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I. INTRODUCTION

Tort reform is one of this country's most hotly debated topics. It is a broad movement bent on altering or at least reconsidering a wide variety of familiar legal doctrines, ranging from joint liability to the rule requiring litigants to pay their own attorney's fees. Of all the subjects encompassed within this debate, however, few have attracted as much interest or concern as the concept of punitive damages.

Punitive damages are a sum of money that wrongdoers must pay to civil claimants as a penalty for engaging in certain forms of socially reprehensible conduct.[1] Although this remedy has enjoyed a long history in American law, its future recently has been cast into doubt. Many experts have argued that such relief should be made more difficult to obtain.[2] Others have advised giving judges, instead of juries, the exclusive authority to mete out this penalty.[3] Still others have recommended placing severe restrictions upon the amount of money that

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1. *See* 35A WORDS AND PHRASES 182-85 (1963) (citations omitted) (presenting various definitions of "punitive damages").

2. *See* AMERICAN BAR ASSOCIATION, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 3-4 (1986) (suggesting the use of a clear and convincing evidence standard for awarding punitive damages); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 351 (1983) (arguing that civil defendants who are subject to punitive damages should be afforded the same Fourth, Fifth and Sixth Amendment procedural protections as criminal defendants).

3. *See* Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 96 (1985-86) (arguing that judges would be more sensitive to the economic and social aspects of punitive damages in products liability cases); Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 664 (1980) (arguing that judges should assess punitive damages because most jurors lack the experience and expertise for such an assessment); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 52 (1982) (stating that trial judges should determine the amount of punitive damages because jurors may be unduly influenced by the defendant's wealth).

may be recovered.[4] A few have even urged that this remedy be eliminated entirely.[5]

Sensing the growing dissatisfaction with punitive damages, lawmakers within the last few years have launched an all-out legislative attack upon this peculiar American legal institution. For instance, many states already have placed strict caps on the size of punitive judgments that may be awarded in certain types of cases.[6] Alternatively, several jurisdictions deny any amount of punitive relief unless the plaintiff can establish the defendant's misconduct by clear and convincing evidence.[7] At the federal level, Congress currently is considering a bill that would limit substantially the recovery of punitive damages in all lawsuits involving product-related injuries.[8]

By and large, such reforms have been initiated and supported by political conservatives, business interests and health care practitioners.[9] These reformers contend that, because courts seldom provide any meaningful guidelines for assessing punitive damages, juries com-

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4. *See* Owen, *supra* note 3, at 48-49 n.227 (recommending that a ceiling be placed on the amount of punitive damages that may be recovered against a defendant for a single act or omission); Tom Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195, 252 (1978) ("Congress could limit a punitive damage award in a single mass disaster case to the lesser of a fixed amount or a percentage of net worth.").

5. *See* L. S. Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 F. 57 (1975) (arguing that punitive damages should not be awarded when they will be paid from a collateral source); James E. Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished, in* DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES 4, 8 (Donald J. Hirsch & James G. Pouros eds., 1969) (arguing that the doctrine of punitive damages should "be removed from modern tort law as quickly as possible").

6. *See, e.g.*, ALA. CODE §§ 6-11-20(4), 6-11-21 (1993 & Supp. 1994) (placing a $250,000 cap on punitive damages); GA. CODE ANN. § 51-12-5.1 (1994) (placing a $250,000 cap on all but product liability cases); KAN. STAT. ANN. § 60-3701 (1994) (providing a complex capping formula). In all, twelve states place some form of cap on the amount of punitive damages that a plaintiff may recover. *See* Martha Middleton, *A Changing Landscape*, 81 A.B.A. J. 56, 59 (providing a chart summarizing approaches of all fifty states); *see also* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 8 n.25 (1992) (citing statutes of eight states).

7. *See, e.g.*, IOWA CODE § 668A.1 (1987) (requiring a "preponderance of clear, convincing and satisfactory evidence" for the award of punitive damages); KY. REV. STAT. ANN. § 411.184(2) (1992) (establishing a clear and convincing evidence standard); OHIO REV. CODE ANN. § 2307.80 (Anderson 1995) (indicating that punitive damage awards must be supported by clear and convincing evidence).

This heightened evidentiary standard is rapidly becoming the majority approach. *See* Middleton, *supra* note 6, at 59 (providing a chart showing that since 1986 seventeen states have adopted the "clear and convincing" standard of evidence); Rustad, *supra* note 6, at 7-8 n.24 (providing a chart demonstrating that twenty-seven states in the last ten years have adopted either a "clear and convincing" or "beyond a reasonable doubt" standard for proving punitive damages).

8. *See* The Product Liability Fairness Act of 1995, S. 565, 104th Cong., 1st Sess. (1995) (proposing a cap on punitive damages at the lesser of $250,000 or twice the amount of compensatory damages).

9. A majority of the senators who proposed Senate Bill 565 are Republicans. *Id.*

monly render enormous retributive verdicts on the basis of sympathy and nothing more.[10] The effect of such unpredictable and often financially devastating liability, they assert, is that many valuable enterprises are forced to raise the prices of their goods or services or, in some cases, to go out of business altogether.[11]

The opponents of punitive damage reform consist primarily of political liberals, trial lawyers and consumer advocates.[12] These antagonists argue that punitive damages perform a couple of important social functions. The most obvious purpose of this civil remedy is to punish specific wrongdoers for engaging in past conduct which is either malicious, oppressive or fraudulent.[13] Its more critical function, however, is to deter potential wrongdoers, usually "deep pocket" corporate defendants, from committing such acts in the future.[14] The feeling is that without the monetary sting that punitive damages inflict, corporate wrongdoers would maximize their profits at the expense of the health and safety of an unsuspecting public.

Both sides of the debate have evidence to support their respective positions. The reformers are able to point to a number of horror stories which illustrate how costly punitive damages can be: like the

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10. *See* Duffy, *supra* note 5 at 8 (stating that while generally punitive damages must bear some reasonable proportion to actual damages, it appears that juries do not adhere to this instruction); John D. Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 885 (1976) ("[W]ith no meaningful standard available for assessing punitive damages, the size of the award is limited only by the passions and prejudices of the jury and the judicial philosophy of the judges.").

11. *See* E. PATRICK MCQUIRE, THE IMPACT OF PRODUCT LIABILITY 1-18 (1988) (assessing the impact of product liability awards on companies' costs and production of new products); *see also* PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 132 (1988) (noting that society ultimately bears the cost of punitive damages as the companies against which punitive awards are assessed distribute the cost of such damages by increasing the price of goods and transportation).

