defendant for the whole lot of them.

This the Constitution will not bear, for it contravenes the most basic principles of procedural due process. As the

262. See generally FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *Chem. Leaman Tank Lines, Inc. v. AETNA Cas. & Sur. Co.*, 89 F.3d 976, 994 (3d Cir. 1996) (upholding the district court's decision to exclude evidence that, while probative, would require a series of mini-trials that would cause undue delay and mislead the jury).

Supreme Court has repeatedly made clear, "Due process requires that there be an opportunity to present every available defense."²⁶³ "If parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would . . . be unconstitutionally deprived of their opportunity to be heard . . ."²⁶⁴ That is precisely the effect of "total harm" punitive damages—if we conceive of them as an effort to punish the defendant for a series of individual, private wrongs.

Indeed, courts have held that, even if a class action were certified on behalf of all victims of a mass tort, "the jury would still be required to determine for each class member whether he or she [was injured], and, if so, whether defendants . . . caused that [injury]."²⁶⁵ According to these courts, allowing the entire plaintiff class to recover without permitting the defendant to question the elements of each individual claim would violate the defendant's due process rights.²⁶⁶ So too would allowing recovery without permitting the defendant to raise all defenses that it may have against individual victims.²⁶⁷ In vindicating these principles, courts have expressed concerns that "[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice,"²⁶⁸ and that the advantages of collective

263. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

264. *Nat'l Union Fire Ins. Co. of Pittsburgh v. City Sav.*, F.S.B., 28 F.3d 376, 394 (3d Cir. 1994); *see also* 16B AM. JUR. 2D *Constitutional Law* § 956 (1998).

265. *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 489 (E.D. Pa. 1997); *see also*, *e.g.*, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342-43 (4th Cir. 1998); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988) ("This is an understandably easy trap to fall into in mass tort litigation. Although many common issues of fact and law will be capable of resolution on a group basis, individual particularized damages still must be proved on an individual basis."); *In re Dow Corning Corp.*, 250 B.R. 298, 360 n.34 (Bankr. E.D. Mich. 2000).

266. *See, e.g.*, *Arch*, 175 F.R.D. at 489 n.21; *id.* at 493 (noting that it "would abrogate the constitutional rights of defendants" for plaintiffs seeking to recover for harm to a group of persons to attempt to prove damages and causation only on a "class-wide basis" (citing *In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir.1990))).

267. *See, e.g.*, *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *In re Masonite Corp. Hardboard Siding Prod. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997) (explaining that defendants "cannot receive a fair trial without a process which permits a thorough and discrete presentation of [their] defenses"); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 372 (D.N.J. 1987).

268. *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993)

litigation "must yield to a paramount concern for a fair and impartial trial."²⁶⁹

In other words, under current law, if all of the victims were to join together in a class action, the defendant would be spared the expense of paying either compensatory or punitive damages for any class members who could not individually establish their underlying cause of action. It is difficult to see why the result should be any different where only a single victim seeks to punish the defendant for the individual wrongs to the entire class.

Indeed, it is a fundamental tenet of the common law that, in those rare circumstances in which the general rule that a single plaintiff may not recover for the harm caused by the defendant to numerous third parties²⁷⁰ is not applicable, the plaintiff must sue in subrogation. In such cases, the plaintiff stands in the shoes of the individual victims, and can recover for the harm to each victim only by proving that victim's claim, and only if the defendant cannot establish that it would have had affirmative defenses to a lawsuit brought by that victim.²⁷¹ Courts have consistently rejected efforts by plaintiffs to make "an illegitimate end-run around principles of subrogation"²⁷² by seeking to recover for the harm done to all victims of the defendant's wrongful course of conduct without showing that every one of the victims could prevail in their own tort suits.²⁷³ As Judge Easterbrook has explained, "no rule of law requires persons whose acts cause harm to cover all of the costs, unless these acts were legal wrongs," and that proposition cannot

(quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)).

269. *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (citing *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir. 1990)).

270. *See, e.g., Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (noting that at common law, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts" could not recover).

271. *See, e.g., Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 233 (2d Cir. 1999) ("[P]laintiffs' right to sue for damages would be subrogated to the rights of those individual smokers for whom they provided health care benefits. . . . [P]laintiffs would stand in the shoes of the injured participants and recoup damages from defendants . . . only to the extent defendants were liable to the participants themselves.").

272. *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788, 790 (5th Cir. 2000).

273. *See, e.g., Int'l Bhd. of Teamsters v. Philip Morris, Inc.*, 196 F.3d 818, 821 (7th Cir. 1999).

legitimately be established through "litigation in which the plaintiffs seek to strip their adversaries of all defenses."²⁷⁴

In the context of "total harm" punitive damages, the plaintiff is not, of course, seeking to be *compensated* for the harm to third parties, and does not have the option of suing in subrogation. Still, the same fundamental principle would seem to apply. If due process will not permit a defendant to be tagged with *compensatory damages* for the wrongs that it visited upon a large number of people without being afforded the opportunity to contest individual elements of each alleged victim's claim and to raise victim-specific affirmative defenses, it cannot tolerate the imposition of *punitive damages* in these circumstances, especially given that punitive damages for each wrong are expressly contingent upon an entitlement to compensatory damages. The defendant can be punished through the mechanism of punitive damages for the harm caused to third parties only if it committed legal wrongs against all of those parties. The only way to establish that it did so is through individual tort suits (or a collective proceeding in which the defendant is afforded the opportunity to defend against each allegation), not litigation in which the plaintiff effectively strips the defendant of all of its defenses.

For this reason, if punitive damages must be conceived of as punishment for private, individual wrongs, it would, I believe, be unconstitutional in most instances to allow a single plaintiff to recover those damages for the wrongs done to an entire class of people.

VI. RE-IMPLEMENTING THE HISTORICAL CONCEPTION

Thus, the Constitution requires that punitive damages awards be limited to the amount necessary to punish the defendant for the wrong to the individual plaintiff. What does it mean, as a practical matter, to say that punitive damages cannot be imposed as punishment for the harm to persons not before the court? How must the current practice be changed to vindicate this principle? The answer does not, in my opinion, lie in any of the proposals for change that have dominated the discussion of "total harm" punitive damages to this point, as these proposals have been preoccupied only with the multiple punishment problem.

274. *Id.* at 823; see also, e.g., *In re Dow Corning Corp.*, 250 B.R. 298, 359-61 (Bankr. E.D. Mich. 2000).

