Michigan Law Review

Volume 116 | Issue 5

2018

Punishment but Not a Penalty? Punitive Damages Are Impermissible Under Foreign Substantive Law

Paul A. Hoversten
University of Michigan Law School

NOTE

Punishment but Not a Penalty? Punitive Damages Are Impermissible Under Foreign Substantive Law

*Paul A. Hoversten**

It is a well-established principle that no court applies the penal laws of another sovereign. But what exactly is a penal law? According to Judge Cardozo, a penal law effects "vindication of the public justice" rather than "reparation to one aggrieved." Although courts have historically treated punitive damages as a purely civil remedy, that attitude has shifted over time. Modern American punitive damages serve not to compensate the plaintiff but to punish the defendant on behalf of the whole community. Therefore, when courts rely on foreign substantive law to impose punitive damages, they arguably violate the well-established principle that no court applies the penal laws of another sovereign. This Note argues that punitive damages are penal in the choice-of-law sense, and state courts violate the penal exception when they impose punitive damages under or alongside foreign substantive law. It proposes several possible means to resolve this dissonance and ultimately concludes that courts should altogether eliminate the prospect of punitive damages when they impose liability under foreign substantive law.

Table of Contents

* J.D. Candidate, May 2018, University of Michigan Law School. I am grateful to Professor Mathias W. Reimann for his insights. Thanks also to my dear friends Reed McCalib, Melissa Cassel, Laura Beth Cohen, Sally Gu, Samantha Jaffe, Charlie Stewart, and each of the Volume 116 Executive Editors for the countless contributions and improvements they made along the way.

Introduction

"The Courts of no country execute the penal laws of another . . . ."[1]

When a broken rule results in punishment, the authority to punish belongs to the person or entity who owns the rule.[2] You don't punish your neighbor's child for staying up past bedtime in her own house while her parents are home. She's not your child, it's not your house, and most importantly, it's not your rule.

Courts behave the same way. State courts routinely apply other states' substantive law in civil cases, but they never apply foreign *penal* law.[3] A Wisconsin court will not hold a defendant criminally liable under a Minnesota statute. Either it will punish the defendant under Wisconsin law or it will not punish her at all. Courts' refusal to apply foreign penal law extends beyond the criminal context; it extends to civil penalties as well.[4]

This principle is grounded in part in norms of fairness to defendants and the legitimacy of punishment.[5] States can exercise coercive power on behalf of the entire community in a way that individuals cannot.[6] The people of Wisconsin, for instance, have conceded to their government the authority to make laws, prosecute them, adjudicate guilt, and punish the guilty.[7] They consent to the prosecution, by the state of Wisconsin, of

1. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

2. *See* John Locke, Two Treatises of Government 126–27 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1690) (explaining that, in nature, each person is responsible for punishing wrongs committed against herself); *id.* at 163–64 (explaining that, in society, the state has exclusive authority to punish violations of its own laws).

3. *See infra* Section I.B. Throughout this Note, the term "foreign" describes laws, courts, and people from not only other countries but also other states.

4. *See* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties . . . .").

5. *Cf.* Small v. United States, 544 U.S. 385, 389–94 (2005) (declining to recognize a conviction in a Japanese court for purposes of a multiple-conviction penalty, explaining that foreign legal systems are sometimes "inconsistent with an American understanding of fairness"); Huntington v. Atrill, 146 U.S. 657, 672 (1892) ("It would be a manifest incongruity for one sovereignty to punish a person for an offence committed against the laws of another sovereignty." (quoting *Ex parte* Bridges, 4 F. Cas. 98, 105 (C.C.N.D. Ga. 1875) (No. 1,862))).

6. Corey Brettschneider, *The Rights of the Guilty: Punishment and Political Legitimacy*, 35 Pol. Theory 175, 183 (2007).

7. *See, e.g.*, Wis. Const. art. IV, § 1; *id.* art. VI, §§ 1, 3; *id.* art. VII, § 8; *id.* art. XIV, § 1.

wrongs that violate the laws of Wisconsin.[8] As a condition of that concession of authority, the people demand certain procedural protections for actual and would-be defendants, among them notice of laws and trial by a jury of peers in the community.[9] The people of Wisconsin, however, have not consented to prosecution of wrongs that violate Minnesota's laws, which they played no role in enacting. Such a prosecution or punishment would breach the social contract that the people of Wisconsin have made with their government. It would violate basic norms of notice and fairness to defendants, and any ensuing punishment would be illegitimate.[10] In general, therefore, courts decline to apply the penal laws of another sovereign.[11]

It is not hard to understand why an out-of-state defendant would feel uneasy at the prospect of punishment by a foreign court or judgment by a foreign jury. Former Chief Justice Neely of the West Virginia Supreme Court of Appeals quipped,

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.[12]

Justice Neely was being wry, but it is true that out-of-state defendants often find themselves in hostile courtrooms. One scholar has found that "[s]tate court judges are about twice as likely to choose law that favors the plaintiff if the plaintiff is local and the defendant is out-of-state" than in the inverse situation.[13] Other scholars have discovered that in states where judges are appointed, damages awards are almost twice as large when the defendant

---

8. *See* Jean-Jacques Rousseau, The Social Contract & Discourses 30–31 (Ernest Rhys ed., G.D.H. Cole trans., J.M. Dent & Sons 1920) (1762); *cf.* Brettschneider, *supra* note 6, at 183 ("[C]rimes prosecuted by the state are considered to be controversies between 'the people' and the accused individual.").

9. *See, e.g.*, Wis. Const. art. I, §§ 5, 7–8, 12.

10. *See* Rousseau, *supra* note 8, at 29 ("[A]n act of Sovereignty . . . is legitimate [ ] because [it is] based on the social contract . . . ."); *cf. Small*, 544 U.S. at 401–02 (recognizing that convictions in some foreign legal systems are "inconsistent with an American understanding of fairness").

11. *But see* The S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). The *Lotus* case suggests that sovereign states can freely exercise criminal jurisdiction outside their own territory unless they specifically agree to constrain themselves. *Id.* at 19. But even if application of foreign penal law would not violate international law in a strict sense, it would nevertheless be "unjust" and "contrary to the comity of nations." *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

12. Richard Neely, The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts 4 (1988). After reprinting this quotation out of context, the *ABA Journal* clarified, "In the context, Neely was using an ironic style to mimic the unspoken rationale he feels some judges use to rule for plaintiffs. The quote does not reflect Neely's personal position on the matter, and the *Journal* regrets inadvertently distorting his views." 75 A.B.A. J., Jan. 1989, at 32.

13. Daniel Klerman, Are State Courts Biased? Evidence from Choice of Law 2 (Aug. 30, 2016) (unpublished manuscript), http://www.law.columbia.edu/sites/default/files/microsites/

was from out of state.[14] There is an even greater disparity in states where judges are elected.[15]

If out-of-state defendants already face hostile judges and juries, then the availability of punitive damages[16] significantly multiplies the effect of that hostility. The Supreme Court has stated that "[punitive damages] are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible."[17] One scholar has explained that punitive damages "may have a retributive or expressive function, designed to embody social outrage at the actions of serious wrongdoers."[18] The opportunity to impose punitive damages is an invitation to the jury to express "moral condemnation"[19] of the (already-vulnerable) Vikings fan in Packers' territory.

Even when defendants are at home, however, it is still incongruous for a state court to impose punitive damages based on another state's substantive law. If punitive damages are meant to punish guilty defendants and each state is uniquely responsible for punishing violations of its own laws, then it is unusual for a jury to "morally condemn" even its own defendant for her violation of another state's law. This is equivalent to punishing your own child for violating your neighbor's bedtime rule.

Nevertheless, state courts do impose punitive damages under foreign law, and juries do use foreign states' laws to express their own "social outrage"[20] at out-of-state defendants and out-of-state torts. For example, in *Wooley v. Lucksinger*,[21] the Louisiana Supreme Court approved a $45.5 million punitive damage award against a Texas HMO, over and above a compensatory damage award of $44.54 million.[22] The Louisiana trial court in

law-economics-studies/klermand._state_court_bias_2016-08-30.pdf [https://perma.cc/SQL4-E3ZM].

14. Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & Econ. 157, 163 (1999) (finding that damages awards are about $219,980 greater than average in such cases).

15. *Id.* (finding that damages awards are $364,950 greater than average in such cases).