12. *See generally* Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform — State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Halsif, 42 AM. U. L. REV. 1365, 1370-72 (1993) (discussing the political battle in punitive damage reform).

13. *See* David G. Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 112 (1982) ("[C]ivil punishment (in some amount proportioned to the wrong) appears to accord with the fair expectations of the group on the limits of the use of the power and resources of its members and the consequences of gross abuse.").

14. *See* Lisa M. Browman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 653 (1982) (discussing the purpose of deterrence in punitive damages). *See generally* Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1989) (recommending that punitive damages be measured by the deterrent effect necessary and suggesting limits for such a remedy); Jason Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987) (setting forth an economic theory of punitive liability to be applied to corporations engaged in potentially harmful activity).

vaccine manufacturer that complied with all applicable FDA regulations only to be slapped with an eight million dollar punitive judgment,[15] or the developer of an innovative new kidney dialysis machine that discontinued the project for fear of incurring the wrath of an unsympathetic jury.[16] The antagonists, on the other hand, cite a number of recent studies — including one released by the United States Justice Department just months ago — which indicate that retributive awards in civil cases actually are quite rare and that they seldom exceed $50,000.[17]

So how can this debate be amicably resolved? The fact is it needn't be, at least not as it is presently conceived. Both sides of the debate, it turns out, have missed the real issue. The question is not whether punitive damages are arbitrarily or abusively administered, but whether there is some convincing justification for them in the first place. This more profound question cannot be answered merely by examining the size of jury verdicts or the change in people's behavior. Rather, it requires that the very foundations and objectives of the punitive damages doctrine be closely reevaluated. That is the aim of this Essay. Part II begins this inquiry by tracing the evolution of punitive damages from ancient times to the present. Part III then lays bare the doctrine's conceptual weaknesses and analyzes its eroding historical underpinnings. The Essay concludes, in Part IV, by advocating a number of restorative remedies which would repair dignitary injuries better than punitive damages ever could.

II. THE HISTORY OF PUNITIVE DAMAGES

A. Ancient Remedies

Punitive remedies were not uncommon in many ancient civilizations. Selected laws in Babylon, Egypt, Greece and Rome imposed upon wrongdoers monetary fines in excess of the actual damage they

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15. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 19 (1990) (citing Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCI. 1395, 1396 (1989)).

16. *Id.* at 20 n.83 (citing Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCI. 1395, 1397 (1989)).

17. *See id.* at 64 (discussing several studies and concluding that "[a]ny changes in the punitive damages system are likely to be based on an unfounded . . . notion of crisis and a fundamental misunderstanding of the problem, the dynamics of the system, and the pattern of change"); Rustad, *supra* note 6, at 23 (discussing several recent studies and stating that, "[e]very empirical study of punitive damages awards concludes that there is simply no evidence that punitive damages are routinely awarded"); *see also Punitive Awards Rare in Civil Suits, Study Says*, L.A. TIMES, July 17, 1995, at A11.

inflicted upon others.[18] Similar provisions were found in the Code of Hammurabi in 2000 B.C., the Hittite Law in 1400 B.C. and the Hindu Code of Manu in 200 B.C.[19] Even the Bible endorses punitive damages in certain circumstances. Specifically, the book of Exodus provides that "[i]f a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore *five* oxen for an ox, and *four* sheep for a sheep."[20]

None of these early legal systems, however, made any attempt to distinguish civil from criminal penalties. In contrast to our justice system, where a wrongdoer may be both criminally prosecuted by the state and sued by a private party in a civil lawsuit, these primitive codes provided only one sanction.[21] This sanction was the sole form of social control available to the ruler or ruling class.[22] It discouraged victims or their families from committing private acts of vengeance which might create civil unrest. In most modern justice systems, including our own, this function is served by the criminal justice system by imprisoning or fining wrongdoers and awarding restitution to their victims. Thus, the retributive aspect of ancient codes was more akin to what we now call criminal law. The modern concept of *civil*, punitive damages was simply unknown to the ancients.

B. The English Experience

1. Medieval Origins

Early on, English courts imposed punitive sanctions for the same reasons as their hoary counterparts. Beginning with the Norman Invasion in 1066 A.D., law in Great Britain was used primarily as a means of controlling a potentially hostile populace.[23] There was no tort law per se; instead, most disputes were handled by local courts on a case-by-case basis.[24] Infractions serious enough to breach the peace were heard by the King's courts.[25] Originally, only direct, affirmative misdeeds would land the perpetrator before a royal justice.[26] Later,

18. 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES §§ 1.1, 1.2 (2d ed. 1989).

19. *Id.* § 1.1.

20. *Exodus* 22:1 (emphasis added).

21. *See* SCHLUETER & REDDEN, *supra* note 18, § 1.2 (explaining that while damages in excess of the harm caused were allowed, multiple sanctions were not).

22. *Id.*

23. *See* THEODORE F. T. PLUNCKNETT, A CONCISE HISTORY OF THE COMMON LAW 15-16 (5th ed. 1956) (discussing English law after the Norman Conquest).

24. *See id.* at 79-105 (discussing three types of courts found in early England: communal courts, seignorial courts and royal courts).

25. *Id.* at 80-81.

26. *Id.* at 465-67 (explaining that trespass was originally limited to cases involving deliberate acts).

however, even omissions fell within the jurisdiction of the common pleas courts.[27] Such suits were initiated when the claimant obtained a writ of trespass (or trespass on the case for omissions) requesting relief from the alleged wrongdoer.[28] If the allegations of the complaint were supported by sufficient evidence, the court would require the defendant to compensate the victim for the loss sustained in their encounter. This, however, was not the end of the defendant's troubles. He also could be thrown in prison for disturbing the tranquility of the realm.[29] If this occurred, he might languish there indefinitely unless he paid to the crown a punitive fine to buy his release.[30]

2. *Coming of Age*

Punitive damages did not appear in English law as a separate civil remedy until the eighteenth century.[31] By this time, the English justice system had developed separate criminal and civil sanctions for intentional misconduct.[32] In civil cases, juries traditionally consisted of townspeople who possessed knowledge or information concerning the matter in dispute.[33] Often some or all of the jurors may have witnessed the event or transaction which brought the parties to conflict.[34] As a result, English courts routinely granted civil juries broad discretion in determining the amount of damages awarded to an injured plaintiff.[35] These verdicts were seldom reviewed and almost never overturned by another court.[36]

As the medieval feudal system declined, the characteristics of the English jury system changed.[37] Instead of using biased and interested witnesses to resolve disputes, courts recruited jurors who were de-

27. *See* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 363-65 (1951) (finding liability for trespass without any showing of "trespassory conduct").