A. THE INADEQUACY OF PRIOR EFFORTS TO SOLVE THE MULTIPLE PUNISHMENT PROBLEM

In their zeal to protect against excessive multiple punishment, a herd of commentators and lawmakers have proposed a variety of reforms to the tort system, many of which would be quite revolutionary indeed.²⁷⁵

Some courts and commentators have proposed what is essentially a "double jeopardy" regime: having the jury in the first case that goes to trial determine an appropriate punishment (if any) for the entire course of conduct, and then precluding all subsequent juries from imposing punitive damages.²⁷⁶

275. In addition to the popular proposals discussed below, a number of commentators have offered other, unique suggestions. See, e.g., Cordray, *supra* note 33, at 309-14 (arguing that serious enforcement of *BMW of North America, Inc. v. Gore's* extraterritoriality limitations will obviate the multiple punishment problem); N. Todd Leishman, Note, *Juzwin v. Amtorg Trading Corp.: Toward Due Process Limitations on Multiple Awards of Punitive Damages in Mass Tort Litigation*, 1990 UTAH L. REV. 439, 468-73 (arguing in favor of delaying enforcement of all punitive damages awards for a course of conduct until all litigation arising out of that conduct has been completed); John A. Maya, Note, *Punitive Damages and the Mass Tort: An Insurance Alternative to the Consequences of Multiple Liability*, 42 SYRACUSE L. REV. 1241, 1262-64 (1991) (arguing in favor of allowing defendants to insure against all but the first award of punitive damages arising out of a single course of conduct).

276. See Schwartz, *supra* note 12, at 422-23 (arguing that, with regard to multiple punitive damages awards, the core principle of double jeopardy is included in the Due Process guarantee). A version of this reform has been adopted by statute in Georgia. Section 51-12-5.1(e)(1) of the Georgia Code states,

In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.

GA. CODE ANN. § 51-12-5.1(e)(1) (2000). *But see* McBride v. Gen. Motors Corp., 737 F. Supp. 1563, 1579 (M.D. Ga. 1990) (striking down this provision on equal protection and due process grounds). Some judges have also endorsed this reform. See *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 (D.N.J. 1989) (concluding that "subjecting defendants to the possibility of multiple awards of punitive damages for the single course of conduct alleged in this action would deprive defendants of the fundamental fairness required by the Due Process Clause"), *vacated in part on reconsideration*, 718 F. Supp. 1233, 1234 (D.N.J. 1989) ("The court abides by its ruling that multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due Process Clause, but concludes that equitable and practical concerns prevent it from fashioning a fair and effective

Others, recognizing an obvious problem with this approach—that often the first case will produce a verdict before the full extent of the defendant's malice and the full scope of the harm that it caused are understood—have admitted an exception to the strict, one-bite-at-the-apple rule. Senator Hatch, who has repeatedly proposed bills “to provide a fair and balanced resolution to the problem of multiple imposition of punitive damages,”²⁷⁷ explains that “[u]nder the exception, an additional award of punitive damages may be permitted if the court determines that the claimant will offer new and substantial evidence of previously undiscovered, wrongful behavior on the part of the defendant.”²⁷⁸ If so, the court will allow a second punitive award, but “must reduce the amount of punitive damages awarded by the amounts of prior punitive damages based on the same acts.”²⁷⁹

remedy.”). One federal judge phrased the argument in this way:

A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate “double jeopardy” but simply because overlapping damage awards violate that sense of “fundamental fairness” which lies at the heart of constitutional due process. . . .

Our law on punitive damages was created in an era of single plaintiff versus single defendant disputes and has not yet been adapted to the complexity of multi-party litigation. Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs.

In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig., 526 F. Supp. 887, 899-900 (N.D. Cal. 1981), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982).

277. 143 CONG. REC. S454 (1997) (statement of Sen. Hatch); *see also* The Multiple Punitive Damages Fairness Act of 1997, *reprinted in* 143 CONG. REC. S454-55 (1997); The Multiple Punitive Damages Fairness Act, *reprinted in* 141 CONG. REC. S5148-49 (1995).

278. 143 CONG. REC. S454 (1997) (statement of Sen. Hatch).

279. *Id.* In a hearing before the Senate Judiciary Committee, one advocate of this reform explained that

legislation should allow a plaintiff in a case tried after punitive damages have already been awarded in a previous case to obtain punitive damages if the court determines in a pre-trial hearing that the plaintiff will offer new and substantial evidence of previously undiscovered, additional wrongful behavior on the part of the defendant, aside from injury to the claimant. This exception preserves a way to augment punishment if it is later discovered that the original punishment was based on inadequate information. This situation may occur, for example, where the investigatory process reveals previously undiscovered documents showing a very substantial coverup of a product hazard, or where it is found that the defendant has hidden or destroyed material documents.

Still other reformers have recognized that, even as modified, the double jeopardy solution might be too lenient on defendants.²⁸⁰ Just as it would be unfair to impose “total harm” punitive damages on a defendant who would likely win 99 of the 100 cases arising out its course of conduct, but happens to lose the first one that comes to trial,²⁸¹ it would be unduly lax to let a defendant who would likely be stung with massive punitive damages in 99 of these cases walk away with little or no punishment if that 100th case happens to be the first one to reach a verdict. To combat this problem, these reformers have proposed that each punitive damages award be calculated by reference to the entire scope of the defendant’s conduct and then reviewed for excessiveness when considered in combination with all prior punitive awards for the same course of conduct.²⁸² Thus, if the prior award (or awards) amount to less than what the jury and judge consider to be the optimal level in the instant case, additional punitive damages will be allowed up to the point at which the total amount of punishment is sufficient to punish in full. If the jury’s award of punitive damages (as reviewed for excessiveness by the judge) is less than or equal to the cumulative amount already awarded, however, no punitive damages will be allowed.²⁸³ Versions of this popular model have garnered significant academic support,²⁸⁴ and have been adopted by statute in Florida,²⁸⁵ Ohio,²⁸⁶ and Missouri,²⁸⁷ proposed by tort reformers

Punitive Damages: Tort Reform and FDA Defenses, Hearings on S. 671 and S. 672 Before the Senate Comm. on the Judiciary, 104th Cong. 101 (1995) (statement of Victor E. Schwartz); see also, e.g., Victor E. Schwartz & Mark A. Behrens, *The American Law Institute’s Reporters’ Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263, 281 (1993).

280. See *infra* notes 284-89.

281. See *supra* text accompanying notes 34-49.

282. See *infra* notes 284-89.

283. See *infra* notes 284-89.

284. See, e.g., Jones et al., *supra* note 12, at 28-32; Pace, *supra* note 33, at 1634; Schulkin, *supra* note 11, at 1800-01; Schwartz & Behrens, *supra* note 279, at 281.

285. FLA. STAT. ANN. § 768.73(2)(a)-(b) (West Supp. 2002).

286. See Brett M. Wall, Comment, *Sympathy for the Devil: How the Ohio Tort Reform Act Creates a Flawed System of Punitive Damages*, 58 OHIO ST. L.J. 1023, 1032-40 (1997). This provision was recently repealed in response to a decision of the Ohio Supreme Court striking down the entirety of Ohio’s tort reform bill. See OHIO REV. CODE ANN. § 2315.21 (Anderson 2001); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1091 (Ohio 1999).