16. Various terms, including "punitive," "exemplary," and "vindictive" damages, generally refer to the same concept. Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 517 (1957). This Note uses the term "punitive damages" throughout.

17. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001) (alteration in original) (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting)).

18. Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2075 (1998).

19. *Cooper*, 532 U.S. at 432.

20. Sunstein et al., *supra* note 18, at 2075.

21. 61 So. 3d 507 (La. 2011).

22. *Lucksinger*, 61 So. 3d at 549. The jury initially awarded $52.4 million in compensatory damages and $65 million in punitive damages. The judge reduced those awards by 15 and 30 percent, respectively. *Id.*

Wooley applied Texas substantive law to the entire case, including the punitive damages portion, even though Louisiana does not ordinarily permit punitive damages at all.[23]

As a more modest example, in *Kammerer v. Western Gear Corp.*,[24] the Washington Supreme Court approved a judgment of $350,000 in punitive damages ($600,000 total damages) for contract fraud under California law.[25] The contract was negotiated, finalized, and performed in California.[26] The dissent cited an "unbroken line" of thirty-seven cases[27] and a series of failed legislative efforts[28] affirming that, under Washington law, "the doctrine of punitive damages is deemed 'unsound in principle, and unfair and dangerous in practice.'"[29] Nevertheless, the defendant in *Kammerer* listened as a Washington jury expressed its own "moral condemnation" through a California statute[30] for conduct that occurred in California, even though the jury's own law would never have allowed it.

State courts refuse to impose criminal sanctions and civil penalties under other states' laws, but most courts show no compunction about borrowing foreign law to impose punitive damages. This Note argues that punitive damages are penal and that state courts violate fundamental choice-of-law principles when they impose punitive damages under foreign substantive law.[31] Part I traces the history and purpose of punitive damages and outlines basic choice-of-law principles at play in civil cases in American courts. Part II argues that punitive damages are penal in the interstate choice-of-law sense and that courts violate the penal exception when they impose punitive damages under or alongside foreign substantive law. Part III considers several possible solutions to the problem and ultimately concludes that state courts should wholly reject punitive damages when they impose liability under foreign substantive law.

---

23. *Id.* at 567.

24. 635 P.2d 708 (Wash. 1981).

25. *Kammerer*, 635 P.2d at 710, 713.

26. *Id.* at 710.

27. *Id.* at 715 n.2 (Stafford, J., dissenting).

28. *Id.* at 715 n.3.

29. *Id.* at 715 (quoting Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1075 (Wash. 1891)).

30. The modern version of this statute is CAL. CIV. CODE § 3294 (West 2016).

31. There are many other closely related issues that this Note does not squarely address, including limitations on punitive damages for excessiveness, enforceability of judgments from state to state, choice of law in federal and international courts, and the public policy exception to the application of foreign substantive law. This Note narrowly addresses punitive damages in state courts when those courts do not apply their own substantive law to the merits of the case.

I. Overview: Punitive Damages and Choice of Law

The doctrine of punitive damages is an anomaly in the law.[32] It straddles the line between tort and criminal law[33]—it simultaneously contemplates private wrongs to individuals and widespread injuries to the public. Professors Prosser and Keeton explain that, with respect to punitive damages, "the ideas underlying the criminal law have invaded the field of torts."[34] But this becomes an uncomfortable mixture when courts apply other states' substantive laws to the merits of the case. After all, it is a well-accepted rule that courts do not apply foreign penal laws.[35] This Part places punitive damages and choice-of-law analysis in context, setting the stage for further argument. Section I.A traces the history and purpose of punitive damages in England and the United States. Section I.B briefly examines American choice-of-law theories and methods in the context of punitive damages.

A. *History and Purpose of Punitive Damages in English and American Law*

Punitive damages appeared in common law cases in the late eighteenth century,[36] but the underlying purpose of the practice was not clear. In 1763, in *Wilkes v. Wood*, a newspaper publisher alleged that King George's secretary of state had committed trespass when he issued a general search warrant without any formal information and without listing any charges.[37] The defendant's lawyer contended that in no prior case had a civil plaintiff argued

32. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 2, at 9 (5th ed. 1984) ("In one rather anomalous respect, however, the ideas underlying the criminal law have invaded the field of torts.").

33. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (describing punitive damages as "quasi-criminal") (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991)).

34. Keeton et al. *supra* note 32, § 2, at 9. In conversation, Professor Mathias Reimann has pointed out to me that Prosser and Keeton might be mistaken. In his telling, the common law historically treated civil and criminal cases as part of a unified body of law and, therefore, punitive damages fit naturally in the common law system. Regardless of their provenance, though, punitive damages occupy a strange place in *modern* American law, somewhere between private law and public law.

35. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

36. 1 John J. Kircher & Christine M. Wiseman, Punitive Damages: Law and Practice § 1:01, at 2 (2d ed. 2000). Societies around the world have employed legal concepts similar to punitive damages throughout history. The Code of Hammurabi, the Hindu Code of Manu, and the Mosaic Law all provided for multiple-damage remedies in some contexts. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1119 (1984). Roman law also provided for punitive damages in civil disputes. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1285–86 (1992). But the concept does not appear in English case reporters until the late eighteenth century. 1 Kircher & Wiseman, *supra*, § 1:01, at 2.

37. Wilkes v. Wood (1763) 98 Eng. Rep. 489, 490, 495; Lofft 1, 2, 12; *see* 1 Kircher & Wiseman, *supra* note 36, § 1:01, at 2; *see also* Huckle v. Money (1763) 95 Eng. Rep. 768, 768; 2 Wils. 206, 206 (a complement case).

"the cause of all the good people of England."[38] But that argument did not deter the court from approving the jury's "large and exemplary"[39] damage award of £1,000.[40] Lord Chief Justice Pratt reasoned, "[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."[41]

Another eighteenth-century English case, however, puts pressure on that theory of punitive damages. In *Duberley v. Gunning*,[42] in 1792, the Court of King's Bench upheld a jury's award of £5,000 for a verdict of "criminal conversation,"[43] at least in part because the nature of the tort made it impossible to measure actual, pecuniary damages.[44] "[I]n a case like the present, where the spirit is principally wounded, and the future happiness of the sufferer destroyed, there is no standard by which the Judges can ascertain the excess of the damages given . . . ."[45] On this theory, the £5,000 award was commensurate with the plaintiff's injury, though obviously in excess of his actual, pecuniary harm.

This confusion made its way across the Atlantic, and throughout the nineteenth century, American courts and scholars equivocated on the motivating purpose of punitive damages.[46] If the court in *Wilkes* was right, then punitive damages serve not to compensate the plaintiff but to punish the defendant and deter similar conduct.[47] In that sense, punitive damages satisfy the injury not of the individual plaintiff but of an entire community.[48] Alternatively, if the *Duberley* court was right, then punitive damages merely

38. *Wilkes*, 98 Eng. Rep. at 493.

39. *Id.* at 498.

40. *Id.* at 499.

41. *Id.* at 498–99.

42. Duberley v. Gunning (1792) 100 Eng. Rep. 1226; 4 T.R. 652.

43. "A tort action for adultery, brought by a husband against a third party who engaged in sexual intercourse with his wife." *Criminal Conversation*, Black's Law Dictionary (10th ed. 2014).

44. *See Duberly*, 100 Eng. Rep. at 1226–27.

45. *Id.* at 1226; *see also* Merest v. Harvey (1814) 128 Eng. Rep. 761, 761; 5 Taunt. 442, 442 ("Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'here is a halfpenny for you, which is the full extent of all the mischief I have done?' Would that be a *compensation*? I cannot say that it would be." (emphasis added)).

46. *See generally* Rustad & Koenig, *supra* note 36, at 1284–1303 (discussing the transatlantic historical development of punitive damages); Sales & Cole, *supra* note 36, at 1120–24 (examining how American courts adopted punitive damages and the justifications for them from English courts); Note, *supra* note 16, at 517–20 (discussing the historical development of punitive damages and the "century of controversy" over them). See also *Fay v. Parker*, 53 N.H. 342 (1872), for a thorough examination of English and American case law on this question.

47. *See* Wilkes v. Wood (1763) 98 Eng. Rep. 489, 498–99; Lofft 1, 18–19.

