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Punitive Damages: An Appeal for Deterrence

Nebraska is one of only four jurisdictions where punitive damages¹ in civil suits are not recognized.² It is, however, the only state which finds such damages to be unconstitutional.³ While punitive damages are often criticized⁴ and susceptible to abuse,⁵ this Comment will outline areas in which punitive damages are necessary for the maintenance of order and peace in society. Also a set of guidelines will be developed which best utilize the purposes of punitive damages while at the same time curbing any abuses inherent in such awards.

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1. Punitive or exemplary damages are "awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant." BLACK'S LAW DICTIONARY 352 (rev. 5th ed. 1979).
 2. *Louisiana*: *Boutte v. Hargrove*, 277 So. 2d 757 (La. Ct. App. 1973); *Massachusetts*: *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E.2d 265 (1943); *Nebraska*: *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960); *Washington*: *Maki v. Aluminum Bldg. Prods.*, 73 Wash. 2d 23, 436 P.2d 186 (1968).
 3. *Abel v. Conover*, 170 Neb. 926, 931, 104 N.W.2d 684, 689 (1960), held that punitive damages were violative of the due process clauses of the Nebraska and United States Constitutions when read with article VII, section 5 of the state constitution which requires that all fines and penalties go to the counties for the support of public schools.
 4. See, e.g., Duffy, *Punitive Damages: A Doctrine Which Should be Abolished*, THE CASE AGAINST PUNITIVE DAMAGES 4 (Defense Research Institute Monograph 1969); Ghiardi, *Should Punitive Damages be Abolished?—A Statement for the Affirmative*, 1965 ABA PROCEEDINGS, SECTION OF INS., NEGLIGENCE AND COMPENSATION LAW 282; Long, *Punitive Damages; An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 888-89 (1976).
 5. Juries are generally given little guidance and the award is largely within the discretion of the jury. This makes the award highly susceptible to passion and prejudice. See Duffy, *supra* note 4. Another area of potential abuse is that the defendant is subject to both criminal and civil punishment when punitive damages are allowed. This can lead not only to over punishment of the defendant but also to use of punitive damages for improper reasons. See *infra* notes 71-76 & accompanying text.

I. INTRODUCTION

A. Brief History and Purposes of Punitive Damages

Created in eighteenth century England,⁶ the doctrine of punitive damages was originally used to justify awards for intangible injuries such as pain and suffering, embarrassment, inconvenience, or other damages difficult to quantify.⁷ The expansion of modern tort law and compensatory damages⁸ to cover intangible as well as tangible harms, shifted the theory for punitive damages to punishment and deterrence.⁹ This new justification prompted critics of the doctrine to call for its abandonment on the grounds that "the purpose for which punitive damages were created no longer exists."¹⁰ But legal doctrines frequently serve purposes different from those of their origin. Notably, the fourteenth amendment, which was designed to protect newly freed slaves, has been applied to a variety of substantive areas.¹¹

Modern courts justify punitive damages on three bases: (1) punishment,¹² (2) deterrence,¹³ and (3) as a private aid to courts in enforcing established norms of conduct¹⁴ by compensating for otherwise non-compensable injuries.¹⁵

6. The first punitive damages case was probably *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763) (illegal search and seizure due to blanket warrants issued against printers and publishers).

7. Long, *supra* note 4, at 873. Punitive damages were awarded to pay for any hurt not placated through compensatory damages, such as "indignities associated with seduction, deceit in inducing marriage, alienation of affection, and other improprieties." *Id.*

8. Compensatory damages serve a reparative function by substituting money for the plaintiff's loss. By providing money substitutes, the law of torts preserves economic stability. See Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1173 (1931).

9. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 at 9 (4th ed. 1971). See also *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (damages may be awarded an injured party by way of penalty and punishment); *Polk, Wilson & Co. v. Fancher*, 38 Tenn. 190, 1 Head 336 (1858) ("[T]he damages should be such as not only to remunerate or compensate the plaintiff, but to operate as a punishment of defendant[s], and an example to deter others from like offenses.") *Id.* at 192, 1 Head at 341.

10. Duffy, *supra* note 4, at 8.

11. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 644 (1980). "So long as a doctrine continues to serve a necessary policy goal, the fact that it has diverged from its original function does not provide a basis for abolishing the doctrine. The pertinent question is whether punitive damages continue to serve a rational policy." *Id.*

12. See *infra* notes 16-19 & accompanying text.

13. See *infra* notes 20-21 & accompanying text.

14. See *infra* notes 22-26 & accompanying text.

15. See *infra* notes 22-26 & accompanying text; see also Long, *supra* note 4, at 875-76.

1. *Punishment/Retribution*

While punishment is one of the most frequently posited reasons for punitive damages, punishment, alone, is a weak justification. Arguably, it is irrational to inflict present suffering in order to remedy past injuries which cannot be undone.¹⁶ However, when punishment is used to control future behavior by putting other similarly situated persons on notice that like conduct will result in unpleasant consequences, the usefulness of punitive damages becomes apparent.

Punishment also serves the purpose of satisfying the desire for revenge by society and the aggrieved individual. By gratifying the instinct of vindictiveness, the award serves as an alternative to self-help, maintaining peace and order in society.¹⁷ For example, in *Alcorn v. Mitchell*,¹⁸ the court awarded punitive damages against a defendant who publicly spit in the plaintiff's face. Rationalizing that the small compensatory award would not prevent the plaintiff from seeking revenge, the court said:

The act in question was one of the greatest indignity, highly provocative of retaliation by force, and the law, as far as it may, should afford substantial protection against such outrages, in the way of liberal damages, that the public tranquility may be preserved by saving the necessity of resort to personal violence as the only means of redress.¹⁹

2. *Deterrence*

As previously mentioned, deterrence and punishment are companion policies justifying punitive damages. The need for punitive damages and the effect of deterrence is most acute in the situation where the defendant tacitly determines that he will engage in wrongful conduct with the expectation of greater profits and run the risk of later paying compensation for the conduct. In this situation, the defendant finds it cheaper to pay damages, if necessary, than to proceed lawfully. If the wrongdoer is assessed compensa-

16. While punishment for vindictiveness sake alone serves no objective consistent with the purpose of punitive damages, punishment inflicted for past acts which influence future acts is completely justifiable. Mallor & Roberts, *supra* note 11, at 648.

17. Justice Holmes once noted:

It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance. . . .

. . . .
The statement may be made stronger still, and it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object.

O. HOLMES, *THE COMMON LAW* 40-41 (1881).

18. 63 Ill. 553 (1872).