287. See MO. ANN. STAT. § 510.263(4) (West Supp. 2002) (allowing

in Congress,²⁸⁸ and incorporated into the U.L.A.'s Model Punitive Damages Act.²⁸⁹

Finally, yet another set of courts and commentators, perhaps concerned with the inflexibility and potential inadministrability of the above approaches, has advanced a more watered-down solution: placing the duty to protect against multiple punishment in the hands of the jurors by instructing the jury to consider prior and potential future punitive awards in fixing the amount of punitive damages to assess,²⁹⁰ or, alternatively, requiring the courts in reviewing the jury's award for excessiveness at least to consider "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation."²⁹¹

All of these proposals have their pros and cons (many are heavy on the cons),²⁹² and the debate among academics and jurists as to which among them is the best has been robust. I do not join in that discussion in these pages for the simple reason that none of these proposals is consistent with the historical (and, I believe, constitutionally mandated) understanding of punitive damages as punishment for the

defendants to receive a credit for prior punitive damages awards for the same course of conduct).

288. See The Multiple Punitive Damages Act, reprinted in 140 CONG. REC. S14836-37 (1994).

289. See MODEL PUNITIVE DAMAGES ACT § 10, 14 U.L.A. 70-71 (2001 Supp.).

290. This is the position advanced by the Second Restatement:

Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate [for the jury] to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight being given to the prior awards.

RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977). This reform has also been endorsed in some form by a number of courts, see *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 40 (Tex. 1998) (collecting cases); Seltzer, *supra* note 2, at 58 n.121 (same), commentators, see, e.g., Owen, *supra* note 2, at 1319; Jacqueline Perczek, Note, *On Efficiency, Punishment, Deterrence and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825, 872 (1993), and state legislatures, see MINN. STAT. ANN. § 549.20(3) (2000); OR. REV. STAT. § 30.925(g) (2001).

291. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (discussing and endorsing the factors employed by the Alabama courts).

292. Judge Friendly's landmark discussion of the multiple punishment issue anticipated and eloquently critiqued many of these proposals. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 (2d Cir. 1967).

individual wrong. Because all of these proposals fight only half of the battle,²⁹³ still allowing for an award of "total harm" punitive damages to a single plaintiff, I believe that they are all unconstitutional.

The only existing proposal that arguably effectuates (albeit unintentionally) the historical limitation on punitive damages is the class action. Finding various faults with the other proposals just mentioned, a number of commentators have come to the conclusion that the best way to solve the multiple punishment problem is to use the class action device to consolidate lawsuits brought by all of the victims of the defendant's misconduct in a single proceeding.²⁹⁴ If all of the

293. Some extant proposals do not even logically tend to solve the multiple punishment problem. For example, a number of commentators have argued that the multiple punishment problem can be effectively, if indirectly, solved simply by employing a handful of procedural safeguards, such as a clear and convincing evidence standard, designed to protect against unwarranted punitive damages awards. *See, e.g.*, Seltzer, *supra* note 2, at 89-91 (endorsing early dismissal of unsupported punitive damages claims, bifurcation of trials, and close appellate scrutiny); Wall, *supra* note 286, at 1050-54 (advocating a clear and convincing evidence standard, de novo appellate review, and other reforms); *see also, e.g.*, Scheufler v. Gen. Host Corp., 126 F.3d 1261, 1272 (10th Cir. 1997) (rejecting a multiple punishment argument in part on the grounds that the defendant was given "considerable procedural safeguards with respect to the punitive damage issue"). As the Supreme Court has noted, however, procedural protections like "the clear and convincing standard of proof[] [are] important check[s] against unwarranted imposition of punitive damages, but, . . . [they] provide[] no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary [or excessive] amounts." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 (1994). Imposing additional procedural safeguards might help ensure that punitive damages are awarded only in appropriate cases, but it will do nothing to protect against excessive multiple punishments when punitive damages are appropriate in more than one case arising out the same course of conduct.

Similarly, a number of commentators have argued that the problem should be solved by imposing draconian substantive reforms not directly related to multiple punishment. *See, e.g.*, Roginsky, 378 F.2d at 839 (noting the option of abolishing punitive damages altogether in cases in which there is a danger of multiple punishment "overkill"); Owen, *supra* note 220, at 48 & n.227 (arguing in favor of imposing dollar caps to protect against unfair multiple punishment). These proposals go too far in the other direction, throwing away the baby with the bath water. As I hope to establish below, there is a way to ameliorate the multiple punishment problem, and to vindicate the historical conception of punitive damages, without going to these extremes.

294. *See, e.g.*, Kevin M. Forde, *Punitive Damages in Mass Tort Cases: Recovery on Behalf of a Class*, 15 LOY. U. CHI. L.J. 397, 450-52 (1984); Janice Kemp, *The Continuing Appeal of Punitive Damages: An Analysis of Constitutional and Other Challenges to Punitive Damages, Post-Haslip and Moviel*, 26 TEX. TECH. L. REV. 1, 68-70 (1995); Mabry, *supra* note 33, at 236-

victims are represented in the same case, and share in a single award of "total harm" punitive damages, then there is no danger of multiple punishment. This solution would also vindicate the historical conception of punitive damages as punishment for individual wrongs; if all victims are represented, the award of punitive damages does not punish the defendant for the harm to victims not before the court.²⁹⁵

As commentators have explained in some detail, however, the class action device, due to its myriad procedural and substantive limitations, is usually not appropriate for assessing punitive damages arising out of mass torts.²⁹⁶ To begin with,

37; Seltzer, *supra* note 2, at 61-88; Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787, 1789-97 (1983); Timothy J. Phillips, Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment*, 1984 U. ILL. L. REV. 153, 163-74; Briggs L. Tobin, Comment, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457, 465-79 (1989); see also Ryan K. Roth, Note, *Mass Tort Malignancy: In the Search for a Cure, Courts Should Continue to Certify Mandatory, Settlement Only Class Actions*, 79 B.U. L. REV. 577, 623-29 (1999) (arguing in favor of mandatory, settlement-only class actions).

295. Actually, this will be true only if the punitive award does not attempt to punish the defendant for the harm to class members who are unable to prevail on their individual claims. Courts employing the conventional understanding of punitive damages do not endorse this limitation. See, e.g., *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996) ("The punitive damages sought in this case are a single collective right in which the putative class has a common and undivided interest; the failure of one plaintiff's claim will increase the share of successful plaintiffs."), *overruled on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072-77 (11th Cir. 2000) (en banc); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333-34 (5th Cir. 1995) ("In class actions or multi-plaintiff suits, the defendant's potential exposure to a large punitive damage award is not affected by the failure of individual claims as long as one plaintiff is successful."), *overruled on other grounds by H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000).