48. *See id.* (arguing that punitive damages reflect "proof of the detestation of the jury to the action itself").

compensate the plaintiff for invisible or nonpecuniary injury.[49] So-called "punitive" damages, then, are nothing special; they are not really *punitive* at all. They simply serve to make the plaintiff whole.

Over time, American courts settled on Lord Chief Justice Pratt's punishment-and-deterrence theory in *Wilkes*. In 2001, the U.S. Supreme Court decided *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* and sharply distinguished between compensatory and punitive damages:

> [Compensatory damages] are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. [Punitive damages], which have been described as "quasi-criminal," operate as "private fines" intended *to punish the defendant and to deter future wrongdoing*. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its *moral condemnation*.[50]

The Court further explained that, because American notions of compensatory damages have expanded to include intangible, nonpecuniary harms (like pain and suffering), "the theory behind punitive damages has shifted toward a more purely punitive (and therefore less factual) understanding."[51] Whatever the original purpose of punitive damages, they are now a weapon of the polity, entrusted to civil juries, to express "social outrage"[52] at the actions of guilty defendants.

B. *Choice of Law and Punitive Damages in American Courts*

Punitive damages doctrine becomes complicated when courts apply foreign substantive law. Courts regularly apply other states' substantive law to civil cases when the circumstances call for it.[53] For instance, if a driver from Illinois crashes into a driver from Kentucky in Iowa and the victim sues in Illinois, the court would have to choose which state's law to apply. But that doesn't mean that courts abandon their own state law altogether.

---

49. *See Duberley*, 100 Eng. Rep. at 1226.

50. 532 U.S. 424, 432 (2001) (emphasis added) (citations omitted). The Court also cited *Gertz v. Robert Welch, Inc.*: "[Punitive damages] are . . . levied by civil juries to punish reprehensible conduct and to deter its future occurrence." 418 U.S. 323, 350 (1974).

51. *Cooper*, 532 U.S. at 437 n.11. For a more detailed explanation of this theoretical evolution, see Benjamin C. Zipursky, Palsgraf*, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1777–84 (2012).

52. Sunstein et al., *supra* note 18, at 2075 ("[P]unitive damages may have a retributive or expressive function, designed to embody social outrage at the actions of serious wrongdoers.").

53. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971). In tort cases, for instance, about twenty-four states follow the Second Restatement approach, ten follow the traditional place-of-the-wrong approach, five follow the "better law" approach, three follow the "significant contacts" approach, two follow the "interest analysis" approach, and six follow some combination of approaches (these data include the District of Columbia and Puerto Rico). Symeon C. Symeonides, *Choice of Law in the American Courts in 2016: Thirtieth Annual Survey*, 65 AM. J. COMP. L. 1, 33 tbl.2 (2017).

Even when a court applies another state's substantive law, there are several circumstances under which it will decline to follow that law on narrower questions presented within a given case. First, a court will apply its own *procedural* law in almost all circumstances.[54] Second, a court might choose to split up the issues presented in the case and determine, for instance, that Kentucky law is more appropriate for some issues but Iowa law is more appropriate for others.[55] This practice is known as *dépeçage* (French for "dismemberment").[56] Finally, a court will not apply another state's *penal* laws.[57]

The Supreme Court enunciated the rule against applying foreign penal laws in the 1825 case *The Antelope*.[58] Chief Justice Marshall stated, "The Courts of no country execute the penal laws of another."[59] That is, state-imposed punishment is left to the state responsible for punishing. By analogy, there is generally no choice-of-law question for criminal cases—whichever court has jurisdiction also applies its own law.[60] This principle generally extends to civil penalties.[61] For example, California law imposes civil penalties on anyone who knowingly emits air contaminants without permission

54. *See* Restatement (Second) of Conflict of Laws § 122 (Am. Law Inst. 1971).

55. *See, e.g.*, Haumschild v. Cont'l Cas. Co., 95 N.W.2d 814 (Wis. 1959) (applying California law to the question of negligence and Wisconsin law to the question of interspousal immunity).

56. "A court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis." *Dépeçage*, Black's Law Dictionary (10th ed. 2014).

57. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825). For a nonexhaustive list of reasons courts might give for avoiding foreign law, see Symeon C. Symeonides, Choice of Law 68–86 (2016).

58. 23 U.S. (10 Wheat.) at 123.

59. *Id.* This case has a complex factual and legal background, involving questions of property, piracy, and slavery in the early nineteenth century. *See id.* at 66–68. For our purposes, this is what matters: in 1819 and 1820, a privateer had captured more than 280 enslaved people at sea, off the coast of Africa. *Id.* at 67–68, 129. The slave trade, though not slavery itself, had been declared illegal in the United States. *Id.* at 106–07. Spain and Portugal had declared the slave trade illegal only north of the equator. *Id.* at 79. Because most of the enslaved people had been initially captured south of the equator, ostensibly from Spanish and Portuguese owners, the vice consuls of Spain and Portugal argued that the enslaved people were Spanish and Portuguese property and that they should be awarded to the Spanish and Portuguese vice consuls. *Id.* at 67–68. The ship carrying the enslaved people, called the *Antelope*, was captured by a United States naval officer off the coast of Florida, *id.* at 123–24, which was Spanish territory at the time. Spanish law prohibited the slave trade north of the equator, *id.* at 79, including in Florida, and presumably, if the captain of the *Antelope* had been held liable for violating that prohibition, that would have triggered forfeiture of the property on that ship to the vice consuls. Although it called the slave trade "abhorrent," *id.* at 115, the Supreme Court declined to enforce the Spanish north-of-the-equator slave-trade prohibition against the captain of the *Antelope*, stating that "[t]he Courts of no country execute the penal laws of another." *Id.* at 110, 122–23. It also declined to impose criminal sanctions on the ground that the slave trade violated the "law of nations." *Id.* at 99.

60. Symeonides, *supra* note 57, at 82 ("Strictly speaking, in the area of criminal law, there is no choice-of-law question—it is merged into the jurisdictional question.").

61. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences

and fails to take corrective action.[62] The penal exception prevents courts in, say, Arizona from applying that law to hold a civil defendant liable, regardless of whether the contaminants were emitted in California, Arizona, or elsewhere.

The word "penal" is, of course, a term of art in this context. In ordinary parlance, any adverse action is "penal" in some sense. But as Judge Cardozo explained in *Loucks v. Standard Oil Co. of New York*,[63] for choice-of-law purposes, a penal statute is "one that awards a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong."[64] He continued, "The purpose must be, not reparation to one aggrieved, but vindication of the public justice."[65]

The salient question, then, is whether and to what degree modern punitive damages map on to Judge Cardozo's conception of penal laws. If punitive damages are not penal, then state courts are free to import other states' relevant substantive law (when appropriate) to impose them. But if punitive damages are penal in Judge Cardozo's sense, then the penal exception expressed in *The Antelope* should prevent courts from applying foreign law with respect to punitive damages altogether.[66] In that world, a court could impose punitive damages only when its choice-of-law analysis pointed to the law of its own jurisdiction. In other words, punitive damages would be available only when a court applied its own law.

II. Punitive Damages Are Penal

Cardozo's articulation of the penal exception is still the modern standard,[67] but it raises as many questions as it answers. By including reference to nongovernment plaintiffs "suing in the interest of the whole community,"[68] Cardozo opened the door to classifying certain semiprivate remedies as penal and, therefore, unenforceable outside the most appropriate jurisdiction. This Part applies Cardozo's articulation of the penal exception to the doctrine of punitive damages and argues that punitive damages are penal in the choice-of-law sense. Section II.A examines Cardozo's understanding of

---

for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties . . . .").

62. Cal. Health & Safety Code § 42402.2 (West 2014).

63. 120 N.E. 198 (N.Y. 1918).

64. *Loucks*, 120 N.E. at 198.

65. *Id.*

66. The penal exception is not rooted in the Constitution, but rather in principles of comity, international law, and common law. *See* The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825); *Loucks*, 120 N.E. at 198. It has never been held unconstitutional for a court to apply foreign penal law, but rather it would be inappropriate to apply foreign penal law because it would violate the well-established principles of comity, international law, and common law.

67. *See* Symeonides, *supra* note 57, at 83.

68. *Loucks*, 120 N.E. at 198.

punitive damages and the penal exception in the context of modern American tort law. Section II.B considers international attitudes about whether punitive damages are penal. Section II.C describes certain penal characteristics of modern American punitive damages to argue that they fit comfortably within Cardozo's articulation of the penal exception.