28. *Id.* at 361-62.

29. Richard L. Marcus, *English Common Law: Studies in the Sources: The Tudor Treason Trials: Some Observations on the Emergence of Forensic Themes*, 1984 U. ILL. L. REV. 675, 692 (expressing the importance of the "tranquility of the realm").

30. *See* George E. Woodbine, *The Origin of the Action of Trespass*, 33 YALE L.J. 799, 805-06 (1923) (explaining that the duty of the justices was "not only to administer the law, but also to increase the royal revenue"; consequently, litigants were required to pay fines to the king). *Id.*

31. Deborah Travis, *Broker Churning: Who is Punished? Vicariously Assessed Punitive Damages in the Context of Brokerage Houses and Their Agents*, 30 HOUS. L. REV. 1775, 1791 (1993).

32. *See* Woodbine, *supra* note 30, at 803 (stating that England had developed both criminal and civil actions as early as the thirteenth century).

33. 1 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW & PRACTICE § 1.02 (1981).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

tached and neutral fact finders.[38] Juries no longer possessed actual knowledge of the parties or events being litigated, but merely observed evidence offered by others. Thus, courts soon felt more comfortable second-guessing the juries' verdicts.[39]

By the 1700s, it was not uncommon for juries, in certain types of cases, to award greater compensation than was necessary to repair the plaintiffs' physical injuries.[40] Although these cases varied considerably, they seemed to fall into four thematic categories: 1) those involving private acts of violence (e.g., assault and battery);[41] 2) those involving acts of dishonor (e.g., seduction, defamation or breach of a promise to marry);[42] 3) those involving abuses of governmental power (e.g., illegal searches and seizures);[43] and 4) those involving corporate malfeasance (limited almost exclusively to railroad companies).[44] At the core of all these cases, however, was a clear unifying feature. Each entailed some sort of egregious misconduct by the defendant on one hand, and a loss of dignity by the plaintiff on the other.

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38. *Id.*

39. *Id.*

40. *Id.*

41. *See* Towle v. Blake, 48 N.H. 92, 96 (1868) (approving the lower court's award of punitive damages against a defendant for his tortious acts of violence); Benson v. Frederick, 97 Eng. Rep. 1130, 1130 (K.B. 1776) (awarding punitive damages to a man who was wrongly stripped and given twenty lashes); Grey v. Grant, 95 Eng. Rep. 794, 795 (K.B. 1764) (explaining that, "when a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages").

42. *See* Knight v. Foster, 39 N.H. 576, 582 (1859) (characterizing a slander case as one of actual malice and therefore granting exemplary damages); Severance v. Hilton, 32 N.H. 289, 291 (1855) (affirming punitive damages for slander); Davidson v. Goodall, 18 N.H. 423, 430-31 (1846) (awarding excessive damages for seduction); Greenleaf v. McColley, 14 N.H. 303, 306 (1843) (punishing the defendant with punitive damages for breach of promise to marry); Chesley v. Chesley, 10 N.H. 327, 328 (1839) (awarding punitive damages for a breach of a promise to marry).

43. *See* Breadmore v. Carrington, 95 Eng. Rep. 790, 792-93 (K.B. 1764) (awarding excessive damages for the execution of illegal warrant); Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763) (awarding excessive damages for entering a man's house by virtue of a nameless warrant); Wilkes v. Wood, 95 Eng. Rep. 767, 767 (K.B. 1763) (awarding excessive damages again for an illegal search warrant).

44. *See* Belknap v. Boston & Me. R.R., 49 N.H. 358, 359 (1870) (asserting an action for assault against railroad employee for ejecting passenger from defendant's railroad car); Hopkins v. Atlantic & Saint Lawrence R.R., 36 N.H. 9, 9-10 (1857) (asserting that an injured plaintiff has an action against a railroad for damages caused by the railroad's negligent, careless and unskilled management of its trains); Varillat v. New Orleans & Carrollton R.R. Co., 10 La. Ann. 88, 88-89 (allowing suit for damages for injury sustained in a collision due to carelessness of a railroad employee).

3. *Conceptual Crisis*

Still reluctant to intrude upon the province of the jury, courts reviewing these verdicts faced a serious dilemma: How could they explain or justify damage awards which seemed to exceed the monetary losses of the plaintiffs? Two different lines of reasoning soon developed.[45]

One view maintained that the additional damages could not be used by the jury to alleviate the plaintiff's financial injuries, but only to make an example of the defendant.[46] By holding the defendant liable for such extra-compensatory relief, some courts believed, both the defendant and others would be deterred from engaging in the same type of misconduct in the future.[47] With this innovation, the contemporary concept of civil, punitive damages was born.

The other justification for permitting inflated damage awards found no basis in punishment or deterrence.[48] Instead, it was premised on the long-recognized ground of compensation.[49] Not the traditional form of compensation allowed for tangible, physical losses, but a different type of recompense for the embarrassment, humiliation or mental anguish sustained by the victim.[50]

D. American Reception

These divergent approaches to excessive verdicts were quickly transplanted into the rapidly emerging body of American law. In 1791, a New Jersey court was the first in the new republic to recognize

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45. Courts often failed to clearly state their grounds for affirming the juries' excessive verdicts. This ambiguity gave rise to an interpretational debate between two of the nineteenth century's most noted legal scholars. Theodore Sedgwick, a Jacksonian intellectual, interpreted these decisions as recognizing a purely punitive remedy. *See* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 38-46 (Arno Press 1972) (1847). The conservative whig, Simon Greenleaf, on the other hand, believed that these cases merely provided compensation for dignitary injuries. 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253 (4th ed. 1848).

46. *See* SEDGWICK, *supra* note 45, at 38-39 (stating that where the defendant engaged in fraud, malice, gross negligence or oppressive behavior "instead of adhering to the system or even the language of compensation . . . [the law] permits the jury to give what it terms punitory, vindictive, or exemplory damages . . . not only to recompense the sufferer, but to punish the offender.")

47. *See id.* at 39-44 (citations omitted) (discussing several English cases in which the court imposed punitive damages).

48. *See* GREENLEAF, *supra* note 45, § 253 n.2 (arguing that Sedgwick's view was unsupported by any express decision on point and contradicted the settled legal principles of the time).

49. *See id.* § 254 (asserting that "[a]ll damages must be *the result* of the injury complained of").