296. See, e.g., Hines, *supra* note 20, at 942; Phillips, *supra* note 12, at 444-48; Deborah Deitsch-Perez, Note, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 BROOK. L. REV. 517, 567-71 (1983). The Fifth Circuit has noted that

[a] single class action for recovery of one award of punitive damages might be an attractive alternative from a theoretical point of view, but does not appear feasible. Because the losses are so widespread and disparate, the vital legal issues would not be common to all plaintiffs, nor would the applicable legal standards be identical in all jurisdictions in which the cases would arise.

Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 527 (5th Cir. 1984). In Judge Friendly's words,

If there were any way in which all cases could be assembled before a single court, as in a limitation proceeding in admiralty, it

only those class actions that are mandatory—that do not allow potential plaintiffs to opt out of the class and bring their own “total harm” punitive damages claims—can effectively solve the multiple punishment problem, as well as effectuate the historical understanding of punitive damages.²⁹⁷ The only form of mandatory class action currently authorized by the Federal Rules of Civil Procedure that could possibly be applicable to most punitive damages cases is the Rule 23(b)(1)(B) class action, which is permissible only when “adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.”²⁹⁸ Those who advocate using this mechanism to resolve mass tort claims argue that, due to potential bankruptcy, the defendant’s assets constitute a “limited fund” such that individual punitive damages verdicts in favor of some plaintiffs will effectively extinguish the rights of other plaintiffs to receive compensation for their injuries.²⁹⁹ That has proven, however, to be a very difficult proposition to establish in most cases, and appellate courts have generally refused to accept the certification of mandatory class actions on these grounds.³⁰⁰

In addition, even if the requirements for a Rule 23(b)(1)(B) class action could be met, there are a number of significant impediments to the use of the class action device to resolve

might be possible for a jury to make one award to be held for appropriate distribution among all successful plaintiffs, although even as to this the difficulties are apparent. But we perceive no way of accomplishing that except by legislation requiring all claims in respect of drugs supervised by the FDA to be asserted in the federal courts—hardly a desirable course.

Roginsky, 378 F.2d at 839 n.11.

297. See Hines, *supra* note 20, at 900-01. Classes certified under Rules 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2) of the Federal Rules of Civil Procedure are mandatory. Rule 23(b)(3) governs opt-out classes.

298. FED. R. CIV. P. 23(b)(1)(B).

299. See Hines, *supra* note 20, at 903-04 (collecting cases in which courts have relied on “limited fund” theories). Courts have also considered whether a Rule 23(b)(1)(B) class would be appropriate on the theory that, due to the potential due process constraints on multiple punitive damages awards, the victims are all seeking essentially the same punitive damages, and an award to one plaintiff would preclude recovery by others regardless of the financial situation of the defendant. See *id.* at 904 (collecting cases). If one accepts the thesis of this article (that punitive damages awards are proper only in the amount necessary to punish the defendant for the wrong done to the individual plaintiff), however, this theory is invalid.

300. See *id.* at 904-05 (collecting cases).

punitive damages claims arising out of a single course of conduct.³⁰¹ Included among these impediments are the following: (1) often, choice of law rules will dictate that different substantive rules or different procedural standards for the imposition of punitive damages apply to different plaintiffs' claims, making it unmanageable to adjudicate all claims in a single proceeding;³⁰² (2) the Anti-Injunction Act³⁰³ makes it nearly impossible for federal courts to prohibit some potential class members from bringing suit in state court;³⁰⁴ (3) even where the defendant's conduct was identical with respect to all victims (which is often not the case), individual issues (including causation and the amount of both compensatory and punitive damages) will tend to predominate, again making a class action unworkable;³⁰⁵ and (4) the court might not have personal jurisdiction over some unwilling absent class members who do not reside in the forum state, and therefore the decision in the class action might not be binding on all victims.³⁰⁶

Not surprisingly, then, most appellate courts have refused to allow class certification in cases of this sort.³⁰⁷ Indeed, in its recent decision in *Ortiz v. Fibreboard Corp.*,³⁰⁸ the Supreme Court appears to have all but sounded the death knell for mandatory class actions in mass tort cases.³⁰⁹

The inadequacy of existing procedures has led numerous commentators to propose new nationwide class action procedures to overcome the multiple punishment problem.³¹⁰

301. See Deitsch-Perez, *supra* note 296, at 535-54 (noting that due process may not permit a mandatory class action in these circumstances even if the requirements of Rule 23 are met).

302. See Hines, *supra* note 20, at 916-19, 922.

303. 28 U.S.C. § 2283 (2000).

304. See *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1180-83 (8th Cir. 1982) (striking down a class certification order on these grounds); Hines, *supra* note 20, at 906-07; Deitsch-Perez, *supra* note 296, at 563-67.

305. See Hines, *supra* note 20, at 914-16.

306. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-47 (1999); Deitsch-Perez, *supra* note 296, at 535-47.

307. See, e.g., *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1002-08, 1010 (3d Cir. 1986); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 856-57 (9th Cir. 1982); *In re Fed. Skywalk Cases*, 680 F.2d at 1180-83; Hines, *supra* note 20, at 902-12.

308. 527 U.S. 815 (1999).

309. See *id.* at 841-48 (raising serious constitutional, historical, and practical concerns with mandatory class certification in mass tort cases under Rule 23(b)(1)(B)).

310. See, e.g., AM. BAR ASS'N SPECIAL COMM. ON PUNITIVE DAMAGES, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 78-81 (1986); AM. COLL.

We need not answer this question, however, at least not in order to vindicate the historical conception of punitive damages. Punitive damages can be effectively limited to the amount necessary to punish the defendant for the individual wrong without revolutionizing the tort system.³¹¹

B. ELIMINATING "TOTAL-HARM" PUNITIVE DAMAGES

If none of the existing proposals adequately ameliorates the constitutional infirmity of "total harm" punitive damages (except in those circumstances in which a class action is permissible), what does? Again, what does it mean, in practice, to say that the jury must limit its award of punitive damages to the amount necessary to punish the defendant for the wrong done to the plaintiff or plaintiffs before the court?

To begin with, the fact that the jury cannot punish the defendant for harm to third parties does not mean that the jury is precluded from considering that harm altogether. Rather, as the Supreme Court held in *BMW of North America, Inc. v. Gore*, evidence of additional, related harms that cannot be punished may be "relevant to the determination of the degree of reprehensibility of the defendant's conduct" toward the plaintiff.³¹² The *Gore* Court noted that, in this regard, the law of punitive damages is similar to the criminal law: The jury can consider evidence of additional wrongdoing as a means of providing some context for the harm at issue, so as to determine whether the individual wrong to the victim is more

OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 20-26 (1989); 2 AM. LAW INST., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 260-65, 412-39 (1991); Deitsch-Perez, *supra* note 296, at 567-71; see also Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1060-90, app. (1986) (proposing a federal mass tort procedure act as the "best approach for dealing with the nationwide litigation crisis engendered by mass-tort lawsuits"); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 840-66, 896-97 (2002) (concluding that "only mandatory-litigation class action will minimize the sum of accident costs through optimal mass tort deterrence and insurance").