A. *Cardozo's Penal Framework in the Context of Modern American Tort Law*

In *Loucks*, Judge Cardozo explained that a statute might be "penal" even if it does not award fines directly to the state coffers: "[A penal statute] is one that awards a penalty to . . . a member of the public, suing in the interest of the whole community to redress a public wrong."[69] He might have had qui tam actions[70] in mind, but there are significant implications for punitive damages in private lawsuits.

There are two problems with applying the *Loucks* articulation of the penal exception to punitive damages. First, the Massachusetts statute at issue in *Loucks* was arguably a punitive damages statute,[71] and Judge Cardozo, speaking for the New York court, ruled that it was not penal.[72] Second, Cardozo explicitly called out punitive damages when he described nonpenal statutes: "The damages may be compensatory or punitive according to the statutory scheme. In either case the plaintiffs have a grievance above and beyond any that belongs to them as members of the body politic. They sue to redress an outrage peculiar to themselves."[73]

But this reading reveals an impasse between Judge Cardozo and twenty-first-century American tort lawyers. Cardozo's understanding of punitive damages does not reflect the modern view, expressed in *Cooper*, that punitive damages are "quasi-criminal,"[74] "intended to punish the defendant and to deter future wrongdoing,"[75] and "an expression of [the jury's] moral condemnation."[76] Rather, Cardozo viewed the foreign statute (and perhaps, "punitive damages" statutes more generally) "not . . . as atonement for a crime," but rather as "solace to the individual who has suffered a private wrong."[77] That is, he viewed the Massachusetts statutory damages as

69. *Id.*

70. "An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Qui tam Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

71. It was a wrongful death statute that awarded $500 to $10,000 in damages, commensurate with the defendant's culpability rather than the plaintiff's loss. *Loucks*, 120 N.E. at 198 (quoting MASS. GEN. LAWS ch. 171, § 2 (1907)).

72. *Id.* at 199.

73. *Id.* (citation omitted).

74. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001) (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991)).

75. *Id.*

76. *Id.*

77. *Loucks*, 120 N.E. at 199.

Duberley damages (compensatory), not *Wilkes* damages (truly punitive).[78] He made his viewpoint clear: "The purpose which informs and vitalizes [the Massachusetts statute] is the protection of the [decedent's] survivors."[79] That's a far cry from Lord Chief Justice Pratt's framework in *Wilkes*, in which "[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding in the future, and as a proof of the detestation of the jury to the action itself."[80]

Cardozo understood that American tort law was at an inflection point and that popular conceptions about the law were "developing."[81] For his part, he rejected the view that private plaintiffs serve on behalf of their whole communities as private attorneys general. Professor Benjamin Zipursky, in a discussion on Cardozo's opinion in *Palsgraf v. Long Island Railroad Co.*,[82] observes,

> At the core of a wide variety of tort thinking today is the assumption that a plaintiff in a tort case is, at least in part, performing a private attorney general role. Yet when Chief Judge Cardozo reached the "Q.E.D." moment of his famous opinion in *Palsgraf*, he was saying that this is exactly what should not happen in a tort suit; the plaintiff should not be able to proceed based on a demonstration that the defendant acted antisocially or wrongfully in some general sense or to some third person.[83]

Thus, the impasse. The modern American view of punitive damages as "moral condemnation"[84] does not align with Cardozo's view of punitive damages as "solace to the individual who has suffered a private wrong."[85]

Defining a "penal" law, Cardozo stated that its "purpose must be, not reparation to one aggrieved, but vindication of the public justice."[86] To make this distinction, consider the role of the jury. In a purely civil, nonpunitive case, the court asks the jury only to find facts; the jury does not ordinarily

78. *See* Duberley v. Gunning (1792) 100 Eng. Rep. 1226, 1226; 4 T.R. 652, 652 ("where the spirit is principally wounded"); Wilkes v. Wood, (1763) 98 Eng. Rep. 489, 498; Lofft 1, 19 ("as a punishment to the guilty"); *see also* discussion *supra* Section I.A.

79. *Loucks*, 120 N.E. at 199.

80. *Wilkes*, 98 Eng. Rep. at 498–99.

81. *See Loucks*, 120 N.E. at 199 ("We cannot fail to see in the history of the Massachusetts statutes a developing expression of . . . policy and purpose. The [wrongful death] statutes have their distant beginnings in the criminal law. To some extent the vestiges of criminal forms survive. But the old forms have been filled with a new content.").

82. 162 N.E. 99 (N.Y. 1928).

83. Zipursky, *supra* note 51, at 1770–71; *see also Palsgraf*, 162 N.E. at 101 ("The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. He sues for breach of a duty owing to himself." (citation omitted)).

84. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001).

85. *Loucks*, 120 N.E. at 199.

86. *Id.* at 198.

express an opinion.[87] In a criminal case, by contrast, the jury not only finds facts but also expresses the "conscience of the community" when it recommends a sentence.[88] Whereas the jury in a purely civil, nonpunitive case merely arbitrates between two private parties, a criminal jury vindicates the public justice, to use Cardozo's terms.[89]

The question, then, is whether a jury's assessment of punitive damages is more like a fact (as in a purely civil case) or an opinion (as in a criminal case). The Supreme Court answered this question definitively in *Cooper*: "A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."[90] Punitive damages are "quasi-criminal"—that is, they "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing."[91] They convey the community's "moral condemnation" of the bad act.[92] The Court could hardly have been more assertive: modern American punitive damages are penal.

It is troubling, then, to think that a court would empower a jury to "morally condemn" a defendant under a foreign state's law. When we ask jurors to weigh in on punitive damages, we ask them to cross the threshold from finding facts into expressing "moral condemnation."[93] Punishment is reserved for the state responsible for punishing. If the jury acts as the "conscience of the community" where the court sits, then we should not ask jurors to express the conscience of another community altogether, a community to which the jurors do not belong.[94]

87. In some sense, all fact-finding involves an expression of the jury's opinion. For example, in a simple negligence case, the jury expresses an opinion as to whether the defendant acted reasonably. Here, however, I use the word "opinion" in a stricter sense to refer to the jury's belief that the defendant is not merely liable or indebted to the plaintiff as a factual matter, but that she is shameful to the community as a normative matter. The Supreme Court made a similar distinction in *Cooper*. *See* 532 U.S. at 432.

88. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 519 (1968); United States v. Lewis, 638 F. Supp. 573, 580 (W.D. Mich. 1986) ("As the lid of a tea kettle releases steam, jury trials in criminal cases allow peaceful expression of community outrage at . . . vicious criminal acts."); *see also* Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 18 (1994).

89. *See Loucks*, 120 N.E. at 198.

90. *Cooper*, 532 U.S. at 432.

91. *Id.* (quoting Pac. Mut. Ins. Life Co. v. Haslip, 499 U.S. 1, 47 (1991) (O'Connor, J., dissenting)).

92. *Id.*

93. *Id.*

94. *See supra* notes 87–88 and accompanying text.

B. *An International Perspective on American Punitive Damages*

Several courts in foreign countries have refused to enforce American punitive damage judgments on the ground that the penal nature of the damages violated their respective public policies.[95] In *Doe v. Eckhard Schmitz*,[96] in 1992, a California court awarded $400,000 in punitive damages (on top of $350,260 in compensatory damages) to an underage victim of sexual abuse.[97] The defendant absconded to Germany, and the plaintiff asked a German court to enforce the judgment.[98] The German Supreme Court enforced the compensatory portion of the judgment, but it refused to enforce the punitive award.[99] According to the German court, "Punitive damages allow a plaintiff to act as a private-public prosecutor, which interferes with the state's monopoly on penalization."[100]

To clarify its rationale, the German court explained that American "punitive damages" might be enforceable in Germany to the extent that they serve to compensate plaintiffs for intangible, nonpecuniary harm.[101] That is, punitive awards are enforceable if they conform to the *Duberley* conception of damages ("where the spirit is principally wounded")[102] but not the *Wilkes* conception ("as a punishment to the guilty").[103] Because American punitive damages are ordinarily "intended to punish the defendant and to deter future wrongdoing,"[104] German courts seemingly perceive them as penal.