50. *See id.* § 253 n.2 (explaining that the grounds of limitation include injury to plaintiffs' character and feelings).

the doctrine of punitive damages.[51] This remedy continued to grow in acceptance among American courts until 1851, when the United States Supreme Court declared it "a well established principle of the common law."[52]

Still, punitive damages were not uniformly adopted in every state. Several states, in fact, expressly rejected the notion of punitive relief in civil cases.[53] In these jurisdictions, "additional" or "excessive" damages could be assessed against malevolent wrongdoers only to compensate for the indignities inflicted upon their victims.[54] A number of states, including Michigan,[55] New Hampshire[56] and Washington,[57] continue to adhere to this position.

III. PUNITIVE DAMAGES DECONSTRUCTED

Admittedly, there is a superficial appeal to both the punitive and compensatory justifications for permitting "additional" damages in cases involving abhorrent antisocial behavior. After all, forcing bad guys to pay huge civil penalties seems like a good way of getting their attention. And giving a little extra compensation to those that have been severely maltreated or debased does not appear particularly unjust. Yet when each of these justifications is examined more closely, neither appears sound enough to stand on its own.

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51. Coryell v. Colbough, 1 N.J. 77 (1791).

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

53. *See, e.g.*, Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1075 (Wash. 1891) (declaring that "the doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice" in civil cases).

54. *See, e.g., id.* at 1073-74 (arguing that the function of punishment is better left to the criminal courts).

55. *See* McFadden v. Tate, 85 N.W.2d 181, 184 (Mich. 1957) (stating where a defendant maliciously inflicts an injury upon a victim the victim is entitled to compensation for the resulting outrage, humiliation and indignity); Jackovich v. General Adjustment Bureau, Inc., 326 N.W.2d 458, 464 (Mich. App. 1982) (finding that the trial court's jury instruction, which explained that punitive damages could be awarded solely to punish defendants, "misstated the Michigan law of damages").

56. *See* Vratsenes v. New Hampshire Auto, Inc., 289 A.2d 66, 68 (N.H. 1972) ("No damages are to be awarded as a punishment to the defendant or as a warning and example to deter him and others from committing like offenses in the future. In other words, no damages other than compensatory are to be awarded.").

57. *See* Stanard v. Bolin, 565 P.2d 94, 98 (Wash. 1977) (declining to allow punitive damages in breach of promise to marry cases absent express statutory authorization); Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1075 (Wash. 1891) (precluding the recovery of punitive damages in all civil personal injury actions).

A. The Rationale of Punishment (and Deterrence)

1. Pretzel Logic

For starters, the phrase "punitive damages" is actually an oxymoron. Punitive penalties concern only the wrongdoer; they seek to hurt the culprit, or affect his behavior, and are assessed only in relation to his misdeed. "Damage," however, applies exclusively to the victim. It refers both to his loss or harm and the remedial measures that are necessary to make him whole.

Once this oxymoron is understood, one can appreciate how truly anomolous the concept of punitive damages actually is anomalous. If punitive damages are designed to punish and deter conduct that is socially undesirable regardless of its consequences, then why are they not imposed as a criminal sanction at the instigation of the state which typically protects the public interest? And if they are meant only as penalties for bad behavior, and have no role in redressing actual losses sustained by victims, then why should those otherwise compensated for their injuries receive the windfall payment of this fine? Unable to answer these questions, the Supreme Court of New Hampshire once proclaimed that punitive damages are both a "monstrous heresy" and "an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law."[58]

2. Out of Place, Out of Time

Beyond this conceptual infirmity, the assumptions which at one time may have necessitated punitive damages are no longer valid. This is as true, in fact, for the more recent cases involving government overreaching and corporate malfeasance as it is for the more traditional cases involving violent attacks and dishonorable behavior. With the advent of modern criminal codes, more liberal social mores, stricter checks upon government action and the age of business regulation, there now appears to be little justification for maintaining a cumbersome and costly system of civil penalties.

a. The ascendancy of criminal law

In colonial America, punitive damages were more than just a supplemental remedy for civil litigants. They were one of the few available instruments of social control.[59] Criminal justice systems from

58. Fay v. Parker, 53 N.H. 342, 382 (1873).

59. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 179 (1989) (stating that institutionalizing punishment operated as a form of social rehabilitation).

New England to Georgia were crude at best and corrupt at worst.[60] Although untrained constables and nightwatchmen recovered lost children and provided shelter for the homeless, they attempted neither to detect crime nor to deter it.[61] In fact, police agencies, as we have come to know them, simply did not exist.[62] While chaos reigned in the streets, ineptitude and avarice presided in the criminal courts. Trials were informal and disorganized.[63] Judges were unskilled or unscrupulous.[64] Indeed, in what is now Green Bay, Wisconsin, a justice of the peace once granted a new trial to a losing party who offered him a bottle of whisky.[65] In that court, it was said, "a bottle of spirits was the best witness that could be introduced."[66] The problem became so bad in Virginia that, in one year, a third of that state's accused felons were discharged by county authorities; and of those who were actually prosecuted, another third were acquitted.[67] Because of this sorry state of affairs, victims seeking justice during this period had little choice but to sue their offenders (and hope for the best) or resort to private acts of vengeance.

Since the eighteenth century, however, the mechanisms of the criminal law have become this country's primary defense against antisocial behavior. Today, highly specialized police agencies target criminals at the federal, state and local levels. Knowledgeable judges bound by a myriad of procedural and evidentiary constraints now try cases in hi-tech courtrooms. Voluminous criminal codes, delineating a broad spectrum of offenses and sanctions, have been adopted in every jurisdiction. Violent offenses, in particular, have been more expansively catalogued and more vigorously prosecuted than ever before. Likewise, punishments for such offenses have been made more severe, though perhaps less barbaric, than at any earlier time in our nation's history. Given the enormity of these developments, any role which punitive damages previously might have played in punishing or deter-

60. *See id.* at 177 (explaining that the colonial criminal justice systems suffered from these deficiencies because they were deeply intertwined with local politics).

61. *See id.* 176-78, 184. For example, during the nineteenth century, police actually acted as intermediaries between thieves and their victims, often arranging for victims to buy back their stolen goods. *Id.* at 178.

62. To illustrate, the first urban police force, in Boston, was not created until 1838. *Id.* at 176.

63. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 140-41 (1973) (discussing the prevalence of frontier justice in the territories of the northwest).

64. *See id.* at 141 (noting that a corruptible justice of the peace, who could barely read or write, provided the final word on justice).