311. I recognize that there are many other reasons why it would be desirable to create a new form of collective adjudication to resolve mass tort disputes. I am concerned in these pages, however, only with the issue at hand—the unconstitutionality of "total harm" punitive damages—which can be addressed without enacting such a reform.

312. 517 U.S. 559, 574 n.21 (1996) (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993)).

reprehensible when considered in light of the defendant's entire course of conduct.³¹³ It may not, however, punish the additional harm.³¹⁴ For instance, a wrongful refusal to pay benefits due under an insurance policy would be more reprehensible—and thus deserving of greater punishment—if it were a part of a nationwide and company-wide practice of victimizing elderly or otherwise vulnerable insureds than it would be if it were simply the result of an isolated act of wrongdoing by one unsavory employee.³¹⁵ The jury should be allowed to consider the evidence of other wrongful denials in order to make that determination, but it should not be permitted to award punitive damages in an amount that it believes to be necessary to punish the defendant for committing all of the nationwide wrongs, or indeed, for committing any wrongs not directly at issue.

313. *See id.* at 573 n.19, 576-77.

314. *See id.* In the criminal law, the sentencing court may consider the defendant's prior wrongful acts, *see Nichols v. United States*, 511 U.S. 738, 747 (1994) (citing *Williams v. New York*, 337 U.S. 241, 244-52 (1949)), or uncharged concurrent wrongful conduct, *see id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 84-91 (1986)); *Williams v. Oklahoma*, 358 U.S. 576, 584-86 (1959), but only for the purpose of determining the reprehensibility of the charged crime. "[T]he enhanced punishment imposed for the later offense 'is not to be viewed as [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" *Witte v. United States*, 515 U.S. 389, 400 (1995) (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)); *see also, e.g., Moore v. Missouri*, 159 U.S. 673, 677 (1895) (holding that "the accused is not again punished for the first offence" because "the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself"). The criminal cases recognize that it would be unconstitutional to actually punish the defendant for extraneous wrongful conduct without requiring the prosecution to prove the defendant's guilt of that additional conduct beyond a reasonable doubt and without offering the defendant a full opportunity, with the assistance of counsel, to raise all available defenses. *See Apprendi v. United States*, 530 U.S. 466, 474-97 (2000) (indicating that the judge may consider other facts or conduct in imposing a sentence for the wrong at issue, but that it would violate due process to punish the defendant for the extraneous wrongs without affording full criminal procedural protections).

315. In the words of the *Gore* Court,

Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.

517 U.S. at 576-77 (citations omitted).

Nor should the jury attempt to take away the profits that accrued to the defendant as the result of wrongs not at issue. At first glance, it may seem appropriate, in punishing the wrong to the plaintiff, to remove those profits in order to achieve the legitimate goal of deterring the defendant from committing similar wrongs in the future. It is, after all, an elementary principle of economics that a defendant will ordinarily engage in wrongful behavior if it has an expectation that, even after legal sanctions, it will derive a net profit from its malfeasance.³¹⁶ That principle, however, when it is employed for the punitive purpose of achieving complete deterrence, must concern itself only with the possibility that the defendant might have escaped liability for the wrong to the plaintiff; it should not be addressed to the possibility that the defendant may have profited from additional wrongs to other persons.

A rational actor will decline to commit a profitable wrong only if it concludes *ex ante* that the expected profit from the wrong is exceeded by the amount of the potential sanction, multiplied by the probability that the sanction will be imposed (that is, the probability that the wrong will be detected and successfully prosecuted).³¹⁷ Therefore, where the probability of sanction is low, the expected punishment for each individual wrong must be high enough to dissuade the actor from committing the wrong on the expectation that it will likely get away with it. Indeed, courts have traditionally recognized that, in situations in which the wrong may have been hard to detect (or caused only minor damages to the individual victim, thus providing little incentive to prosecute), concerns for deterrence justify setting the penalty at a higher level than would otherwise be appropriate.³¹⁸ That principle, which, to be sure,

316. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166 (J.H. Burns & H.L.A. Hart eds., The Athlone Press 1970) (1780) ("The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.").

317. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207-09 (1968); Hylton, *supra* note 84, at 424-25; Polinsky & Shavell, *supra* note 90, at 887-88.

318. See, e.g., *Gore*, 517 U.S. at 582 (noting that higher punitive damages "may . . . be justified in cases in which the injury is hard to detect," or where "a particularly egregious act has resulted in only a small amount of economic damages"); *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (Opinion of Scalia, J.) ("[S]ince deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties.").

can sometimes yield very high punitive damages, focuses only on the nature of the wrong done to the plaintiff. It does not ask how many other wrongs the defendant committed, and it does not concern itself with whether or not the defendant will, in fact, escape liability for other wrongs.

To engage in the latter exercise is to punish the other wrongs. Imagine, for instance, a criminal case in which the police catch a car thief in the act of stealing a car and, in the course of coercing an involuntary and inadmissible confession out of him, learn that he has stolen seven other cars. In these circumstances, it would be appropriate to punish the defendant only for the single theft that could be established without recourse to the unconstitutional confession. That punishment already takes into account the possibility that the defendant might have gotten away with the crime; we do not simply fine the defendant in an amount equal to the resale value of the vehicle. In addition, the fact that the defendant has a history of criminal behavior may lead us to impose a sentence at the high end of the range authorized for a single auto theft. It would clearly be impermissible, however, to say that because we believe that the defendant has gotten away with seven other auto thefts, and therefore derived a net benefit from his thievery, we will punish him in the name of deterrence eight times as hard for the one theft that we *can* prove than we would have if we could punish him separately for each of the other thefts, or if we believed that this was the only theft that he had committed. In these circumstances, all of the semantic gymnastics in the world cannot get around the fact that we manifestly would be punishing the defendant for all eight thefts; what we would really be saying is that, to ensure that the defendant is fully deterred, we will punish the wrongs done to all of the victims. This is precisely what the Constitution does not permit. The deterrence tail cannot wag the punishment dog.³¹⁹ Any attempt to ensure that the defendant

319. *Cf.* *Mass. Bonding & Ins. Co. v. United States*, 352 U.S. 128, 133 (1956) ("By definition, punitive damages are based upon the degree of the defendant's culpability."). Indeed, courts have traditionally recognized that the goal of deterrence is achieved only through the mechanism of retributive punishment. *See, e.g., Tiblier v. Alford*, 12 F. 262, 265 (C.C.E.D. La. 1882) ("Exemplary or punitive damages are . . . allowed . . . as a punishment, to deter others from like conduct."); *Stinson v. Buisson*, 17 La. 567, 572 (1841) (declaring that punitive damages "are given as an example to deter others from similar conduct in future, and really for the purpose of punishing men for their bad motives and intentions"); *Harmon v. Harmon*, 61 Me. 233, 234 (1873)

is made to answer for, and does not profit from, a past wrong is an act of punishment for that wrong.³²⁰