The Italian Supreme Court took a similar position in *Parrott v. Fimez* in 2005.[105] In that case, an Alabama jury awarded $1 million in total damages to the plaintiff because the defendant had defectively designed a motorcycle

95. Cedric Vanleenhove, *A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional '¡No Pasarán!'*, 41 VT. L. REV. 347, 353–61 (2016) (recounting a German case and an Italian case). Generally, a court's refusal to enforce a foreign judgment or apply foreign law because it is contrary to public policy is distinct from a court's refusal to enforce a judgment or apply a law because it is penal. *See* SYMEONIDES, *supra* note 57, at 75–78. But here, the distinction makes no difference. In the cases described in this Section, the public policy exception and the penal exception are functionally equivalent, and regardless, they are merely meant to illustrate that foreign courts perceive American punitive damages as penal, not that foreign courts have applied the penal exception as such.

96. See Vanleenhove, *supra* note 95, at 353–56, for a summary of the case.

97. *Id.* at 353–54, 383.

98. *Id.* at 353.

99. *Id.* at 353–54.

100. *Id.*

101. *Id.* at 356.

102. Duberley v. Gunning (1792) 100 Eng. Rep. 1226, 1226; 4 T.R. 652, 652; *see also* discussion *supra* Section I.A.

103. Wilkes v. Wood (1763) 98 Eng. Rep. 489, 498; Lofft 1, 19; *see also* discussion *supra* Section I.A.

104. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001).

105. For an English translation of the court's decision, see Lucia Ostoni, Translation, *Italian Rejection of Punitive Damages in a U.S. Judgment*, 24 J.L. & COM. 245, 251–62 (2005).

crash helmet, causing the decedent's death.[106] (The jury did not distinguish between compensatory and punitive damages in the award, but it was clear that the damage award was at least partly punitive.)[107] The Italian court refused to enforce the judgment altogether because "damages in private law are not connected to the idea of punishment or to the wrongdoer's misconduct."[108] It distinguished punitive damages from compensatory damages, noting that the latter "focus on the victim, relate to his or her loss, and intend to make him or her whole."[109] Put simply, the court's decision means that *Duberley* damages are available in Italy; *Wilkes* damages are not.[110]

It is important not to overstate the European courts' conclusions. Both the German and Italian decisions relate to enforceability of judgments, not choice of law.[111] And, of course, the German and Italian positions do nothing to bind American courts. Nevertheless, these foreign cases reveal that the argument presented here—that punitive damages are penal in the interstate choice-of-law sense—is not entirely new.

C. *Penal Characteristics of Punitive Damages in the United States*

American courts and legislatures have also signaled that punitive damages have penal characteristics. Modern American punitive damages doctrine proceeds on the theory that the plaintiff acts at least partially as a private attorney general, prosecuting the wrong on behalf of her community.[112] Some states have expressly articulated that punitive damage awards are grounded in this theory. For example, in Oregon, a plaintiff may recover only 30 percent of her punitive damage award; the remainder is directed to the state attorney general.[113] In such a case, it is easy to map punitive damages directly onto Cardozo's formulation of the penal exception: they "award[ ] a penalty to the state, or to a public officer in its behalf."[114] Other

106. *Id.* at 246.

107. *Id.* at 249 ("[A]bsent a rationale in the Alabama decision, the Italian court could not understand the criteria upon which the Alabama court had quantified its damages. According to the Italian court, therefore, it was not possible to exclude that the award at issue had a punitive nature."); *cf.* S. & N.A.R. Co. v. Sullivan, 59 Ala. 272, 278–79 (1877) ("[T]he purpose and result of the [wrongful death statute] were not a mere solatium to the wounded feelings of surviving relations, nor compensation for the last earnings of the slain. We think the statute has a wider aim and scope. It is punitive in its purposes.").

108. Vanleenhove, *supra* note 95, at 360.

109. *Id.*

110. *See* discussion *supra* Section I.A.

111. *See* Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 La. L. Rev 529, 530–31 (2010) (explaining the distinction between choice of law and judgment enforceability for punitive damages in the domestic and international contexts).

112. Zipursky, *supra* note 51, at 1780–83; *see* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 372–80 (2003) (describing "split-recovery schemes," in which the court directs a portion of the punitive award to the state fisc or another fund on the theory that punitive damages redress public wrongs).

113. Or. Rev. Stat. § 31.735 (2016).

114. *See* Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 198 (N.Y. 1918).

states have not been so straightforward about their public-redress theory of punitive damages. Nevertheless, most states' punitive damages regimes operate under some version of this theory.[115] This is apparent from the structural and procedural safeguards that state courts have implemented in the context of punitive damages.[116]

For instance, most states have implicitly recognized the quasi-criminal nature of punitive damages by setting a heightened evidentiary burden for the conduct requirement.[117] Under Kansas law, "[t]o warrant an award of punitive damages, a party must prove to the trier of fact *by clear and convincing evidence* that the party against whom the damages are sought acted with willful or wanton conduct, fraud, or malice."[118] Even more strictly, Colorado courts demand that the jury find *beyond a reasonable doubt* that a defendant acted "with an evil intent, and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidence a wrongful motive."[119] Colorado is alone in applying a beyond-a-reasonable-doubt standard (a criminal standard) to the conduct requirement for imposing punitive damages, but thirty states have joined Kansas in applying a clear-and-convincing-evidence standard.[120] This solicitude implicitly recognizes the special, "quasi-criminal"[121] nature of punitive damages.

When we shift the theoretical framework from a private compensation model to the private attorney general model, the participants' roles change. The plaintiff is no longer just a private party but also a quasi prosecutor. The defendant is not merely asked to satisfy a debt but compelled to submit to the whole community's retribution. As discussed above,[122] the jury is no longer a mere fact finder but also a moral arbiter.[123] Given that the participants take on these quasi-public roles, punitive damages look more like "vindication of the public justice"[124] than "reparation to one aggrieved."[125] Therefore, the antioutsourcing policy of the penal exception ought to apply in full force.

---

115. *See* Zipursky, *supra* note 51, at 1783–84 (describing states' "structural and procedural changes" to punitive damage awards, all of which point toward a theory of semipublic redress).

116. *See id.*

117. Lori S. Nugent & Robert W. Hammesfahr, Punitive Damages: A State-by-State Guide to Law and Practice § 7:3 (2012–2013 ed. 2012).

118. First Sav. Bank, F.S.B. v. Frey, 27 P.3d 934, 939 (Kan. Ct. App. 2001) (citing Reeves v. Carlson, 969 P.2d 252, 255 (Kan. 1998)) (emphasis added).

119. Tri-Aspen Constr. Co. v. Johnson, 714 P.2d 484, 486 (Colo. 1986) (emphasis added) (quoting Frick v. Abell, 602 P.2d 852, 854 (Colo. 1979)).

120. Nugent & Hammesfahr, *supra* note 117, § 7:3.

121. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001) (quoting Pac. Mut. Ins. Life Co. v. Haslip, 499 U.S. 1, 19 (1991) (O'Connor, J., dissenting)).

122. *See* discussion *supra* Section II.A.

123. *See Cooper*, 532 U.S. at 432.

124. Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 198 (N.Y. 1918).

125. *Id.*

III. Potential Solutions to the Penal Problem

The penal exception does not broadly prevent courts from imposing punitive damages; it only prevents them from doing so under foreign law. This Part addresses three potential solutions that courts might use to avoid the problems presented by punitive damages and the penal exception to foreign choice of law. Section III.A considers the possibility that courts engage in *dépeçage* to ensure that the narrow question of punitive damages is governed by the law of the forum state, even if other issues are governed by foreign law. Section III.B suggests that, when faced with the choice between foreign law and forum law, courts should choose the punitive damages rules that are most favorable to the defendant. Section III.C offers the simplest and most logically satisfying solution: when the substance of a case is primarily governed by foreign law, courts should take punitive damages off the table altogether.

A. *Forum Law* Dépeçage

Given that almost all fifty states permit punitive damages in one form or another,[126] it might be forgivable to respond to the penal problem with a sense of apathy. After all, if a plaintiff is eligible for punitive damages based on the same conduct requirement and the same burden of proof in both Arizona and California,[127] then it might make little practical difference whether a court applies Arizona law or California law to the question of punitive damages. And even if the rules differ slightly—for example, Idaho law generally permits punitive damage awards up to three times the compensatory award whereas New Jersey law generally caps punitive damage awards at five times the compensatory award[128]—it's not patently offensive to hold a defendant accountable under the forum-state scheme since both states' laws effectively warrant the same kind of judgment.