65. *Id.*

66. *Id.*

67. HALL, *supra* note 59, at 170.

ring violent criminal wrongdoers now appears to be completely obviated.

b. The decline of dishonor

While public concern about violent activity has increased over the years, interest in dishonorable behavior clearly has faded. Many dishonorable acts which earlier attracted punitive sanctions — like seduction or breaching a promise of marriage — are not even tortious today.[68] Although defamation continues to be actionable, relief for such conduct is severely limited and extremely difficult to obtain.[69] In contrast to early common law doctrine, which held defamers strictly liable, today the Supreme Court precludes recovery unless the victim can prove that the speaker acted maliciously.[70] The practical effect of this requirement is to protect from exemplary damages those who dishonor others by the loose exercise of their First Amendment rights.

c. A new state of restraint

Another important objective of punitive damages — specifically, combating abuses of government power — also seems largely anachronistic today. Punitive damages were first formally recognized in the eighteenth century English precedents of *Wilkes v. Wood*[71] and *Huckle v. Money*.[72] Both cases arose out of an occurrence which was all too common at the time. Lord Halifax, the Secretary of State, issued baseless warrants to harass a printer and his employee who had published material critical of King George II.[73] Although in each case the plaintiff had suffered little actual injury, the court awarded "exemplary damages" to discourage government officials from engaging in such tyrannical behavior in the future.[74]

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68. Prosser notes the clear trend toward abolishing such claims. *See* W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 124, at 929-30 (5th ed. 1984).

69. *See id.* § 111, 771-72 (stating that the law of defamation "contains anomalies and absurdities . . . , it is a curious compound of strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and serious harm").

70. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) (concluding that neither factual error nor content defamatory of official reputation (whether alone or in combination) provide a sufficient basis to warrant awarding punitive damages for false statements unless "actual malice" is alleged and proved). By contrast, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), relaxed the burden of proof for plaintiffs who are private individuals rather than public officials. *See id.* at 345-46 (explaining that "private individuals are . . . more vulnerable to injury than public officials and are more deserving of recovery").

71. 95 Eng. Rep. 767, 767 (K.B. 1763).

72. 95 Eng. Rep. 768, 768-69 (K.B. 1763).

73. *Huckle*, 95 Eng. Rep. at 768; *Wilkes*, 95 Eng. Rep. at 767.

74. *Huckle*, 95 Eng. Rep. at 769; *Wilkes*, 95 Eng. Rep. at 767.

Using civil sanctions to harness state power was understandable in eighteenth century England where corruption and tyranny were prevalent. In the United States, by contrast, there has never been a need to invoke punitive damages as a bulwark against government oppression. Indeed, Americans have long enjoyed a plethora of public and private law protections which both discourage and inhibit official overreaching. For example, the Fourth and Fourteenth Amendments to the United States Constitution prohibit illegal searches and seizures.[75] When these constitutional commands are violated, the familiar "fruit of the poisonous tree" doctrine excludes from criminal trials any information acquired by the offending investigators.[76] In addition, the rogue cops themselves may be personally punished for their misdeeds.[77] As the Rodney King incident demonstrates, police who abuse their authority now are almost certain to face criminal prosecution.[78] On top of this, such transgressors may be held individually liable under both federal and state law for infringing the civil rights of their victims.[79]

Though all of these protections are important, the threat of civil liability alone provides enormous potential for deterrence. Considering that government officials typically earn modest salaries, and generally do not profit from their misdeeds, any sort of financial accountability can be personally devastating. Indeed, for the overzealous public servant, an award of even compensatory damages may not only end his career, it may force him into bankruptcy. If this pros-

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75. U.S. CONST. amends. IV, XIV.

76. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 485-86 (citation and footnote omitted) (concluding that statements made by defendant concurrent with his unlawful arrest constituted fruits of the agents' unauthorized action, and thus should be excluded from evidence).

77. *See generally* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509 (1994) (detailing the state and federal prosecutions against the police officers involved in the Rodney King beating).

78. *See id.* at 534 (reviewing the legal action taken against the officers involved in the Rodney King incident).

79. For example, § 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994) is the federal statute that is most often used to hold government officials liable for committing civil rights violations. On the state level, many jurisdictions now recognize broad exemptions to sovereign immunity under which victims may sue state officials for misconduct. *See, e.g.*, Medeiros v. Kondo, 522 P.2d 1269, 1271 (Haw. 1974) ("[I]f an official in exercising his authority is motivated by malice, and not by an otherwise proper purpose, then he should not escape liability for the injuries he causes."); Bone v. Andrus, 527 P.2d 783, 785 (Idaho 1974) (stating that sovereign immunity protects the state, and not individual state officials, from tort actions) (citing Smith v. State, 473 P.2d 937 (Idaho 1970)); Robinson v. Board of County Comm'rs, 278 A.2d 71, 74 (Md. 1971) ("[W]e cannot think of any reason why a public official should not be held responsible for his malicious actions even though he claims they were done within the scope of his discretionary authority.").

pect is not enough to induce caution, it is difficult to see what further deterrence punitive damages could provide.[80]

d. A more constrictive corporate climate

Whatever the public attitude towards big government, the plain fact is that government was not the primary concern of most Americans during the antebellum period. More feared and distrusted was the rapidly emerging American corporation, especially the railroad company.[81] Railroads enjoyed a privileged status during the nineteenth century.[82] Many companies were granted lucrative monopolies in designated geographic areas.[83] States lavished corporate directors with land and financial assistance.[84] In New York, the railroads so controlled the commissioners appointed to regulate them that the commissioners successfully lobbied the legislature to abolish their own offices.[85] Even the common law was slanted noticeably in favor of these soulless behemoths: trespassers were owed virtually no duty of care;[86] injured customers were routinely denied recovery because of their own contributory negligence;[87] employees victimized by coworkers had no recourse against the company;[88] and liability for track fires was limited to the first adjoining landowner.[89]

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80. In rejecting a separate monetary award for the technical infringement of a constitutional right, the Supreme Court noted that "Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations." Memphis Community School Dist. v. Stachura, 477 U.S. 299, 310 (1986).

81. *See* HALL, *supra* note 59, at 197-98 (discussing the laissez-faire attitude of legislators and the public's response to such attitude).

82. *See id.* at 95-96 (detailing the promotional programs that states implemented to assist railroads).

83. *See id.* at 97 (summarizing the monopoly privileges state legislators granted and their anti-developmental consequences).

84. For a succinct discussion of the government's promotion of the railroad industry during the nineteenth century see HALL, *supra* note 59, at 95, 96, 192, 197-98. *See generally* CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890 (1960) (discussing the government's support of railroads during the industrial revolution).