19. *Id.* at 554.

tory damages, the maximum penalty will merely restore him to the status quo and he is likely to resort to wrongful conduct again. On the other hand, if punitive damages exist, the risk of a substantial penalty may *deter* his wrongful conduct. An illustrative case, *Funk v. Kerbaugh*,²⁰ concerned a defendant who decided it would be "cheaper to pay damages"²¹ for blasting in a manner which destroyed the plaintiff's building, rather than to alter the blasting method.

3. "Private Attorney General"

The control of antisocial conduct is generally vested with the criminal justice system, but all outrageous conduct cannot be punished by government prosecution.²² Does this mean misconduct which is not prosecuted should go unregulated? Reason would suggest otherwise, and many courts have based punitive damage awards on "the promotion of justice where justice otherwise might not be served."²³ Punitive damages give incentive to an individual to serve as a "private attorney general" and bring a wrongdoer to "justice."²⁴ Because all wrongdoing is not subject to criminal sanction, it is important to encourage individual members of society to bring suits and to allow monetary sanctions to be imposed against misconduct. This need is particularly important when the plaintiff's damages are minimal and it would be economically unfeasible to bring suit. For example:

When Y thoughtlessly drives his automobile into a crowded pedestrian area, X is only slightly injured. No one else is hurt. The results could, and normally would, have been tragic. Providentially, they were only trivial in this case. The prospect of punitive damages could induce X to sue Y, who should be held responsible for his dangerous conduct. Without the prospect of punitive damages, X would not be able to collect a large enough judgment to make the suit worthwhile.²⁵

20. 222 Pa. 18, 70 A. 953 (1908) (per curiam).

21. *Id.* at 19, 70 A. at 954.

22. Mallor & Roberts, *supra* note 11, at 649. All anti-social conduct is not classified as criminal conduct and not subject to state prosecution. Also, limits on judicial and prosecutorial resources make enforcement of all criminal laws impossible. See *infra* notes 77-89 & accompanying text.

23. Long, *supra* note 4, at 878.

24. Availability of punitive damages may make it worthwhile for plaintiffs to sue defendants who should be sued but who, in the absence of punitive awards, would not be, because of the trifling nature of the actual damages suffered by the plaintiff. The public interest requires these defendants to be admonished. The prospect of punitive damages encourages the plaintiff to seek the admonishment. This motive for bringing suit is sometimes discussed under the rubric of the "bounty" or the "private attorney general" theory.

Id. (footnotes omitted). See Walker v. Sheldon, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961).

25. Long, *supra* note 4, at 878.

In addition to providing a plaintiff a private punitive remedy, the doctrine encourages individuals to pursue their legal remedies in lieu of private and often violent self-help remedies.²⁶

B. Unconstitutionality in Nebraska

Despite these justifications, Nebraska courts have refused to award punitive damages based upon two sections of the Nebraska Constitution.²⁷ In *Boyer v. Barr*,²⁸ the first Nebraska case to discuss punitive damages, the court held such damages to be so oppressive as to constitute a violation of the due process clause.²⁹

26. See *supra* note 17 & accompanying text.

27. The provisions which Nebraska courts have found to disallow punitive damages are:

Article I, section 3

Sec. 3. Due Process of law. No person shall be deprived of life, liberty, or property, without due process of law.

• • • •

Article VII, section 5

Sec. 5. Fines, penalties, and license money; allocation. *All fines, penalties, and license money, arising under the general laws of the state, except fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways of this state, shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties, and license money arising under the rules, by-laws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, except that all fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways shall be placed as follows: Seventy-five per cent in a fund for state highways, and twenty-five per cent to the county general fund where the fine or penalty is paid.* (Amended, 1956) (emphasis added).

28. 8 Neb. 68 (1878).

29. *Id.* at 72. Included in *Boyer* was the following quotation by Mr. Justice Foster in *Fay v. Parker*, 53 N.H. 342, 397 (1872):

Let the criminal law deal with the criminal, and administer punishment for the legitimate purpose and end of punishment, namely, the reformation of the offender and the safety of the people. Let the individual whose rights are infringed and who has suffered injury go to the civil courts and there obtain full and ample reparation and compensation; but let him not thus obtain the 'fruits' to which he is not entitled and which belong to others. Why longer tolerate a false doctrine which in practical exemplification deprives a defendant of his constitutional right of indictment or complaint on oath, before being called into court—deprives him of the right of meeting the witnesses against him face to face—deprives him of the right of not being compelled to testify against himself—deprives him of the right of being acquitted unless the proof of his offense is established beyond all reasonable doubt—deprives him of the right of not being punished

This line of reasoning continued for many years.³⁰ In addition, there have been slight rumblings that punitive damages are unconstitutional due to article VII, section 5 of the state constitution.³¹ While article VII, section 5 clearly states that all "penalties" are to be given to the school fund, considerable debate has centered on what constitutes a penalty.³² The issue was settled in *Abel v. Conover*,³³ where the court held: "A statute which imposes liability for actual damages and additional liability for the same act provides a penalty."³⁴

In *Abel*, the court found unconstitutional a statute which allowed treble damages against deceitful attorneys. While noting that similar statutes in other jurisdictions had withstood due process scrutiny, the court held that the statute provided for a penalty clearly violative of the due process clause, *when considered in connection with* article VII, section 5.³⁵ The standard used to determine what constitutes a penalty violative of the two sections of the

twice for the same offense? Punitive damages destroy every constitutional safeguard within their reach.

Boyer v. Barr, 8 Neb. at 72.

30. See, e.g., *William Deering & Co. v. Miller*, 33 Neb. 654, 657, 50 N.W. 1056, 1057 (1892); *Boldt v. Budwig*, 19 Neb. 739, 745, 28 N.W. 280, 283 (1886); *Riewe v. McCormick*, 11 Neb. 261, 264-65, 9 N.W. 88, 89 (1881).

31. See *Atchison & Nebraska R.R. v. Baty*, 6 Neb. 37 (1877). After a six page discussion of the due process clause, the court in dicta said:

Again, it seems clear that the statute in question is incompatible with another provision of the constitution. It will not be pretended that the act was intended to define a statutory criminal offense. Still, it is impossible to regard the excess beyond the value of the property in any other light than a penalty, not resting in contract, but a penalty or fine for the purpose of punishment; but this penalty or fine is by the statute given to the party claiming damage for the accidental loss of his property, and hence the act must come in conflict with that provision of the constitution which declares that "all fines and penalties," etc., "shall be appropriated exclusively to the use and support of common schools."

Id. at 45. Article VII, section 5 was placed in the Nebraska Constitution in 1875. Nothing in the history of the adoption of the section suggests that it was meant to limit the state's police power to provide for punitive damages. Vold, *Constitutionality of Statutory Double or Treble Damages Provisions in Nebraska*, 19 NEB. L. BULL. 63, 69 (1940).