If we view the penal exception through this pragmatic lens, then a court could escape the penal problem by simply applying its own law to the narrow question of punitive damages while applying foreign law to the other issues. Splitting up the issues and applying different law to each issue is known as *dépeçage*; it is a common practice in choice-of-law cases, and the Second Restatement of Conflicts encourages courts to engage in *dépeçage* in

126. *Compare* Nugent & Hammesfahr, *supra* note 117 (noting that only Michigan, Nebraska, New Hampshire, and Washington broadly disallow punitive damages), *with* Helmut Koziol, *Punitive Damages—a European Perspective*, 68 La. L. Rev. 741, 743 (2008) (noting that six U.S. states disallow punitive damages). The discrepancy likely owes to the fact that Massachusetts and Louisiana only allow for punitive damages by statute (rather than by common law) in narrow circumstances. *See* Int'l Fid. Ins. Co. v. Wilson, 443 N.E.2d 1308, 1317 n.20 (Mass. 1983); John W. deGravelles & J. Neale deGravelles, *Louisiana Punitive Damages—a Conflict of Traditions*, 70 La. L. Rev. 579, 585–87 (2010).

127. *See* Nugent & Hammesfahr, *supra* note 117, § 7:3.

128. *See* Humeston v. Merck & Co., No. ATL-L-2272-03-MT, 2005 WL 6232816 (N.J. Super. Ct. Law Div. Sept. 12, 2005).

tort cases.[129] For instance, in *Erny v. Estate of Merola*,[130] the New Jersey Supreme Court ruled that although New Jersey law should have applied with respect to the issue of comparative negligence, New York law should have applied to the question of joint and several liability.[131]

Provided that a court applies the law of *its own jurisdiction* ("forum law" or "*lex fori*")[132] to the question of punitive damages, then it arguably escapes the penal problem. For example, in a wrongful-death action, an Arizona court could apply Colorado law for the standard of liability and Arizona law for punitive damages. The Arizona Supreme Court endorsed a similar approach in 1985 in *Bryant v. Silverman*.[133] The court asserted that Arizona had the "greatest interest" in the question of punitive damages.[134]

More recently, a court in New Jersey expressed a sentiment that sounded like a step toward forum law *dépeçage* for punitive damage awards, at least in the context of products liability.[135] In *Humeston v. Merck*,[136] the New Jersey state trial court determined that it would apply its own law to the punitive damages question (rather than Idaho's law) at least in part because New Jersey had a "commitment to the victims of defective products," and a "recognition that the place where a product manufactured [in New Jersey] ultimately comes to rest and cause injury is a matter of pure fortuity."[137]

The forum law decisions in *Bryant* and *Humeston* were not explicitly grounded in the penal exception, but both decisions arguably provided cover for the courts to assess punitive damages without running afoul of the penal exception. Even if the Arizona and New Jersey courts did *punish* the defendant by imposing punitive damages, at least they did so under their own laws. Courts do not apply foreign states' penal laws,[138] but of course they are free to apply their own penal laws.

---

129. *See* Restatement (Second) of Conflict of Laws § 145(1) cmt. d (Am. Law. Inst. 1971) ("Each issue is to receive separate [choice-of-law] consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states."); *id.* § 146 ("In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, *with respect to the particular issue*, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied." (emphasis added)).

130. 792 A.2d 1208, 1214 (N.J. 2002).

131. *Erny*, 792 A.2d at 1221.

132. "The law of the forum; the law of the jurisdiction where the case is pending . . . ." *Lex fori*, Black's Law Dictionary (10th ed. 2014).

133. 703 P.2d 1190, 1193 n.1 (Ariz. 1985); *see Humeston*, 2005 WL 6232816 (performing separate choice-of-law analyses on three discrete issues: (1) consumer fraud, (2) failure to warn, and (3) punitive damages); *see also* Minebea Co. v. Papst, 377 F. Supp. 2d 34, 40 (D.D.C. 2005) ("The issue of punitive damages is distinct from that of liability for the underlying claims, however, and choice of law for that issue must be analyzed separately.").

134. *Bryant*, 703 P.2d at 1197.

135. *See Humeston*, 2005 WL 6232816.

136. *Id.*

137. *Id.* at 21 (quoting Gantes v. Kason Corp., 679 A.2d 106, 113 n.2 (N.J. 1996)).

138. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

Forum law *dépeçage* is appealing on a superficial level, but it fails to satisfy the more pressing theoretical problem presented by extraterritorial punitive damages. To its credit, it only permits a jury to "morally condemn" a defendant within the community's own moral framework. But even though the Arizona court in *Bryant* maneuvered to Arizona law for the question of punitive damages, it withheld judgment on which law would govern the defendants' liability, and it suggested that different state laws might apply to different portions of the case.[139] The same could never happen in a criminal context. An Arizona court would never impose criminal liability on a defendant for violating a Colorado criminal statute, even if it based its sentencing decision on Arizona's sentencing guidelines. Indeed, the Supreme Court has held that "[i]t would be a manifest incongruity for one sovereignty to punish a person for an offence committed against the laws of another sovereignty."[140]

A more practical problem with indiscriminate forum law *dépeçage* is that it would often subject the defendant to harsh punitive standards that she otherwise would have avoided. If punitive damages are penal, then it makes little sense for the forum court to punish the defendant even more harshly than it would under the more appropriate law. For example, in wrongful-death lawsuits, Colorado caps punitive damages at $500,000, but Massachusetts does not.[141] If a Massachusetts court were to apply forum law to the question of punitive damages, the defendant would shoulder a greater risk than if the court were to manage the entire case under Colorado law. Under the guise of fairness to the defendant, the court would expose the defendant to even greater liability.

B. *Choice-of-Law Presumption in Favor of the Defendant*

Rather than applying forum law indiscriminately to questions about punitive damages, courts could employ a more nuanced analysis that emphasizes fairness over formalism. Because the penal exception is at least partially inspired by ideas of notice and fairness to defendants,[142] courts could perform their choice-of-law analyses in a way that favors defendants. When faced with a choice between two or more states' punitive damages laws,

139. *Cf.* Bryant v. Silverman, 703 P.2d 1190, 1193 n.1 (Ariz. 1985) (explaining that the court would engage in *dépeçage* to determine the most appropriate law for damages).

140. Huntington v. Attrill, 146 U.S. 657, 672 (1892) (quoting *Ex parte* Bridges, 4 F. Cas. 98, 105 (C.C.N.D. Ga. 1875) (No. 1,862)).

141. Ogburn-Sisneros v. Fresenius Med. Care Holdings, Inc., No. 2013-05050, 2015 WL 6437773, at *6 (Mass. Super. Ct. Oct. 19, 2015).

142. *See* Huntington v. Atrill, 146 U.S. 657, 672 (1892) ("It would be a manifest incongruity for one sovereignty to punish a person for an offence committed against the laws of another sovereignty."); discussion *supra* Introduction; *cf.* Small v. United States, 544 U.S. 385, 389 (2005) (declining to recognize a conviction in a Japanese court for purposes of a multiple-conviction penalty, explaining that foreign legal systems are sometimes "inconsistent with an American understanding of fairness").

courts could default to the most lenient available law.[143] This would resemble the ordinary principle that, in the face of a legal ambiguity, "a tie goes to the defendant."[144]

In *Ogburn-Sisneros v. Fresenius*, a Massachusetts court applied the more lenient Colorado law to the punitive damages question in a wrongful death lawsuit.[145] It stated, "The fact that . . . Colorado limits the amount of the punitive damages award, while Massachusetts does not, is insufficient to establish that Massachusetts has a greater interest in applying its own law to this case."[146] Similar facts led to a similar conclusion in *Zimmerman v. Novartis*.[147] In that case, a Maryland federal court (sitting in diversity) held that New Jersey law should apply to punitive damages even though Maryland law applied to questions of liability and compensatory damages.[148] New Jersey law capped punitive damages at five times the amount of the compensatory award; Maryland imposed no cap on punitive damages.[149] The court applied the defendant-friendly New Jersey law in part on the ground that "[t]he Defendant, having its principal place of business in New Jersey, has a justified expectation of being subject to New Jersey law for punitive damages."[150]

Neither the *Ogburn-Sisneros* court nor the *Zimmerman* court invoked the penal exception, but both courts resolved the punitive damages choice-of-law question in favor of the defendant.[151] Although neither court articulated a rule that courts should always resolve such questions in favor of the defendant, either could have. At least in part, the spirit underlying the penal exception is notice and fairness to the defendant.[152] For courts that recognize that punitive damages are inherently penal but are unwilling to abandon

143. This approach would still require courts to engage in some qualitative analysis about the defendant's relationship to her chosen law. If courts were to defer to defendants' choice-of-law arguments without serious scrutiny, it seems likely that defendants would magically produce contacts with Michigan, Nebraska, New Hampshire, and Washington, all of which broadly prohibit punitive damages. *See* NUGENT & HAMMESFAHR, *supra* note 117, § 7:3. Courts would still need to scrutinize those arguments to determine whether or not they are legitimate.

144. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 330 (2007) (Scalia, J., concurring in the judgment).

145. *Ogburn-Sisneros*, 2015 WL 6437773, at *1.

146. *Id.* at *6 n.12; *see also* Minebea Co. v. Papst, 377 F. Supp. 2d 34, 40–42 (D.D.C. 2005) (holding that German law, which disallows punitive damages, should apply rather than New York law).

147. 889 F. Supp. 2d 757, 762–63 (D. Md. 2012).

148. *Zimmerman*, 889 F. Supp. 2d at 761–63.

149. *Id.* at 760 & n.2.

150. *Id.* at 764 (quoting Talley v. Novartis Pharm. Corp., No. 3:08-CV-361-GCM, 2011 WL 2559974, at *4 (W.D.N.C. June 28, 2011)).

151. The decisions were favorable to the defendants only in a relative sense. Of course, the decisions would have been even more favorable to the defendants if the courts had rejected punitive damages altogether. *See* discussion *infra* Section III.C.

152. *See* Huntington v. Atrill, 146 U.S. 657, 672 (1892) (quoting *Ex parte* Bridges, 4 F. Cas. 98, 105 (C.C.N.D. Ga. 1875) (No. 1,862)) ("It would be a manifest incongruity for one

extraterritorial punitive damages altogether, *Ogburn-Sisneros* and *Zimmerman* suggest a middle ground. That is, if a court is determined to impose punitive damages on a defendant even when other states' laws apply to the merits of the action, it could still ensure that the defendant is not overpunished.

Although this defendant-favorability approach has the relative advantage of fairness to the defendant, it is difficult to defend on principle. There is no quasi-penal quasi exception. If punitive damages are penal, then courts have no business imposing them under foreign law. If they are not penal, then a court should apply whatever law is most appropriate to the parties and the facts of the case,[153] regardless of which law is more lenient. Even if it offers some practical benefit or soothes a court's conscience, this defendant-favorability approach does little to resolve the theoretical dissonance inherent in imposing punitive damages under foreign substantive law.

C. *Total Exclusion of Punitive Damages Outside the Forum Law*

Forum law *dépeçage* for punitive damages is administrable but unfair.[154] A presumption in favor of the defendant's choice-of-law is fairer but unprincipled.[155] In order to apply law in a way that is principled, fair to the defendant, and easily administrable, courts should wholly reject punitive damages when they impose liability under foreign substantive law. Under this approach, if a court applies foreign substantive law to the merits of the case, then the plaintiff becomes automatically ineligible for punitive damages. As far as punitive damages are concerned, this approach would collapse the choice-of-law question into the jurisdictional question, mirroring the criminal law approach.[156] In the criminal context, a court will not take jurisdiction over a case unless it will apply its own law to the merits. Under this proposed approach, a court would behave the same way with respect to punitive damages.

This total-exclusion approach is intuitive, if blunt. If punitive damages are penal, then there is no room for middle ground. A court would never allow a foreign prosecutor to append a criminal allegation to a civil case; it would dismiss criminal allegations without prejudice, and the prosecutor would pursue the matter in the more appropriate forum. Similarly, in the civil context, a court could adjudicate the entire nonpunitive portion of a case, then dismiss the plaintiff's punitive claims either with or without

---

sovereignty to punish a person for an offence committed against the laws of another sovereignty."); discussion *supra* Introduction; *cf.* Small v. United States, 544 U.S. 385, 389 (2005) (referring to a uniquely "American understanding of fairness").

153. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (AM. LAW INST. 1971).

154. *See* discussion *supra* Section III.A.

155. *See* discussion *supra* Section III.B.

156. *See* SYMEONIDES, *supra* note 57, at 82–83 ("Strictly speaking, in the area of criminal law, there is no choice-of-law question—it is merged into the jurisdictional question. A state either has jurisdiction, in which case it applies its own law, or lacks jurisdiction, in which case it would ordinarily extradite the defendant to a state with proper jurisdiction.").

prejudice.[157] If a court dismisses the punitive claims without prejudice, then the plaintiff would theoretically be free to pursue punitive damages in a more appropriate jurisdiction.[158]

At least one court in Nebraska has been prepared to apply this total-exclusion approach.[159] In *Estate of Donahue ex rel. Brown v. Wel-Life at Papillion, Inc.*, a Nebraska plaintiff sued a South Dakota defendant in a Nebraska court, alleging wrongful death,[160] and the court applied the substantive law of South Dakota.[161] South Dakota law allows for punitive damages; Nebraska law rejects them.[162] Although it applied South Dakota law to the substance of the wrongful-death claim, it stated:

> Defendants are correct in pointing out that Nebraska courts are not required, or even necessarily permitted, to apply damages law from another state. Punitive damages may be permitted in Nebraska in cases . . . [that] utilize punitive damages from federal statutes. However, the present case is in state court, does not involve federal statutes, and the only other law referenced is that of South Dakota.[163]

It continued, "There is no exception to the rule even when one party is from another state . . . ."[164] One could characterize the court's approach as total exclusion or forum law *dépeçage*;[165] either way, the result was that the court rejected the plaintiff's request to impose punitive damages under or alongside foreign substantive law.

It is true that this total-exclusion approach would dramatically reduce the availability of punitive damages for injured plaintiffs. But the Supreme

---

157. *See id.* at 83.

158. It is not clear whether another court would entertain a claim for punitive damages where the liability portion of the case is already res judicata. To my knowledge, it would be a novel request.

159. *See* Estate of Donahue *ex rel.* Brown v. Wel-Life at Papillion, Inc., No. 1057463, 2009 WL 8613470 (Neb. Dist. Ct. Apr. 30, 2009). The case ultimately resulted in a jury verdict for the defendant, so the question of punitive damages was moot. Judgment, Estate of Donahue *ex rel.* Brown v. Wel-Life at Papillion, Inc., No. 1057463 (Neb. Dist. Ct. Dec. 14, 2009), 2009 WL 8613471.

160. Judgment, *supra* note 159.

161. *See* Plaintiff's Response to Defendants' Motion to Strike South Dakota Punitive Damage Claim, Estate of Donahue *ex rel.* Brown v. Wel-Life at Papillion, Inc., No. 1057463 (Neb. Dist. Ct. Oct. 27, 2008), 2008 WL 8830014.

162. S.D. CODIFIED LAWS § 21-3-2 (2004) ("[T]he jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant."); Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989) ("[P]unitive, vindictive, or exemplary damages contravene [Nebraska's constitution], and thus are not allowed in this jurisdiction.").

163. *Estate of Donahue*, 2009 WL 8613470.

164. *Id.*

165. *See* discussion *supra* Section III.A.

Court has been clear: "Punitive damages are not compensation for injury,"[166] and "[p]unitive damages are specifically designed to exact punishment *in excess of* actual harm."[167] Plaintiffs are not *entitled* to punitive damages unless the applicable law so entitles them; they merely receive the benefit of the defendant's punishment as a consequence of moral luck. Plaintiffs are no more entitled to punitive damage awards than individual prosecutors are entitled to criminal fines. This approach would come as a disappointment to plaintiffs, but not as an injustice.

Arguably, however, plaintiffs from certain states *are* entitled to punitive damage awards as a matter of legal right, not just moral luck. California law, for instance, provides for punitive damage awards by statute.[168] But a California plaintiff only enjoys that legal right to the extent that California law applies in the first place. If a court (in California or elsewhere) applies non-California law, that statutory entitlement dissolves. But even if a Nevada court applies California substantive law to the merits of a case, it should come as no great surprise that the Nevada court would judiciously avoid the portions of California law that would lead it to *punish* the defendant. Even if a California plaintiff is in some sense "entitled" to a punitive damage award, a Nevada court should honor interstate choice-of-law rules before honoring the plaintiff's foreign "entitlement."