Indeed, the *BMW of North America, Inc. v. Gore* decision specifically rejects the notion that concerns for deterrence can justify taking away the defendant's profits from the harm done to other victims where the court is not empowered to punish the defendant for harming those victims. Recall that, in *Gore*, the Court held that concerns for federalism and comity dictate that a state does not have the power to punish out-of-state conduct.³²¹ Thus, the Court refused to allow the plaintiff to collect punitive damages in an amount that was designed to take away the defendant's nationwide profits from its wrongful course of conduct,³²² notwithstanding the plaintiff's argument that, absent a disgorgement of nationwide profits, the company would not have sufficient incentive to change its company-wide

(noting that the jury was charged that punitive damages are awarded "for the purpose of punishment, so that it shall be an example that he will not be likely to do the thing again"); *Hagan v. Providence & Worcester R.R.*, 3 R.I. 88, 91 (1854) (explaining that punitive damages are awarded upon evidence of wickedness "which for the good of society and warning to the individual, ought to be punished"); *Watts v. S. Bound R.R.*, 38 S.E. 240, 242 (S.C. 1901) (noting that punitive damages "operat[e] as a deterring punishment to the wrongdoer, and as a warning to others"); *Willis v. McNeill*, 57 Tex. 465, 471 (1882) (observing that punitive damages go "by way of punishment to the plaintiffs as an example to the public to prevent a repetition of the act"). As the Iowa Supreme Court explained in 1875, the deterrent effect of punitive damages "is but an incident" of the retributive punishment. *Ward v. Ward*, 41 Iowa 686, 688 (1875); see also *id.* ("[O]ne of the objects of punishment in all cases is to prevent the repetition of the crime by the culprit and others. The example of punishment, it is presumed, will deter others from the commission of the offense in the future.").

320. See *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979) (observing that in taking away the profits from the entire course of conduct, the "jurors apparently responded to an invitation to punish Sturm, Ruger for all wrongs committed against all purchasers and users of its products, rather than for the wrong done to this particular plaintiff"), *on reh'g*, 615 P.2d 621 (Alaska 1980); *Owen*, *supra* note 220, at 51 n.243 ("How the profitability of the misconduct should figure into the calculation of a punitive damages award is an aspect of the broader question whether the defendant should be forced to redress the totality of its wrong to the public in a single action and a single punitive damages award."); see also *McDaniel v. Walker*, 24 S.E. 378, 381 (S.C. 1896) (instructing the jury that, "as a matter of justice, the law permits further compensation, not only to make up to the plaintiff for all injury he has sustained, but to prevent the defendant from deriving any profit from the wrongful act complained of, *at the expense of the plaintiff*" (emphasis added)).

321. See *supra* note 65 and accompanying text.

322. See *Gore*, 517 U.S. at 574 n.21 (holding that "it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction").

policy, and therefore would not alter its conduct.³²³

That said, let us return to the question at hand: what, as a practical matter, do we have to change in order to vindicate the constitutional principle that the jury may punish the defendant only for the harm done to the plaintiff? In fact, not all that much change is required.

Historically, the jury had a great deal of leeway in awarding punitive damages. The Supreme Court repeatedly noted in the nineteenth century that “[t]he discretion of the jury in such cases is not controlled by any very definite rules.”³²⁴ “[N]o precise rule of law fixes the recoverable damages[;] it is the peculiar function of the jury to determine the amount by their verdict.”³²⁵ The jury was usually instructed to render an award of punitive damages in an amount that would be sufficient to punish the defendant for the wrong done to the plaintiff, and would deter the defendant and others from committing similar wrongs in the future.³²⁶ Little guidance beyond that was typically given. This nearly unfettered discretion being so well established, the Court has long held that no constitutional infirmity lies in the fact that the states do not provide the jury with a detailed “rule for measuring damages.”³²⁷ As recently as 1991, the Court found nothing unconstitutional about bare-bones instructions of this sort, so long as the courts employ, as a check on the jury’s discretion, post-trial and appellate review procedures to “ensure that the award ‘does not exceed an amount that will accomplish society’s goals of punishment and deterrence.’”³²⁸

In light of these cases, it would be an uphill battle to argue that the Constitution requires monumental changes to our system of awarding punitive damages—and I make no such argument here. The fact that the Constitution mandates that the jury limit its award of punitive damages to the amount necessary to punish the defendant for the wrong done to the plaintiff does not mean that we need new legislation or a

323. *See id.* at 572 n.18, 573-74.

324. *Mo. Pac. Ry. v. Humes*, 115 U.S. 512, 521 (1885); *see also, e.g., Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) (“This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.”).

325. *Barry v. Edmunds*, 116 U.S. 550, 565 (1886).

326. *See Pac. Mut. Life. Ins. Co. v. Haslip*, 499 U.S. 1, 15, 19 (1991).

327. *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 285 (1912).

328. *Haslip*, 499 U.S. at 21 (quoting *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989)).

radical reworking of our entire tort system. Instead, all that we need is a return to basics.

Along these lines, this Article does not address the difficult and important normative questions of how much is enough to punish and deter,³²⁹ how the jury should go about reaching that conclusion,³³⁰ or whether the jury as an institution is capable of performing its duty in a competent fashion at all.³³¹ Nor does it join in the longstanding debate about whether punitive damages should be substantially reformed³³² or even abolished altogether.³³³ Rather, it leaves the law as it has always been, trusting (for better or for worse) the determination of how much the defendant should be forced to pay in the name of retribution and deterrence to the broad discretion of the jury,

329. See, e.g., Hylton, *supra* note 84, at 421 (noting varying approaches to computing optimal deterrence); Polinsky & Shavell, *supra* note 90, at 890-91 (proposing guidelines for achieving optimal deterrence through punitive damages).

330. See, e.g., David Crump, *Evidence, Economics and Ethics: What Information Should Jurors be Given to Determine the Amount of a Punitive-Damage Award?*, 57 MD. L. REV. 174, 230 (1998) ("What is striking . . . is that sometimes jurors are given virtually no information that is closely associated with the deterrence gap when asked to determine punitive awards."); Polinsky & Shavell, *supra* note 90, at 957-62 (proposing complex jury instructions to assist the jury in determining an economically efficient outcome).

331. See, e.g., Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 217 (1998) (opining that "the wisdom of a judge is preferable in this instance to the collective wisdom of the jury"); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2093 (1998) (exploring the limitations of the jury as an institution for awarding punitive damages); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 316 (2001) (concluding on the basis of experimental data that juries are generally incapable of setting the amount of punitive damages in an efficient manner).