32. For a full discussion of penalties, see Vold, *supra* note 31, at 65-82. Basically, two lines of reasoning exist as to the meaning of the term penalty. The Nebraska Constitution does not supply a definition. One interpretation of penalty is found in *Huntington v. Attrill*, 146 U.S. 657, 666-67 (1892), where the term was held to include only such fines or punishments which could be enforced by the state. The other line of reasoning encompasses a much broader range of actions.

33. 170 Neb. 926, 104 N.W.2d 684 (1960).

34. *Id.* at 930, 104 N.W.2d at 688. The court rejected the definition of penalty stated in *Huntington* and adopted the broad definition of penalty.

35. *Id.* at 931, 104 N.W.2d at 689.

constitution appears to be any damages "clearly in excess of compensatory damages."³⁶

Although the case law prior to *Abel* is inconclusive and ambiguous,³⁷ it now appears that the unconstitutionality of punitive damages in Nebraska is firmly ensconced, and nothing short of an overruling of *Abel* or a constitutional amendment will change the state of affairs.

II. PUNITIVE DAMAGES IN OTHER JURISDICTIONS

The United States Supreme Court once said that the doctrine of punitive damages was so well embedded in American law that to question the awarding of punitive damages "will not admit of argument."³⁸ Presently, only Nebraska,³⁹ Massachusetts,⁴⁰ Washington,⁴¹ and Louisiana⁴² refuse to allow punitive damages. Three other states, Connecticut,⁴³ Michigan,⁴⁴ and New Hampshire,⁴⁵ allow punitive damages, but *only* to the extent that they further the compensatory function of damages. In Connecticut punitive damages are to be limited to "the amount of expenses of litigation in the suit, less taxable costs."⁴⁶ Indiana has taken a different approach by allowing punitive damages, but only to the extent that such conduct is not punishable as a crime.⁴⁷ If the conduct is crim-

36. *Id.*

37. One commentator, after reviewing all Nebraska decisions from 1877-1919, said:

The Nebraska common law cases on exemplary damages nowhere depend upon or cite for support the school fund section of the Constitution. The judicial language from *Boyer v. Barr* seems clear, however, that the idea in mind in that case was that provisions for exemplary damages involved penalties so oppressive as to constitute violation of the due process clause of the Constitution.

Vold, *supra* note 31, at 84.

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

39. *See, e.g.*, *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960).

40. *See, e.g.*, *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 269, 47 N.E.2d 265, 272 (1943) (exemplary damages not allowed unless authorized by statute).

41. *See, e.g.*, *Maki v. Aluminum Bldg. Prods.*, 73 Wash. 2d 23, 25, 436 P.2d 186, 187 (1968) (doctrine of punitive damages is unsound in principle and such damages will not be allowed absent statutory authorization).

42. *See, e.g.*, *Boutte v. Hargrove*, 277 So. 2d 757, 760 (La. Ct. App. 1973), *mod.*, 290 So. 2d 319 (1974) (punitive damages are not recognized under civil law without a statute).

43. *See, e.g.*, *LeBlanc v. Spector*, 378 F. Supp. 301, 305-06 (D. Conn. 1973).

44. *See, e.g.*, *Wise v. Daniel*, 221 Mich. 229, 233, 190 N.W. 746, 747 (1922).

45. *See, e.g.*, *Bixby v. Dunlap*, 56 N.H. 456, 464-65 (1876).

46. *LeBlanc v. Spector*, 378 F. Supp. 301, 305 (D. Conn. 1973).

47. *Moore v. Waitt*, 157 Ind. App. 1, 8, 298 N.E.2d 456, 460 (1973); *see also Aldridge, The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123, 123 (1945).

inal, punitive damages will not be awarded, even if the crime has not been prosecuted.

A. Standard of Culpability Necessary to Trigger Punitive Damages

Punitive damages are not awarded as a matter of right in any state.⁴⁸ A sufficient standard of culpability must be met prior to receiving a jury instruction for punitive damages. The culpability standard is based on an individual's mental state and not on his outward conduct. However, the standard varies from state to state so that "almost any term that describes misconduct coupled with a bad state of mind will describe the case for a punitive award."⁴⁹ In

48. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9 at 204 (1973).

If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award. It is, of course, for the court to say whether the plaintiff has sufficient proof of aggravated misconduct to warrant leaving the issue to the jury.

Id. at 204-05 (footnotes omitted).

49. *Id.* at 205 (footnote omitted). Illustrative of the variety of standards are quotes from several court opinions:

Arizona: Punitive damages are allowed "for gross, wanton, and culpable negligence." *Ross v. Clark*, 35 *Ariz.* 60, 68, 274 P. 639, 642 (1929).

Arkansas: "[N]egligence alone, however gross, is not sufficient, and that there must be an added element of intentional wrong, or, what is its equivalent, conscious indifference in the face of discovered peril, from which malice may be inferred." *St. Louis S.W. Ry. v. Evans*, 104 *Ark.* 89, 93, 148 S.W. 264, 265 (1912) (quoting *St. Louis Iron Mountain & S. Ry. v. Dysart*, 89 *Ark.* 261, 268, 116 S.W. 224, 226 (1909)).

Idaho: "[T]hey [exemplary or punitive damages] cannot be recovered unless the evidence shows clearly that the action of the wrongdoer is wanton, malicious, or gross and outrageous, or where the facts are such as to imply malice and oppression . . ." *Harrington v. Hadden*, 69 *Idaho* 22, 24-25, 202 P.2d 236, 237 (1949) (quoting *Unfried v. Libert*, 20 *Idaho* 708, 728, 119 P. 885, 891 (1911)).

Illinois: "[Punitive damages] are allowed . . . where a wrongful act is characterized by circumstances of aggravation, such as willfulness, wantonness, malice, or oppression . . ." *Eshelman v. Rawalt*, 298 *Ill.* 192, 196-97, 131 N.E. 675, 677 (1921).

Iowa: "[P]unitive damages are not allowed as a matter of right. . . . When malice is shown or when a defendant acted with wanton and reckless disregard of the rights of others, punitive damages may be allowed as punishment to the defendant and as a deterrent to others." *Katko v. Briney*, 183 N.W.2d 657, 662 (Iowa 1971).

Missouri: "[W]antonness and recklessness" furnishes a basis for punitive awards. *Jennings v. Cooper*, 230 S.W. 325, 328 (Mo. Ct. App. 1921).

Pennsylvania: "Punitive damages will be allowed for torts that are committed wilfully, maliciously, or so carelessly as to indicate wanton disregard of the rights of the party injured." *Thompson v. Swank*, 317 *Pa.* 158, 159, 176 A. 211, 211 (1934).