85. HALL, *supra* note 59, at 96.

86. *See, e.g.*, Sheehan v. Saint Paul & Duluth Ry. Co., 76 F. 201, 205 (7th Cir. 1896) (holding that the railroad owed no duty to a trespasser whose foot became caught between a rail track and a cattle guard).

87. *See, e.g.*, Pennsylvania R.R. Co. v. Aspell, 23 Pa. 147, 150 (1854) (holding the railroad company not liable to a passenger for an accident which might have been prevented by the passenger's ordinary attention to his own safety).

88. In particular, courts denied recovery under the now defunct "fellow-servant" rule. *See, e.g.*, Farwell v. Boston & Worchester R.R. Corp., 45 Mass. (4 Met.) 49, 62 (dismissing a claim by an engineer whose hand was injured after another employee improperly threw a switch).

89. *See, e.g.*, Webb v. Rome, Watertown & Ogdensberg R.R. Co., 49 N.Y. 420, 426 (1872) (citing the well-established common law rule that "he who negligently manages a fire on his own

Punitive damages provided one of the few checks upon the power of these burgeoning giants. Railroad companies which remained unfettered by government regulation could nevertheless be hauled into court and made to pay for compromising the safety of their passengers.[90] Here, at last, was a legitimate reason for imposing an extra-compensatory, civil sanction. Punitive damages were the lone weapon which small Davids might use to slay the huge Goliaths who threatened to injure or exploit them.

With the battle against the railroads well under way, the weapon of punitive damages soon was turned against a new group of titans. By the turn of the century, product manufacturers, not railroads, became the focal point of the punitive damage attack. This trend has continued throughout the twentieth century. Today, the primary use of punitive damages is to punish or deter those who make or sell "bad" merchandise.[91]

One must wonder, however, whether modern merchants should be treated the same as nineteenth century robber barons. Perhaps such treatment would be appropriate if the legal, political and economic conditions that existed a hundred years ago also existed today. The problem is that they do not.

Unlike the railroad companies of yesteryear, which were actively promoted by state government, contemporary product manufacturers face a number of constraints upon their power and discretion. Antitrust laws now prohibit businesses from forming monopolies in order to exploit their patrons or to gain an unfair economic advantage over their competitors.[92] Further, practically all product industries are regulated to some extent by both the state and federal governments. Manufacturers of extremely dangerous products — like automobiles and drugs — often are required by law to conduct specific tests, adopt particular designs, or follow certain procedures.[93] Legal doctrines, as

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property, is liable to his immediate neighbor for the damages caused to him by the spread of the fire").

90. *See, e.g.*, Trapnell v. Hines, 268 F. 504, 505-06 (3d Cir. 1920) (noting that railroads must exercise reasonable care towards passengers under the circumstances).

91. *See generally* Ellen Wertheimer, *Punitive Damages and Strict Products Liability: An Essay in Oxymorons*, 39 VILL. L. REV. 505 (1994) (questioning the application of punitive damages to products liability cases where there has been no showing of fault).

92. For example, the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (1994) and the Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12, 13, 14-17 & 29 U.S.C. §§ 52, 53 (1994) comprise two of the earliest and most influential monopoly-busting statutes.

93. For instance, the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, *repealed by* Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (1994) and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208, S4 (1994), require auto manufacturers to establish internal safety standards). Similarly, the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-393

well, subject manufacturers to onerous performance standards. For instance, the theories of strict liability,[94] implied warranty,[95] and market share liability[96] all require manufacturers to make the best possible product or risk financial ruin. With so much control already being exercised over the manufacturing industry, little in the way of constructive deterrence is likely to come from imposing further punitive sanctions.

e. The end of one road; a bridge to another?

The lesson from all this is quite clear: despite whatever historical circumstances may have once necessitated the use of punitive damages, the traditional goals of punishment and deterrence no longer provide an adequate justification for awarding extra-compensatory relief to civil claimants. Even so, this doctrinal collapse does not necessarily condemn punitive damages to the legal scrap pile. It still remains to be seen whether the imposition of such "excessive" damages may be supported by the alternative rationale of compensation.

B. The Rationale of Compensation

While perhaps it makes sense to compensate victims for intangible injuries like embarrassment or mental distress, there is no need to designate a separate category of damages to serve this end. In contrast to medieval England, which did not award money for mental anguish, American courts today readily recognize psychic injuries as an accept-

(1994) requires pharmaceutical companies to include certain information on the label or packaging of prescription drugs, including adequate directions for use, warnings concerning overdoses and specific dangers to children, and a list of active ingredients, side effects, contraindications and effectiveness.

94. The theory of strict products liability holds manufacturers accountable for product-related injuries regardless of the degree of care that they have exercised in the preparation and sale of their goods. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

95. For example, under § 2-314(2)(c) of the Uniform Commercial Code, a product manufacturer may be held liable (despite his best efforts) if his merchandise turns out to be unfit for its ordinary purpose.

96. The concept of market share liability provides that a plaintiff who is injured by a dangerous product may recover damages against one or more manufacturers of that product, even though the plaintiff is unable to prove which manufacturer actually sold the product that caused his injury. Morris v. Parke, Davis & Co., 667 F. Supp. 1332, 1342 (1987). Under the market share liability theory, courts assess liability against manufacturers in proportion to their percentage of total sales for the offending product. *Id.* The named defendants then have the burden of proving that they did not manufacture the product that injured the plaintiff. *Id. See also* Sindell v. Abbott Labs, 607 P.2d 924, 937 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980) (holding that any manufacturer of the drug diethylstilbestrol (DES) could be found liable for plaintiff's injuries without proof of factual causation provided the plaintiff named as defendants a sufficient number of DES manufacturers who controlled a substantial share of the market for the product).

able form of relief, both when they are accompanied by physical harm and often when they are not.[97]

Purists might argue, however, that English courts were concerned with more than just the psychological effects of intentional wrongdoing; they were disturbed by the deeper dignitary injuries that may have accompanied them. But even if one accepts the idea that dignitary harm is distinguishable from, and far more ethereal than, mere pain and suffering — a position which I endorse — it is inconceivable that any monetary remedy could ever repair such damage adequately.