332. Compare Schwartz & Behrens, *supra* note 279, at 281 (proposing substantial reforms to our system of awarding punitive damages), and Pace, *supra* note 33, at 1607 (same), with Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1330 (1993) (defending the status quo).

333. Compare Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 61 (1990) (criticizing the empirical case against punitive damages), and David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 359 (1998) (rebutting the case for abolishing punitive damages and arguing that punitive damages serve important retributive and deterrent goals), with John D. Ingram, *Punitive Damages Should be Abolished*, 17 CAP. U. L. REV. 205, 213 (1988) (arguing that punitive damages no longer make sense in our modern civil legal system), and James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1171 (1984) (arguing that punitive damages no longer serve any useful goals).

with the simple change that the jury resume its traditional role of punishing only the wrong to the plaintiff.

This traditional role is not entirely forgotten today.³³⁴ The Second Circuit remarked only a decade ago that the "traditional manner" of awarding punitive damages in cases of mass torts or product liability involves the jurors "confining their consideration of the appropriate punishment to the injury inflicted upon the plaintiffs in each particular litigation."³³⁵ Over the past fifteen years, a number of courts have refused to consider multiple punishment claims on the ground that, in fact, the jury in the prior case did not award "total harm" punitive damages at all.³³⁶ Rather, "the evidence demonstrated that the punitive damage awards were only for the harm inflicted upon the specific plaintiffs" in each case.³³⁷ Still, in

334. In addition to the few cases that have outright rejected "total harm" punitive damages and the corresponding modern conception of punitive damages as punishment for public wrongs, *see supra* Part III.C, one can stumble upon the occasional modern case that seems to vindicate the historical principle, albeit without much analysis. For instance, *Pridemark Custom Plating, Inc. v. Upjohn Co.*, 702 S.W.2d 566 (Tenn. Ct. App. 1985), was a product liability action brought by the lessor and lessee of a burned-down factory against the manufacturer of the highly flammable insulation that caused the accident. At trial, the plaintiffs introduced evidence that an employee had died in the fire and urged the jury in closing arguments to punish the defendant for that death. *Id.* at 573. The court held that the admission of this evidence was erroneous because "punitive damages . . . are to punish the defendant in the interest of society for the acts against the plaintiff who was damaged thereby." *Id.* (emphasis added). In a wrongful death action brought by the employee's family, such evidence would surely be relevant, but in the instant case, it "had no probative value in proving the nature of defendant's acts toward the plaintiffs and the resulting damages." *Id.* The court would have done better to speak in terms of the "wrong" to the plaintiffs, rather than the "acts" directed against them (since many legal wrongs can flow from the same act, and punitive damages historically went to punish only the wrong to the plaintiff), and it may have gone too far in excluding the evidence altogether, but it was correct to recognize that the jury could not properly punish the defendant for the wrongful death.

335. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir. 1990).

336. *See infra* note 337.

337. *Owens-Illinois v. Armstrong*, 591 A.2d 544, 557 (Md. Ct. Spec. App. 1991), *aff'd in part & rev'd in part*, 604 A.2d 47 (Md. 1992); *see also, e.g., King v. Armstrong World Indus.*, 906 F.2d 1022, 1030 (5th Cir. 1990) ("Punitive damages awarded . . . have reflected the harm inflicted upon only the plaintiffs in those suits."); *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1466 (D. Haw. 1989) ("[T]here is no evidence . . . that the juries . . . awarded [punitive] damages for the full extent of defendants' allegedly outrageous and repetitive behavior."). These courts did not, however, suggest that it would have been impermissible for the prior jury to have done otherwise.

recent years, it has become more and more common for the courts to abandon the historical conception of punitive damages in favor of allowing the plaintiff to seek and recover "total harm" punitive damages.³³⁸

We need to reverse that trend, and to get away from the notion—so often repeated that it seems almost axiomatic these days—that punitive damages are designed to punish the defendant for engaging in wrongful conduct.³³⁹ It is that notion that leads courts to believe that every victim of a defendant's wrongdoing has a claim to punitive damages in an amount that is sufficient to punish the entire scheme.³⁴⁰ It is that notion that leads plaintiffs to ask for "total harm" punitive damages, and juries to award them. Indeed, even where the plaintiff's attorney is not explicit in asking the jury to punish the defendant for harming others, a jury that sees itself as punishing the defendant for committing the wanton act or series of acts is still naturally inclined to do so. That is why so many judges and commentators worry about multiple punishment.

We need to be much more careful with our language and more explicit in recognizing that, in fact, the purpose of punitive damages is *not* to punish the defendant for its wrongful act, but rather to punish the defendant for the wrong done, and the injury caused, to the plaintiff. In many circumstances, this distinction is mere semantics. That is perhaps the explanation for the emergence of the modern conception of punitive damages. To be sure, one can unearth occasional early cases that speak of punitive damages as

338. See *supra* text accompanying notes 1-6.

339. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

340. See, e.g., *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996) (stating that "where the wrong to the individual is small but the course of conduct is large, the potential punitive damages would be to punish and deter the course of conduct as a whole"), *overruled on other grounds by* *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333-34 (5th Cir. 1995) ("As punitive damages are collective awards, each plaintiff has an integrated right to the full amount of an award."), *overruled on other grounds by* *H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000).

punishment for the wrongful act or conduct.³⁴¹ Loose language of that sort was sufficient when there was no call for greater precision—which was most of the time, as the vast majority of early cases involved harm to only one victim.³⁴² When it mattered, however, the courts generally made the distinction clear.³⁴³ Subsequently, however, courts and commentators seized upon the loose language as articulating the true nature and purpose of punitive damages, and employed it to sanction the practice of awarding punitive damages based on the total harm to society—completely losing sight of the fundamental distinction between punishment for wrongful conduct and punishment for private wrongs.³⁴⁴ We need to find that distinction again.

In other words, we can continue to afford the jury ample discretion to fix an appropriate punishment, but we must make sure that the jury is properly informed of what, exactly, it is supposed to be punishing. In addition, we must also ensure that the courts, in exercising their constitutionally mandated role as a check on the jury, enforce the limit on the scope of the jury's penal authority.

This can be done by taking several simple procedural steps. First, contrary to the prevailing current practice, the plaintiff's attorney should not be permitted to ask the jury to punish the defendant for the full scope of the harm caused by its actions, or indeed, to punish the defendant for the harm caused to anyone other than the actual plaintiff or plaintiffs before the court. Second, and again contrary to the current practice, the plaintiff's attorney should not be permitted to ask the jury to take away the defendant's profits from its entire course of conduct, or indeed, to take away the profits that inured to the defendant from wrongs done to anyone other than the plaintiff or plaintiffs before the court.

In addition, the trial court should instruct the jury that punitive damages punish the defendant for the wrong done to the plaintiff.³⁴⁵ The jury should be instructed that it may

341. See, e.g., *Mitchell v. Bradstreet Co.*, 22 S.W. 358, 360 (Mo. 1893) (stating that punitive damages are awarded "for the purpose of punishing the defendant for the wrongful act").

342. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838 (2d. Cir. 1967).

343. See *supra* Part III.

344. See *supra* text accompanying notes 1-6, 62-73.

345. See, e.g., *N. Ohio Trac. & L. Co. v. Peterson*, 43 Ohio Civ. Dec. 14, 15

consider the harm to other victims only for the purpose of ascertaining the degree of reprehensibility of the wrong to the plaintiff, but it may not punish the defendant for the wrong done, or the harm caused, to persons not before the court; nor should it endeavor to remove the profits illicitly gained at the expense of victims not before the court.

Historically, when the courts admitted evidence of harm that the defendant's wrongful act or course of conduct caused to others, they instructed the jury along precisely these lines. For instance, in the eighteenth century English seduction case of *Tullidge v. Wade*,³⁴⁶ discussed above, the court upheld the punitive award to the father only because

[u]pon summing up the evidence to the jury, the Judge . . . told them over and over again, that, in giving damages in this action, they must not consider the injury done to [the daughter] as to the promise of marriage, but must leave that matter quite out of the question, because [the daughter] may have another sort of action upon that promise.³⁴⁷

Similarly, in *Phelin v. Kenderdine*,³⁴⁸ a nineteenth-century American seduction case brought by an aggrieved father, also discussed above,³⁴⁹ the court allowed the jury to consider the defendant's breach of a promise of marriage to the daughter insofar as it made the wrong to the father more reprehensible, but it held that "the defendant has a *right to require* in regard to such evidence [an instruction] that the jury must not award to the father any part of the damages which belong to the daughter, by reason of the breach of the contract of marriage."³⁵⁰ Indeed, it is a familiar principle that, when evidence is admitted for one purpose, but it would violate the Constitution for the jury to consider it for a different purpose, the court should instruct the jury not to consider the evidence for the impermissible purpose.³⁵¹

(Ohio Cir. Ct. 1908) ("[Y]ou may award to plaintiff punitive or exemplary damages; that is, damages in addition to compensatory damages, for the purpose of punishing the defendant for the wrong done to plaintiff . . .") (quoting the trial court's jury instructions)).

346. 95 Eng. Rep. 909 (C.P. 1769).

347. *Id.* at 909.

348. 20 Pa. 354 (1853).

349. See *supra* text accompanying notes 157-161.

350. *Id.* at 362 (emphasis added and omitted).

351. See, e.g., *Tennessee v. Street*, 471 U.S. 409, 414-15 (1985) (holding that the Confrontation Clause is not violated by the introduction of the confession of an accomplice for the nonhearsay purpose of rebutting the defendant's testimony that his own confession was coercively derived from the

Finally, in post-trial and appellate proceedings, the courts should review the trial record and the punitive award first to ensure that the award was not based on an effort to punish the defendant for the wrong done to persons other than the plaintiff or to take away the profits gained at the expense of persons other than the plaintiff,³⁵² and second to determine whether the award is excessive in light of the legitimate state interest in punishing the defendant for the wrong done to the plaintiff, and the plaintiff alone.³⁵³ Of course, concerns for deterrence allow the courts to justify a higher punitive damages award where the harm was difficult to detect or the wrongful conduct caused only minimal damages to each individual victim.³⁵⁴ Moreover, like the jury, the reviewing

accomplice's statement, but only if the jury is instructed not to consider the confession for the truth of the matter asserted); *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("[I]ntroduction of the defendant's prior conviction did not pose a sufficient danger of unfairness to the defendant . . . in part because such evidence was accompanied by instructions limiting the jury's use of the conviction to sentence enhancement."); *Harris v. New York*, 401 U.S. 222, 224 (1971) (holding that the state may introduce statements elicited from a defendant in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), for the purpose of impeachment, so long as the jury is instructed that such evidence may not be considered for the purpose of determining guilt).

352. See *Coryell v. Colbaugh*, 1 N.J.L. 90, 91 (1791) (suggesting that reversal would be appropriate in a seduction action brought by the father if the punitive damages award also attempted to punish the wrong done to the daughter); *Brownell v. McEwen*, 5 Denio 367, 369 (N.Y. Sup. Ct. 1848) (indicating that, where the jury in a seduction case brought by the father also heard evidence of a possible breach of a promise to marry, reversal would be appropriate if it could be established that the jury actually attempted to punish both the wrong to the father and the wrong to the daughter); see also, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 424 (1994) (holding that a reviewing court has a duty to strike down a punitive award if it appears that the jury "acted from improper motives" (quoting *Blunt v. Little*, 3 F. Cas. 760, 762 (C.C. Mass. 1822) (No. 1578) (Story, J.))); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 467 (1993) (Kennedy, J., concurring in part and concurring in the judgment) (explaining that a reviewing court should look to the size of the award, "as well as direct evidence from the trial record," to determine whether the jury based the amount of its punitive damages award on improper considerations); *Freeman v. A & M Mobile Home Sales, Inc.*, 359 S.E.2d 532, 536 (S.C. Ct. App. 1987) ("Like an award of actual damages, an award of punitive damages will be set aside if it . . . appears to be the result of . . . improper considerations."); *Hall Oil Co. v. Barquin*, 237 P. 255, 277 (Wyo. 1925) (holding that, when a jury based the amount of its punitive damages award on improper considerations, reversal is required).

353. See *Blunt*, 3 F. Cas. at 761-62 (Story, J.) (holding that a reviewing court has a duty to strike down a punitive award that is "excessive in relation to the . . . injury").

354. See *supra* note 318 and accompanying text.

courts may consider the evidence of additional harm in order to ascertain the reprehensibility of the wrong at issue. They should not, however, uphold an excessive verdict on the ground that it was an acceptable punishment for the harm to others, or that it is reasonable when considered in connection with the profits that the defendant gained from its entire course of wrongful conduct.

CONCLUSION

The practice of asking the jury in a case brought by a single victim of a defendant's wrongful course of conduct to award punitive damages in an amount that will punish the entire illicit scheme has fostered volumes of academic and judicial commentary advancing numerous complex and far-ranging proposals in the name of protecting the defendant against excessive multiple punitive damages awards for the same wrongdoing. At once, these proposals go too far and not far enough. They fall short in the sense that they fail to recognize that it is not just the prospect of multiple punishment that makes these "total harm" punitive damages awards unconstitutional; even a single such award violates due process because it impermissibly punishes the defendant for harm caused to society and to persons not before the court. At the same time, they reach too far in the sense that they assume that the only solution lies in radical (and sometimes convoluted) modifications to the traditional procedures for awarding punitive damages. In fact, the exact opposite is true. The constitutional infirmity can be ameliorated through a simple return to the historical understanding of punitive damages as punishment only for the wrong done to the plaintiff.