South Carolina: The jury does not merely have an option but a duty to award punitive damages "when under proper allegations a plaintiff

addition, anything which negates a bad intent precludes punitive damages.⁵⁰ The vague and conflicting interpretations of the various state standards led one commentator to generalize "that virtually any punitive damages guidelines can be construed to fit the pleasure of the judges and the juries called upon to administer the justice."⁵¹

State standards are both judicially and statutorily created and span "an astounding range of conduct from 'oppression, fraud, or malice' on the one extreme to 'rudeness' or 'mere caprice' on the other."⁵² Statutes generally require a showing of wanton, willful, or intentional conduct to support a punitive award, but some states allow punitive damages when gross negligence is established.⁵³ Punitive damages for gross negligence are generally allowed only when conduct is so extreme as to evince a conscious or criminal indifference to the safety or rights of others.⁵⁴ One commentator has suggested that punitive damages for gross negligence be as-

proves a willful, wanton, reckless, or malicious violation of his rights." *Sample v. Goff* Ref. Co., 183 S.C. 399, 410, 191 S.E. 209, 214 (1937).

Long, *supra* note 4, at 880.

50. See D. DOBBS, *supra* note 48, § 3.9 at 205.

51. Long, *supra* note 4, at 881.

52. *Id.* Illustrative of state statutes are the following:

California:

CAL. CIV. CODE § 3294 (West Supp. 1982)

(a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Colorado:

COLO. REV. STAT. § 13-21-102 (1973):

In all civil actions in which damages are assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages.

53. See, e.g., *Louisville & N. R.R. v. Hall*, 87 Ala. 708, 723, 6 So. 277, 283-84 (1889); *American Fidelity and Cas. Co. v. Farmer*, 77 Ga. App. 166, 178, 48 S.E.2d 122, 132 (1948); *Clanton v. Chrisman*, 174 Okla. 425, 427, 51 P.2d 748, 750 (1935); *Goff v. Lubbock Bldg. Prods.*, 267 S.W.2d 201, 206 (Tex. Civ. App. 1953).

54. D. DOBBS, *supra* note 48, at 206. Such extreme conduct is necessary so as to continue the deterrence function of punitive damages. Without evidence of a conscious disregard for another's rights, no deterrence value would exist, and the only function punitive damages would serve would be that of retribution. For a good discussion of the punishment value of punitive damages, see Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. Rev. 1158, 1164-65 (1966) [hereinafter cited as *Reappraisal*].

essed only if the following question is answered affirmatively: "[D]id the defendant know that he was taking a great risk involving the rights of others?"⁵⁵

Illustrative of the culpability necessary under most gross negligence standards is *Claunch v. Bennett*.⁵⁶ In *Claunch*, the defendant encouraged a friend to drag race with him on a busy city street. The plaintiff sued for injuries caused when an accident resulted. Although there was no proof that the defendant desired to cause harm to others, the fact that he knowingly created such a great risk of injury was enough to subject him to punitive damages. The use of an objective standard in *Claunch* made effective deterrence possible. If instead, the standard of gross negligence had required proof that the defendant tacitly decided to take a risk not knowing that a penalty could be imposed, then retribution and not deterrence would have been the sole function of a punitive damage award.⁵⁷

B. Extent of Liability

Unlike criminal statutes, standards for punitive damages do not provide gradations of punishment for various offenses. While a judge may instruct the jury about the weight to be given to a defendant's level of culpability,⁵⁸ there are no statutorily or judicially defined maximum or minimum limits to punitive awards. This open-endedness and broad jury discretion are the major arguments against punitive damages.⁵⁹ Juries are generally asked to render a verdict on the basis of four factors: (1) the grievousness of the act,⁶⁰ (2) the degree of culpability,⁶¹ (3) the potential for damage,⁶² and (4) the wealth of the defendant.⁶³ The admissibility of the wealth of the defendant has caused considerable debate,⁶⁴

55. *Id.* at 1165.

56. 395 S.W.2d 719 (Tex. Civ. App. 1965).

57. *See Reappraisal*, *supra* note 54, at 1165.

58. Evidence of reckless rather than intentional conduct can and should be presented to the jury in order to mitigate the punitive damages award.

59. *See Ghiardi*, *supra* note 4, at 284-85; *Long*, *supra* note 4, at 888-89.

60. Both *actual* and *threatened* harm should be considered in assessing punitive damages. Just because the consequences of the act were small is no reason to let defendant off the hook when he was lucky that harm was not as great as he intended. *Mallor & Roberts*, *supra* note 11, at 667.

61. The more flagrant the conduct the greater the need for deterrence. Focus must be placed on the duration of the misconduct, the degree of the defendant's awareness of the hazard, and any concealment of the hazard. *Mallor & Roberts*, *supra* note 11, at 667.

62. This focus will allow greater deterrence.

63. *See, e.g.*, *Malco, Inc. v. Midwest Aluminum Sales, Inc.*, 14 Wis. 2d 57, 66, 109 N.W.2d 516, 521 (1961). *See also*, *D. DOBBS*, *supra* note 48, at 206.

64. One commentator noted:

but it is necessary in order to provide for meaningful deterrence. For example, a uniform penalty levied for a specified act would trigger different levels of deterrence. A one thousand dollar award might greatly deter a poor defendant, but barely concern a wealthy defendant. While the admissibility of the defendant's wealth is essential to effectuate the deterrent purpose of punitive damages, it is also necessary to *protect* the defendant from being rendered destitute.⁶⁵

Critics have assailed punitive damages as leading to excessive jury verdicts. Although possibly true, the argument ignores the existence of judicial review.⁶⁶ Most jurisdictions recognize remittitur which allows the plaintiff to choose either a new trial or a lesser damage award set by the judge.⁶⁷ If punitive damages are available, the judge could review the evidence and determine if the jury verdict was a product of prejudice or passion. If punitive damages are not available, the jury may award "punitive-like" damages in the name of pain and suffering (or some other recognized compensatory damage), and the court would be less likely to curb jury abuse. For example, a Wisconsin case was tried three times before different juries, twice with, and once without a punitive damage award. Each jury granted the same total award.⁶⁸ Thus, it seems

[I]t is probable that this very evidence, instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment, not only on the size of the verdict, but in deciding who shall win the case. It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare.

Morris, *supra* note 8, at 1191. Although a clear majority of states allow the admission of financial status, several courts still refuse such evidence. See, e.g., Hensley v. Paul Miller Ford, Inc., 508 S.W.2d 759, 764 (Ky. 1974).

65. See, e.g., Holmes v. Hollingsworth, 234 Ark. 347, 353, 352 S.W.2d 96, 100 (1961); Miller v. Schnitzer, 78 Nev. 301, 310-11, 371 P.2d 824, 829-30 (1962). It is generally held that a punitive damage award will not be allowed to the extent that it would bankrupt a defendant. Although the award should be large enough to punish and deter future conduct, it should not deprive defendant of all his assets.