1. The Peculiar Nature of Dignitary Harm

When a tortfeasor intentionally or maliciously inflicts harm upon another — say, by violently raping her — he does more than merely injure her body or destroy some of her personal property. He denies her personhood. Every human being, because of his or her capacity to reason, is imbued with an intrinsic worth that can never be compromised or revoked. This worth, or dignity as it is sometimes called, is the same for all people regardless of their race, ethnicity, gender or social status. It entitles each individual to a certain degree of freedom — specifically, the freedom to be let alone when so desired. As the eighteenth century German philosopher Immanual Kant has observed, this freedom requires that all human beings be treated as ends in themselves, and not as a means to an end by anyone else.[98]

A wrongdoer who deliberately injures others repudiates this basic moral precept. By committing the act of rape, the rapist uses his victim as an object to satisfy his perverse sexual or psychological desires or predilections. This show of disrespect is more than just a trifling lack of courtesy. It is an attempt by the wrongdoer both to assert his intrinsic superiority and to dehumanize his victim.[99]

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97. Plaintiffs typically bring such claims under the theory of negligent infliction of emotional distress. *See, e.g.*, Saint Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 (1987) (dispensing with the requirement of proof of physical injury in a claim for intentional infliction of emotional distress and allowing a hospital patient and her husband to recover for mental injuries suffered after the hospital improperly disposed of their stillborn daughter's body). Other jurisdictions have also rejected the physical manifestation requirement as a limitation on recovery for mental anguish damages. *Id.* at 652 n.3 (citations omitted).

98. IMMANUEL KANT, THE METAPHYSICS OF MORALS § 11 (Mary Gregor trans., 1991).

99. *See* Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1698 (1992) (stating that retribution is an attempt by courts to nullify "the wrongdoer's message of superiority over the victim" by placing the victim in the position he would have occupied had the wrongdoer not acted).

2. *Dollars Do Not Restore Dignity*

The injury effected by such conduct, though intangible, is far more grievous, and more difficult to redress, than any form of corporeal harm. Because dignity is the cornerstone of self-respect, any dignitary invasion is an assault upon the psyche of the victim.[100] Such damage cannot be repaired with money forcibly disgorged from the wrongdoer. Indeed, Kant notes that the dignity of a person has no price or equivalent value for which it may be exchanged.[101] Thus, no award of monetary relief, whether in the form of compensatory or punitive damages, can serve to properly rectify the moral imbalance created by the wrongdoer. In fact, to allow a dehumanizer to pay for the privilege of degrading another is to add insult to the underlying moral injury.

IV. RESTORATIVE REMEDIES

When a wrong arises from an intensely personal, communicative act of degradation — as is true in cases of intentional misconduct — it can be reversed only by some gesture that both denies the culprit's attempted superiority and reaffirms the victim's humanity. To make such a gesture, the wrongdoer might acknowledge the victim's loss and explain why he committed the offending act, offer a sincere public apology, furnish community service, offer personal service to the victim over a specified period, create a scholarship or trust fund in the victim's name, or perform any other act of submission that elevates the victim's moral status.[102] Any or all of these remedies could be implemented through voluntary mediation between the parties, or

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100. Self-respect is a basic human need. It has two interrelated components: a sense of personal efficacy and a sense of self-worth. NATHANIEL BRANDEN, THE PSYCHOLOGY OF SELF ESTEEM 104 (1969). Both of these components are jeopardized by dehumanizing behavior. Self-worth is determined largely by how we are treated by others. Those who are treated like dirt eventually will regard themselves as dirt. Slaves, prison inmates and holocaust victims provide ample proof of this fact. Personal efficacy, on the other hand, depends upon a person's own ability to achieve his goals. To the extent that degrading behavior affects a victim's psyche, altering both his attitudes and ambitions, it prevents him from implementing a virtuous life plan.

101. KANT, *supra* note 98, § 37.

102. *See* Hampton, *supra* note 99 at 1698 (arguing that the effect of a wrongdoer's apology to a victim is to "annul[ ] the appearance of degradation accomplished by [the] act, and establish[ ] the right moral relationship between [the victim and the wrongdoer]"). In a recent study, 542 people were asked to suggest punishments for wrongdoers in a series of hypothetical transactions. R. MURRAY THOMAS & ANN DIVER-STAMNES, WHAT WRONGDOERS DESERVE 75 (1993). The participants' recommendations included engaging in work that directly benefits the victim, laboring for the victim's families, furnishing community service, offering a public apology, and receiving public censure and humiliation. *Id.*

through an appropriate equitable order enjoining the wrongdoer to provide the required performance.

A. *Defamation Means Sometimes Having to Say You're Sorry*

Although such remedies are rare under the civil law, courts have employed them in defamation cases for years.[103] Defamation is a dignitary tort in which the victim's reputation, and thus his perceived worth as a community member, is blemished or impaired.[104] Needless to say, no amount of money can remove the black stain placed upon the victim's name by a false statement. Accordingly, few defamation plaintiffs file suit just to obtain compensatory or punitive damages. Rather, these victims initiate litigation to clear their reputations by demanding that the defendant retract his scurrilous remark and/or provide a public apology.[105]

B. *Paradigm Shift in the Criminal Law*

Curiously, this type of moral reparation has found greater acceptance within the criminal justice system than it has in the civil law. What makes this unusual is that traditionally the criminal law has been far more preoccupied with punishing or rehabilitating wrongdoers than it has with placating victims, who often are treated as witnesses and nothing more.

Within the last few decades, however, many jurisdictions have embraced the idea of "restorative justice" as a paradigm for handling criminal matters.[106] Restorative justice views crime not just as a harm to society but as the violation of one person by another.[107] Thus, under this model, the offender cannot undo his misdeed merely by serving time in a jail cell. Rather, he must actively correct his wrong by making amends directly to his victim.[108]

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103. *See* Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789, 791 (1986) (reporting that "the major motivating factors [for filing suit] are restoring reputation, correcting . . . falsity, and vengeance").

104. BLACK'S LAW DICTIONARY 417 (6th ed. 1990).

105. *See* Bezanson, *supra* note 103, at 800 (noting the Iowa Libel Research Survey's finding that eighty-three percent of those who instituted litigation expressed an interest in non-litigation alternatives).

106. *See* Ellen Joan Pollack, *Victim-Perpetrator Reconciliations Grow in Popularity*, WALL ST. J., Oct. 28, 1993, at B1 (relating that the popularity of victim-offender reconciliation has lead to the development of over 125 restorative justice programs throughout the United States).

107. For a general account of the philosophy and objectives of the restorative paradigm see Mark S. Umbreit, *Holding Justice Offenders Accountable: A Restorative Justice Perspective*, JUV. & FAM. CT. J., Spring 1995, at 31-42.