Some might also argue that the total-exclusion approach would incentivize forum shopping, but more likely, it would simply encourage plaintiffs to seek out the most appropriate forum. If state courts resolved to impose punitive damages only when applying their own substantive law, then plaintiffs would be inclined to file suit in the forum most likely to apply its own law. In other words, the total-exclusion approach would encourage plaintiffs to seek the jurisdiction with the "most significant relationship" to the parties and the facts of the case (to the extent that courts act predictably in their choice-of-law analyses).[169] If this proposed approach to punitive damages and choice of law encourages forum shopping, it is the right kind of forum shopping.

On the flip side, the total-exclusion approach would incentivize defendants to argue their way out of the forum in order to avoid punitive damages. But a closer look at the *forum non conveniens*[170] doctrine reveals that courts

166. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

167. *Id.* (emphasis added) (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting)).

168. Cal. Civ. Code § 3294 (West 2016).

169. *See* Restatement (Second) of Conflict of Laws § 145 (Am. Law Inst. 1971)

170. "The doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place." *Forum non conveniens*, Black's Law Dictionary (10th ed. 2014).

are well equipped to respond to such cunning. A state court will only dismiss a case under *forum non conveniens* if it serves the interests of justice.[171] The Supreme Court provided guidance in *Piper Aircraft Co. v. Reyno*: "If the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all . . . the [trial] court may conclude that dismissal would not be in the interests of justice"[172] and therefore deny the defendant's motion to dismiss. After all, *forum non conveniens* is designed "to avoid the oppression or vexation that might result from automatically honoring plaintiff's forum choice."[173] If a defendant successfully argues her way out of the forum and thereby escapes punitive damages, then by implication, it would likely have been "oppress[ive]" and "vex[ing]" to honor the plaintiff's forum choice (and allow punitive damages) in the first place.[174]

Another counterargument to total exclusion is that the American aversion[175] to the *renvoi*[176] doctrine, which leaves some civil cases without a natural jurisdictional home. *Renvoi* means "sending back";[177] it occurs when the forum court looks to a foreign state's choice-of-law rules, which in turn might point back to the law of the forum or to another state's law.[178] Avoiding *renvoi* means that a Mississippi court might apply Alabama substantive law to a given case even though an Alabama court, under its normal choice-of-law principles, would not apply its own law.[179] Because state courts vary in their approaches to choice of law, there are some cases in which no jurisdiction where the plaintiff may file suit would apply its own substantive law.[180] Under the total-exclusion approach, that means that plaintiffs in such cases would find themselves altogether ineligible for punitive damages.

There are two important rebuttals to this problem. First, plaintiffs are not *entitled* to punitive damages unless the applicable law so entitles them.[181] If a plaintiff is so unlucky as to find herself without a jurisdiction that will apply forum law (and therefore, punitive damages), then that is unfortunate but not unjust. Second, to the extent it is a problem at all, the *renvoi* problem is a choice-of-law problem, not a punitive damages problem. If courts

171. *Cf.* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981).

172. *Id.*

173. Jack H. Friedenthal et al., Civil Procedure § 2.17, at 87–88 (5th ed. 2015).

174. *See id.*

175. *See* Restatement (Second) of Conflict of Laws § 145 cmt. h (Am. Law Inst. 1971).

176. "The doctrine under which a court, in resorting to foreign law, also adopts the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum." *Renvoi*, Black's Law Dictionary (10th ed. 2014).

177. *Id.*

178. *See* Restatement (Second) of Conflict of Laws § 145 cmt. h (Am. Law Inst. 1971).

179. For a narrative illustration of the *renvoi* problem, see Jeffrey Jackson et al., Mississippi Civil Procedure § 4:16 (2017).

180. *See id.*

181. *See supra* text accompanying and following note 168.

are bothered that some civil cases have no natural home (in which jurisdiction and choice of law align), then they should solve the *renvoi* problem. Until that day, courts should not ignore the penal exception simply because they will inevitably distribute punitive damages unevenly.

Perhaps the most compelling argument against the total-exclusion approach is based on the notion that the approach could potentially strip the state where the wrong occurred of its inherent power to punish the defendant. Imagine that a New York defendant defrauds a New York plaintiff in Pennsylvania. Isn't a Pennsylvania court inherently empowered to punish that defendant by imposing punitive damages (under either Pennsylvania or New York law) even if New York law is most appropriate for the substance of the fraud claim? This is probably the most forgivable application of punitive damages under foreign law because Pennsylvania can claim a strong policy interest in deterring conduct that occurs within its own borders. Nevertheless, such punishment violates the penal exception. A Pennsylvania court should not ask a Pennsylvania jury to express its conscience through New York law. In any event, neither Pennsylvania nor the plaintiff is helpless in this scenario. If Pennsylvania wants to punish the defendant for fraud, it may do so under its criminal law. If the plaintiff wants to secure a punitive damage award, she can pursue that award in a New York court.

The total-exclusion approach raises (at least) one more question: If courts can only apply punitive damages under forum law, won't they alter their choice-of-law analyses in order to apply forum law more often? Perhaps.[182] Choice-of-law rules in state courts are all over the map, and uniformity is not on the horizon.[183] As an empirical matter, state judiciaries exhibit a strong preference for their own substantive law anyway,[184] whether or not judges admit it openly.[185] Some scholars have advocated for a universal presumption of forum law in choice-of-law analysis,[186] and several state courts already employ such an approach.[187] If the total-exclusion approach pushes courts to apply forum law more often than they otherwise would, it

182. As mentioned in the Introduction to this Note, "[s]tate court judges are about twice as likely to choose law that favors the plaintiff if the plaintiff is local and the defendant is out-of-state than vice vers[a]." Klerman, *supra* note 13, at 2.

183. Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 582 (2002) ("[A]chieving uniformity in choice-of-law approaches among the states is difficult. Arriving at a proper choice-of-law methodology has eluded the best minds of our profession and promises to continue to do so."); *see also id.* at 579 ("Scholars generally concede that U.S. choice-of-law doctrine is a mess.").

184. *See id.* at 566. Michigan, for example, applies a *lex fori* presumption in all choice-of-law analyses: "[W]e will apply Michigan law unless a 'rational reason' to do otherwise exists." Sutherland v. Kennington Truck Serv., Ltd., 562 N.W.2d 466, 471 (Mich. 1997).

185. In his article, Professor Whitten suggests that many courts employ "dishonest" reasoning in order to arrive at "pro-forum, pro-recovery, pro-local party recovery" substantive law. Whitten, *supra* note 183, at 569.

186. *See generally* Albert A. Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960); Whitten, *supra* note 183.

187. *See supra* notes 184–186 and accompanying text.

would not devastate the state judiciary systems. In fact, it might even lead them toward a more understandable, more uniform approach to choice-of-law analysis in general.

Conclusion

The theory of punitive damages in American courts has shifted, and in the modern landscape, it is inappropriate for state courts to impose punitive damages under foreign substantive law. Whereas punitive damages perhaps once functioned to compensate plaintiffs for invisible, nonpecuniary injuries, they now serve to express "moral condemnation"[188] and "social outrage."[189] They are assessed to satisfy the community's conscience, not to compensate the plaintiff's injury. They no longer function as "reparation to one aggrieved," but instead as "vindication of the public justice."[190] But "[t]he Courts of no country execute the penal laws of another."[191] When a state court determines that its own substantive law is not the most appropriate law for the merits of a case, then it violates the penal exception by imposing punitive damages.

Ultimately, if courts accept the theory that punitive damages are penal, then they should not impose them under or alongside foreign substantive law. Courts might technically escape the penal problem by implementing forum law *dépeçage*[192] or assuage their consciences by exercising a choice-of-law presumption in favor of the defendant with respect to punitive damages.[193] But total exclusion of punitive damages under foreign substantive law is the only solution that is sound in theory and practice.[194] It is the responsibility of the courts to ensure that penal laws extend no further than their own state borders. Punitive damages should be out of reach when state courts do not apply forum law.

188. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001).

189. Sunstein et al., *supra* note 18, at 2075.

190. Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 198 (N.Y. 1918).

191. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

192. *See* discussion *supra* Section III.A.

193. *See* discussion *supra* Section III.B.

194. *See* discussion *supra* Section III.C.