66. The remedy for jury abuse in punitive damage awards is, just like the remedy for excessive mental anguish or other less than objective jury awards, judicial supervision and award reduction. Cf. Walton v. Bennett, 376 P.2d 240 (Okla. 1962) (court affirmed the damage award after examining the record). For an excellent discussion of remittiturs and additurs, see Carlin, *Remittiturs and Additurs*, 49 W. VA. L. Q. 1 (1942).

67. *Reappraisal*, *supra* note 54, at 1171.

68. See Bass v. Chicago & N.W. Ry., 36 Wis. 450 (1874) (jury awarded \$4,500 in punitive and compensatory damages); 39 Wis. 636 (1876) (jury awarded \$4,500 in compensatory damages); 42 Wis. 654 (1877) (jury awarded \$2,500 in compensatory damages and \$2,000 in punitive damages).

Suggesting the difficulty of isolating punitive from compensatory damages, one commentator said: "[T]he theory of punitive damages (without the name) is built into the average juror's value system; the latitude permitted in

that punitive damages should be forthrightly allowed, leaving to a reviewing court the opportunity to lessen those punitive damage awards which are abusive and inconsistent with the facts.

III. ROLE OF PUNITIVE DAMAGES: WHEN IMPOSITION WILL BEST SERVE THEIR PURPOSE

Obviously, punitive damages should only be assessed when, and if, the purposes for which they were intended will be effectuated.⁶⁹ Some of those purposes are identical to the functions served by the criminal justice system.⁷⁰ The focus of this Comment now turns to when punitive damages can be imposed not only to meet their purposes, but also to fill any gaps left open by the criminal law.

A. Conduct Generally Prosecuted as a Crime

Punitive damages are arguably not warranted where the tortious conduct also constitutes a crime which is ordinarily prosecuted. This is because the purposes for which punitive damages are assessed would not be achieved.⁷¹ First, because of the criminal prosecution, there is no need to provide incentives for private actions.⁷² Second, and more importantly, the deterrent aspect of punitive damages is far overshadowed by the deterrent effects of a criminal sanction.⁷³ One commentator said: "[N]o matter how mild the criminal sanction, the possibility of confinement or the

calculating personal injury award[s] is so wide that proof of defendant's outrage will enhance some verdicts without express instruction allowing punitive damages." Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 226 (1960).

69. See *infra* notes 71-89 & accompanying text.

70. Both punitive damage sanctions and criminal sanctions serve three functions: (1) retribution—an expression of society's reprehension for certain conduct, (2) general deterrence—deters others in society from acting similarly, and (3) special deterrence—deters an individual defendant from repeating his conduct. The criminal system provides two functions not served through punitive damages: (1) neutralization—isolates individuals from society, and (2) rehabilitation. *Reappraisal*, *supra* note 54, at 1161.

71. When conduct is generally prosecuted as a crime, the criminal sanction serves all the functions of punitive damages and renders such punitive sanctions duplicative and unnecessary. *Reappraisal*, *supra* note 54, at 1173-75.

72. *Id.*

73. *Reappraisal*, *supra* note 54, at 1173-75.

The policy attack on punitive damages is most persuasive when the conduct for which punitive damages are imposed is also punishable as a crime. If a defendant has violated a criminal statute, he or she stands to lose liberty or property in addition to suffering the stigma of criminal conviction. The argument against the imposition of punitive damages in such cases is that society's interest in punishing the wrongdoer is served adequately by the criminal system, and

stigma of a criminal record are greater deterrents to wrongful conduct than the mere imposition of monetary sanctions.⁷⁴ If deterrence⁷⁵ and private litigation are rendered inconsequential, the remaining motive for awarding punitive damages is compensation. If full compensation is the desired result, then statutes which specifically provide for recovery of attorneys' fees are preferable to punitive damage awards.⁷⁶

B. Conduct which is Criminal, but Rarely Prosecuted

This is the situation in which the need for punitive damages is most acute. Limited judicial and prosecutorial resources substantially restrict the number of crimes prosecuted. Consequently, criminal conduct goes unpunished and similar future conduct is not deterred.⁷⁷ Individuals can, however, significantly regulate misconduct when punitive damages encourage private lawsuits to redress wrongs.⁷⁸ This is particularly true of rarely prosecuted technical violations of the law such as libel and slander, trespass, and technical batteries.⁷⁹ In these instances punitive damages serve as a substitute for the criminal law and avoid duplication.⁸⁰

The deterrent value of punitive damages is greatest in affecting commercial behavior.⁸¹ The assessment of compensatory dam-

the imposition of punitive damages would work an unjustifiable double punishment.

Mallor & Roberts, *supra* note 11, at 655 (footnote omitted).

74. *Reappraisal*, *supra* note 54, at 1173. An additional stigma imposed by the criminal law is that a criminal record is admissible in a subsequent criminal proceeding, while the past imposition of punitive damages is not admissible in subsequent civil proceedings. *Id.* at 1174.
75. But note, it has been shown that punitive damages in the ordinarily criminally prosecuted area are still greater deterrents to the very wealthy defendant who would be only slightly deterred if sanctioned with a criminal fine. *Curtis Publishing Co. v. Butts*, 351 F.2d 702, 719 n.47 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967).
76. *See generally*, D. DOBBS, *supra* note 48, at 194, for situations in which several jurisdictions have provided for the recovery of attorneys' fees.
77. This group of cases also includes conduct which is not prosecuted because it no longer reflects the moral views of society, for example, adultery. *Reappraisal*, *supra* note 54, at 1167.
78. *See supra* notes 22-26 & accompanying text.
79. *See Reappraisal*, *supra* note 54, at 1175.
80. *Id.* at 1175-76. One commentator noted: "Penalties fixed—at least as to maximum and minimum—in advance by a legislature which does not have the particular culprit in mind may not make for effective punishment in particular cases." Morris, *supra* note 8, at 1196.
81. This is readily apparent by noting the number of federal statutes which provide multiple civil penalties in addition to criminal sanctions. *See, e.g.*, 15 U.S.C. § 15 (Supp. IV 1980) (treble damages for private person injured by violation of antitrust laws); 15 U.S.C. § 72 (1976) (treble damages for private person injured by unfair competition in importing trade); 18 U.S.C. § 2520 (1976)

ages, alone, will, at a minimum, leave the wrongdoer at the status quo and could even leave him with a profit. In the absence of punitive damages it is often cheaper to take the risk of becoming liable for compensatory damages, than to proceed in the lawful way.⁸² This was the situation in *Funk v. Kerbaugh*⁸³ where the defendant persisted in recklessly blasting near the plaintiff's property knowing it would cause damage. The court found that modified blasting could have been equally effective without destroying the plaintiff's property, but the defendants believed "it cheaper to pay damages for the injury they might cause than to do the work in a different way."⁸⁴

Similarly, plea bargaining, suspension of sentences, pardons, immunity, and parole further erode deterrence in the criminal law. Supplementing the criminal law with punitive damages in areas where the deterrence level is low will assure that individuals will be less likely to freely take risks which will potentially harm others, because it will no longer be economically feasible. In addition, punitive sanctions, unlike criminal fines,⁸⁵ can be tailored to a particular defendant to maximize the deterrent effect.⁸⁶ Punitive damages, therefore, serve a useful function in the criminal conduct

(authorizes punitive damages in an unlimited amount for person injured by wire interception); 29 U.S.C. § 216(b) (Supp. I 1977) (discretionary award of up to two times actual damages for violation of minimum wage and overtime pay provisions of Fair Labor Standards Act); 42 U.S.C. § 3612(b)-(c) (1976) (authorizes up to \$1,000 punitive damages for private person enforcing fair housing laws).