108. *Id.*

This healing process is both promoted and facilitated by victim-offender mediation.[109] Victim-offender mediation offers an aggrieved party the opportunity to confront his wrongdoer in a controlled setting.[110] These meetings, which may occur either before or after a criminal trial and are always voluntary, typically unfold in two stages. In the first, the victim is allowed to ask questions — like "why did you do this to me?" — and to describe how the crime has affected his life.[111] The offender, on the other hand, may respond to the victim's inquiries, ask questions of his own, or offer an apology.[112] In the second stage, the parties negotiate and sign a restitution agreement which compensates the victim for his loss.[113] Besides requiring the offender to make financial reparation, such agreements frequently direct him to perform service for the victim or the community.[114]

Early studies show these mediation programs to be highly successful.[115] For example, at Minneapolis' Center for Victim Offender Mediation, eighty-six percent of victims in the program said meeting their offenders was helpful, while ninety-five percent of the offenders felt better after the mediation.[116] Interestingly, most of the victims — a staggering ninety-two percent — felt that meeting the offender, talking about the crime, expressing their grief and receiving an apology were more important than obtaining monetary compensation.[117]

C. Time for a Change

Given this experience, there is no reason to doubt that such remedies would be equally effective in a civil context. In fact, the civil justice system seems to be a more appropriate forum for this type of restorative paradigm. After all, the civil lawsuit traditionally has been used as the primary means for resolving serious interpersonal disputes. If we are to maintain our current bifurcated system of justice — with one branch of the system, the criminal law, addressing public offenses and the other branch, the civil law, correcting private wrongs

109. *See generally* Mark S. Umbreit, *Crime Victims and Offenders in Mediation: An Emerging Area of Social Work Practice*, 38 SOC. WORK 69-73 (1993).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* Mark S. Umbreit, *Minnesota Mediation Center Produces Positive Results*, CORRECTIONS TODAY, Aug. 1991, at 195 (explaining that "88 percent of [the] victims [surveyed in the Center for Victim Offender Mediation program] were concerned about offenders' needs for counseling and other rehabilitative services").

115. *Id.*

116. *Id.*

117. *Id.* at 194-95.

— then restorative remedies clearly fit more comfortably into the latter category.

In any event, recent anecdotal evidence suggests that civil litigants are eager to accept these more personal, restorative solutions to their transactional conflicts. In California, for example, a basketball fan who was allegedly assaulted and defamed by a coach declared his willingness to discontinue legal action against him if the coach would merely apologize for the incident.[118] Similarly, in Canada, thousands of orphans who supposedly had been abused by several nuns filed a $1.2 billion lawsuit against the Catholic Church for no other reason than the get "someone to say they were sorry."[119] Likewise, in the O.J. Simpson affair, the family of murder victim Ronald Goldman instituted a wrongful death action against Mr. Simpson which, according to Kimberly Goldman (Ronald's sister), "doesn't have anything to do with money."[120] Its true purpose, she explained, is to make Simpson feel at least some measure of the pain presently being endured by her family.[121] Most recently, one of several plaintiffs who recovered a $15.9 million "excessive force" judgment against the Los Angeles County Sheriff's Department, the largest such verdict in the county's history, remarked that "the money is nothing" and that it could never end the nightmares still haunting the victims.[122] Looking forward to the punitive phase of the trial, the plaintiffs' attorney noted that his clients would be happy receiving nothing more than $1 and a written apology from each of the offending deputies.[123]

D. Critic's Corner

Skeptics may question the sincerity of these proclamations. After all, in each case, the plaintiff or plaintiffs have invoked the legal process and have made a request for compensatory and/or punitive damages. Without a claim for punitive relief, it is quite possible that these actions would never have been initiated. Indeed, in cases where the monetary loss of the victim is minimal, a lawyer who accepts a contingency fee will receive little for his efforts unless he is able to win a

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118. Mike Hiserman, *Northridge Staff Member Serves Notice, Asks Boseman to Apologize*, L.A. TIMES, Feb. 25, 1995, at C7.

119. Anne Swardson, *Quebec "Orphans" Charging Abuses; Thousands Declared Retarded By Nuns in Postwar Asylums*, WASH. POST, Apr. 2, 1993, at A1.

120. *Goldman Family Suing Simpson*, BUFF. NEWS, May 6, 1995, at A5. The Goldmans' complaint requests funeral expenses and an unspecified amount of punitive damages.

121. Specifically, Kimberly Goldman opined that, "if we can make [O.J. Simpson] feel a quarter of the pain we feel, it's worth it." *Id.*

122. Bettina Boxall, *Despite Vindication, Pain Lingers*, L.A. TIMES, Aug. 9, 1995, at B1.

123. *Id.* at B2.

substantial award of punitive damages. If this payoff were eliminated, many attorneys would be discouraged from taking cases involving the most serious forms of misconduct; and if this occurred, the skeptics warn, many a deliberate wrongdoer would avoid having to pay any legal penalty.

As unsettling as these contingencies may be, they do not justify retaining the civil remedy of punitive damages. Even if one were to accept the notion that the civil law should be used in conjunction with the criminal law to prosecute law-breakers — a position which now appears outdated — punitive damages are not necessary for this purpose. The reason is that an intentional wrongdoer already may be made to pay more than merely compensatory damages; he may be required to pay the victim's attorney's fees as well.[124] Such a remedy, in fact, serves dual objectives. Besides imposing an extra deterrent sanction on the offender, it gives ample incentive to victims and their attorneys to see that serious wrongs do not go uncorrected.

V. CONCLUSION

In the end, any drawbacks to eliminating punitive damages would be far outweighed by the advantages of adopting the types of personal, restorative remedies mentioned in this Essay. The savings to the judicial system alone would be enormous. Trials could be shortened and needless motions and appeals obviated. In addition, courts no longer would have to justify the lottery-like windfall that punitive damages provide to the luckiest or greediest plaintiffs. The marketplace would benefit as well. Providers of valuable products and services could pursue new technologies without fear of paralyzing or even fatal liabilities. Consumers, in turn, could buy products at affordable prices without paying the hidden tort tax that now accompanies most goods.

But the biggest plus of all would be the new sense of satisfaction that victims of malicious wrongdoing would receive from the civil justice system. By replacing punitive damages with more humanistic remedies like mediation or equitable intervention, those who suffer the horror and degradation of such conduct will at last be able to get what they really seek — not a financial bonanza, but a bit of respect, a touch of compassion, a glimmer of understanding, a degree of control and a liberating sense of closure.

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124. *See* Dobbs, *supra* note 14, at 888-94 (concluding that intentional wrongdoers who are required to shoulder plaintiff's litigation costs would be adequately deterred from repeating the offending behavior).