82. One author commenting on the securities laws said:

The sheer size of purely compensatory recoveries may also have a significant deterrent effect. This contention, however, ignores one of the goals of punitive damages in such cases. If recovery is limited to plaintiff's actual damages, even if profits made by defendant at plaintiff's expenses are included, it still may be profitable for defendant to violate the law, since there is little chance of being discovered in every fraudulent act.

Comment, *Fashioning A Lid for Pandora's Box: A Legitimate Role for Rule 10b-5 in Private Actions Against Insider Trading on a National Stock Exchange*, 16 U.C.L.A. L. Rev. 404, 411 (1969).

83. 222 Pa. 18, 70 A. 953 (1908) (per curiam).

84. *Id.* at 19, 70 A. at 954. For other cases in the same class, see Morris, *supra* note 8, at 1185-88.

85. For due process reasons, criminal fines must be set in advance by the legislature and as such cannot be tailored to the individual defendant in order to maximize the deterrent effect. Mallor & Roberts, *supra* note 11, at 657.

86. Noting this flexibility, one commentator said:

So the punitive damage device as now used provides for almost unlimited individualization of treatment of defendants. The only limitations are that the burden of the defendant's admonition must be confined to a money judgment and the jury's determination is subject to the veto of trial and appellate judges.

Morris, *supra* note 8, at 1189.

area. To dispose of their availability *merely* because a criminal law *exists*⁸⁷ is to remove an effective method for deterring outrageous conduct.

In summary, a middle position should be taken: Punitive damages should not be awarded where the criminal system fulfills its role, but should be allowed when they become the only effective method of regulation.⁸⁸ One commentator found the following to be a reasonable approach to imposing punitive damages for criminal conduct:

What is needed in such cases is not a wholesale ban on punitive damages, but rather a system of getting more information to the trial judge. The judge should have access to information concerning criminal prosecutions of the defendant to make an informed decision about the propriety of a punitive damages instruction. If prosecution has been instituted for an offense that carries a serious penalty, the judge properly could decline the instruction. If, however, criminal prosecution has not been instituted against the defendant, or if prosecution *has* been instituted but the maximum penalty is unduly slight in relation to the seriousness of the defendant's conduct and ability to pay, punitive damages may be appropriate.⁸⁹

C. Non-criminal Conduct

In the absence of criminal sanctions, punishment through civil litigation is likely to be the only effective means of regulating and deterring undesirable conduct. Most of these cases involve tortious conduct. Again, an award of punitive damages promotes private lawsuits, deters self-help, and "enable[s] society to regulate effectively undesirable conduct that it chooses not to punish by criminal sanctions."⁹⁰ Since there is no overlap in the functions of punitive damages and the criminal law, punitive damages are effective in these cases because all of the purposes of the award are fulfilled.

IV. APPLICATION OF PUNITIVE DAMAGES

Blanket imposition of punitive damages can be, and usually is, as abusive as not allowing for such damages at all. Therefore, it is necessary to define the limits of punitive damages and find a workable approach for their imposition. Other jurisdictions have delineated five major limitations on punitive damage awards which will be discussed and analyzed below.

87. See *supra* note 47 & accompanying text.

88. Mallor & Roberts, *supra* note 11, at 658.

89. *Id.* (footnotes omitted).

90. *Reappraisal*, *supra* note 54, at 1162 (footnote omitted).

A. Vicarious Liability

Presently, punitive damages are intended to serve two major functions: (1) punishment of the wrongdoer, and (2) deterrence of similar conduct. This sub-section will analyze how and whether these purposes are served when punitive damages are imposed upon someone other than the wrongdoer. The issue is whether the employer should be held vicariously liable for the culpable acts of his employee. The majority of courts passing on the issue have held that the principal is strictly liable for the acts of his agent.⁹¹ The rationale is that vicarious liability is in the public interest because it induces employers to exercise greater care in the selection and supervision of employees.⁹²

Two other theories have been advanced for the imposition of punitive damages in this context. First, the "entrepreneur" theory⁹³ suggests that vicarious liability is a social insurance device. According to the "entrepreneur" theory, the employee is probably not able to compensate the plaintiff, so without other recourse the plaintiff remains uncompensated for the loss. But, if the employer is held liable, he can spread the loss through the business and insure against such losses. Therefore, losses are spread and do not fall upon the victim.⁹⁴ The theory rests on the assumption that the employer is in a better position to spread the loss. This is probably correct, yet it also limits the usefulness of the entrepreneur theory as a basis for imposing punitive damages. The entrepreneur theory shifts risks, but this concerns only the reparative (compensatory) function of torts, and not the punitive function.⁹⁵ Punitive damages are only to be imposed on the sufficiently culpable actor in order to punish and deter. If the principal is responsible for the wrongdoing, the functions of punitive damages are served, but if the principal is wholly innocent of any wrongdoing, the only purpose for which punitive damages can be imposed is compensatory.⁹⁶ Since the compensatory function of damages is served

91. See, e.g., *Western Coach Corp. v. Vaughn*, 9 Ariz. App. 336, 338, 452 P.2d 117, 119 (1969); *Goddard v. Grand Trunk Ry. of Can.*, 57 Me. 202, 224 (1869) (leading case); *Taxicab Drivers' Local Union No. 889 v. Pittman*, 322 P.2d 159, 168 (Okla. 1957).

92. See *Goddard v. Grand Trunk Ry. of Can.*, 57 Me. 202, 224 (1869).

93. For an excellent discussion of the entrepreneur theory, see Smith, *Frolic and Detour* (pts. 1 & 2), 23 COLUM. L. REV. 444, 716 (1923); Douglas, *Vicarious Liability and Administration of Risk* (pts. 1 & 2), 38 YALE L.J. 584, 720 (1929).

94. Morris, *supra* note 8, at 1199.

95. *Id.* at 2000. "The operation of the doctrine of punitive damages gives the plaintiff an undeserved windfall that has nothing to do with the reparative function, which is duly served (at least in theory) by the allowance of compensatory damages." *Id.*

96. This would allow plaintiff double compensation because he is already entitled to any compensatory damages which he can prove.

without the need for punitive damages, sufficient justification for the imposition of punitive damages upon an innocent principal is not apparent.⁹⁷

The second theory upon which punitive damages are allowed without proof of the principal's liability, is the "extra-legal punishment" theory.⁹⁸ This approach suggests that the admonitory function of punitive damages would be served in the following way: The master is forced to pay for the wrongdoing of the servant, but the servant is punished by the master through discharge, refusal to issue letters of recommendation, denial of advancement, or other effective admonition.⁹⁹ If punitive damages will encourage employers to exercise closer control over their servants, there might be sufficient ground for awarding them in the vicarious liability situation. But, it has been frequently noted, that vicarious liability does little to induce employers to better supervise, train, or punish their employees.¹⁰⁰ Therefore, the strict imposition of punitive damages under respondeat superior should be rejected because

97. It has been said that: "Compensatory liability without fault is warranted primarily because of its effect on the specific victim—it is the most equitable means of assuring adequate compensation—and only incidentally because of its deterrent effect upon the tortfeasor." Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1297, 1304 (1961) (footnotes omitted) [hereinafter cited as *Entrepreneur*]. The author continues by saying that the only justification for punitive damages is the *effect on future conduct*, never for the specific effect on the victim because he has already been fully compensated. *Id.* at 1304.

98. See Morris, *supra* note 8, at 1202-03.

99. This theory has been criticized as ineffective:

The same fact—the servant's financial irresponsibility—which defeats the operation of the reparative function if the injured person is confined to an action against the servant, also makes it impossible to admonish the servant as a tort defendant. So, unless the servant has committed a crime—which is not often the case—it is impossible to do anything to him in a law court which will discourage such wrongs.

Morris, *supra* note 8, at 1202.

100. See, e.g., *Entrepreneur*, *supra* note 97, at 1304.

The likelihood of effective prevention is difficult to ascertain. A more careful hiring program may weed out some potential miscreants but certainly not all, given the present state of psychological knowledge and testing. Neither will any amount of warnings and sanctions guarantee complete success, for there may always be some individuals upon whom such measures will have scant effect. Indeed, an authoritarian atmosphere may nurture the very type of behavior it seeks to prevent.

Id. See also *Goddard v. Grand Trunk Ry. of Can.*, 57 Me. 202, 266-67 (1869) (dissent):

[H]ow shall the corporation avoid the constant recurrence of penalties for the offenses of others? Can they, when they select another servant, exercise any more care or be more watchful over him? Can they change the passions of men? What is their fault if they have

the purposes for punitive damages are not served and "the loss will fall either upon the public, as where the employer is capable of passing it on by price increases, or upon shareholders, who are completely innocent and who usually get nothing from the malicious tort of the subordinate employee."¹⁰¹

A minority of courts, following the *Restatement of Torts*,¹⁰² hold the principal not liable for the acts of his agent unless he has participated in or ratified the agent's conduct.¹⁰³ The leading case em-

exercised all the care, wisdom, and prudence with which men are invested? Must they be punished for not being omnipotent?

.

If the punishment, thus inflicted, is to serve as a warning to others, who must take warning? Evidently the innocent as well as the guilty. The innocent are to be the greatest sufferers by reason of the offense, and punished alone directly. It is to serve as a warning to all innocent persons, that they may be punished for the offenses of others, after having fully compensated the injury done.

Id.

101. D. DOBBS, *supra* note 48, at 214.

102. RESTATEMENT (SECOND) OF TORTS § 909 (1979):

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal or a managerial agent authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal or a managerial agent was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a manager agent of the principal ratified or approved the act.

103. States following this rule include: *California*, *McInerney v. United R.R. of S.F.*, 50 Cal. App. 538, 549, 195 P. 958, 962 (1920); *Connecticut*, *Maisenbacker v. Society Concordia*, 71 Conn. 369, 379-80, 42 A. 67, 70 (1899); *District of Columbia*, *De Foe v. Potomac Elec. Power Co.*, 123 A.2d 920, 923 (D.C. 1956); *Idaho*, *Curtis v. Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 305, 194 P.2d 281, 293 (1948); *New Jersey*, *Kelleher v. Detroit Motors*, 52 N.J. Super. 247, 252, 145 A.2d 335, 338 (App. Div. 1958); *New York*, *Kutner v. Fargo*, 20 Misc. 207, 208, 45 N.Y.S. 753, 753 (Sup. Ct. 1897), *aff'd*, 34 A.D. 317, 54 N.Y.S. 332 (1898); *North Dakota*, *Rickbeil v. Grafton Deaconess Hosp.*, 74 N.D. 525, 550, 23 N.W.2d 247, 260 (1946); *Ohio*, *Curry v. Big Bears Store*, 142 N.E.2d 684, 685 (1956); *Oregon*, *Fuller v. Blanc*, 160 Or. 50, 58, 83 P.2d 434, 435 (1938); *Gill v. Selling*, 125 Or. 587, 593, 267 P. 812, 814-15 (1928) (dictum), *aff'd on rehearing*, 126 Or. 584, 270 P. 411 (1928); *Rhode Island*, *Hagan v. Providence & W. R.R.*, 3 R.I. 88, 89-91 (1854); *South Carolina*, *Turman v. Seaboard Air Line Ry.*, 105 S.C. 287, 289, 89 S.E. 655, 656 (1916); *Texas*, *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 144, 70 S.W.2d 397, 408 (1934); *Vermont*, *Sparrow v. Vermont Sav. Bank*, 95 Vt. 29, 32, 112 A. 205, 206 (1921); *Virginia*, *Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 309, 49 S.E.2d 363, 368 (1948).

The application of this position is illustrated by the following examples taken from the Comment to RESTATEMENT OF TORTS § 909 (1939):

Illustrations:

1. A employs an ejection company to dispossess a tenant. A knows that the company has a reputation for using undue force in

ploying this rationale is *Lake Shore & Michigan Southern Railway Co. v. Prentice*.¹⁰⁴ The case held:

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent.¹⁰⁵

In *Lake Shore*, the railroad company was found not liable for punitive damages for the illegal, wanton, and oppressive arrest of a passenger by a conductor on one of the company's trains.¹⁰⁶ The court found no policy reason which supported the imposition of damages beyond that which would fully compensate the plaintiff.

The policy basis for imposing punitive damages where the employer ratifies the employee's conduct is understandable. For example, in *Cashin v. Northern Pacific Railway*,¹⁰⁷ employees of the railroad used dynamite blasts to aid their work, threatening a farm family's lives and damaging the family's property. The railroad ratified the employee's acts for three consecutive years by paying damages. The fourth year a heavier charge was used which inflicted personal injury as well as property damage. The court allowed punitive damages against the railroad for the acts of its employees. The imposition of punitive damages in this instance serves to warn employers that it will no longer be cheaper to risk lives and pay damages, thereby providing an impetus for more prudent future conduct.

dealing with tenants. An employee of the company, in accordance with its usual methods, commits an unprovoked battery upon B, the wife of the tenant, in order to induce her to leave. In an [action] by B against A, punitive damages can properly be awarded.

2. A, the owner of a theatre, employs a special policeman to keep order. In ejecting a small boy from the theatre, the policeman cruelly abuses him. Upon learning the facts, A expresses his approval. Punitive damages can properly be awarded against A in an action for the battery.

3. A, a corporation owning a series of retail stores, employs B as operations manager to supervise the management of the units. While visiting a unit B discovers facts which lead him to believe erroneously that one of the clerks has been stealing. He directs the local manager to imprison the clerk. In the ensuing interview he permits the local manager to use outrageous means of intimidation. In the clerk's action against the corporation, punitive damages can properly be awarded.

RESTATEMENT OF TORTS § 909 comment b, illustration 1-3 (1939).

104. 147 U.S. 101 (1893).

105. *Id.* at 107.

106. *Id.* at 116.

107. 96 Mont. 92, 28 P.2d 862 (1934).

The *Restatement of Torts* takes the preferred position by absolving employers from liability for punitive damages when a properly supervised and trained employee acts outrageously and allows punitive damages against employers who have participated to some extent in the wrongdoing. Such a rule promotes the purposes of punishment and deterrence by imposing punitive damages only upon those guilty of misconduct. Nevertheless, this rule is criticized because a large damage award against an employer/corporation results in increased costs to the public and punishment of innocent shareholders.¹⁰⁸ While this argument may have some merit in cases in which the shareholders are innocent of any wrongdoing, the question may be asked as to whether the shareholders should share in the responsibility for punitive damages when they have been reaping the benefits of an employee's culpable conduct through increased profits. For example, in *Toole v. Richardson-Merrell, Inc.*,¹⁰⁹ corporate employees covered up reports and fictionalized data in order to receive FDA approval for a new drug, MER/29, which purportedly inhibited cholesterol production in the blood. After harmful side effects from the drug's use began to appear, the corporation continued to deny a possible flaw in the drug. Over 5,000 people were injured. The court awarded \$250,000¹¹⁰ in punitive damages finding that the defendant corporation had acted recklessly and in wanton disregard of possible harm to others by marketing MER/29 even though it had knowledge of the drug's harmful side effects.¹¹¹ The company had grossed \$7,000,000 from the sale of MER/29 in the first year.¹¹² With sales ratios like those in *Toole*, punitive damages may be the best means available to deter corporations from risking lives by recklessly marketing known harmful products. If it is cheaper to pay compensatory damages than to lose sales or create a safe product,

108. Critics of vicarious liability in *any* situation point to the fact that even though the corporate officers, etc., may have ratified the agent's wrongdoing, the eventual losers are the innocent shareholders and "in the vast majority of cases, they do not benefit from the malicious tort." *Entrepreneur, supra* note 97, at 1307. The argument continues that since the shareholders wield very limited power over corporate management, the effect of the punitive damage award is purely compensatory to the plaintiff and not a deterrence to either the culpable corporation or the innocent shareholders. *Id.*

One solution to the problem would be to impose personal liability on the individuals who in fact authorized and executed the malicious conduct. *Id.* at 1309.

109. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

110. The jury award of \$500,000 in punitive damages was reduced by consent to \$250,000. *Id.* at 693-94, 60 Cal. Rptr. at 403.

111. *Id.* at 713-15, 60 Cal. Rptr. at 415-16. For a discussion of punitive damages concerning the MER/29 cases, see Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 134-37 (1968).

112. 251 Cal. App. 2d at 701, 60 Cal. Rptr. at 408.

what incentive is there for a company, like Richardson-Merrill, Inc., to proceed in an honest, safe manner?

B. Insurability of Punitive Damages

Related to vicarious liability is whether punitive damages should be an insurable risk.¹¹³ The issue is twofold: (1) contract interpretation, and (2) public policy. The focus here will be on whether the insurability of punitive damages violates public policy. In *Northwestern National Casualty Co. v. McNulty*¹¹⁴ the court held that such insurance was against public policy. The court concluded that to allow insurance for punitive damages would frustrate the purposes of punitive damages, and would punish society for the wrongs of the insured by passing the loss on to premium payers.¹¹⁵ If insurance was allowed, "society would then be punishing itself for the wrong committed by the insured."¹¹⁶ Public policy reasons mandate that "the delinquent driver must not be allowed to receive a windfall at the expense of the purchasers of insurance, transferring his responsibility for punitive damages to the very people—the driving public—to whom he is a menace."¹¹⁷ As one commentator reasoned, punitive damage insurance undermines the policies behind the award because "[i]nsurance coverage leaves the defendant unscathed, imposes the loss on innocent policyholders, and accomplishes merely a windfall recovery for the plaintiff."¹¹⁸ In *Tedesco v. Maryland Casualty Co.*,¹¹⁹ it was observed that since insurance covering criminal fines would be against public policy, there should be a similar result as to insurance against losses brought about by the imposition of penalties for public wrongs.

McNulty appears to have set the trend in this area¹²⁰ with only limited contrary authority.¹²¹ One such case, *Lazenby v. Universal*

113. For a discussion of contract interpretations, see King, *The Insurability of Punitive Damages: A New Solution to an Old Dilemma*, 16 WAKE FOREST L. REV. 345, 357-61 (1980).

114. 307 F.2d 432 (5th Cir. 1962).

115. *Id.* at 440-41.

116. *Id.* at 441.

117. *Id.* at 442.

118. McKillip, *Punitive Damages in Illinois: Review and Reappraisal*, 27 DE PAUL L. REV. 571, 578 (1978).

119. 127 Conn. 533, 537, 18 A.2d 357, 359 (1941).

120. D. DOBBS, *supra* note 48, at 216 n.69.

121. *See, e.g.*, *Carroway v. Johnson*, 245 S.C. 200, 202-03, 139 S.E.2d 908, 909 (1965) (although based on dubious precedent, the court held that "all sums" language in the insurance policy included punitive damages); *Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 852, 440 S.W.2d 582, 584 (1969) (held that line between punitive and compensatory damages was not clear

Underwriters Ins. Co.,¹²² cited three reasons for allowing punitive damage coverage: (1) most courts have found coverage as a matter of contract interpretation,¹²³ (2) a fine line divides the cases in which punitive damages are recoverable from those cases in which such damages are not recoverable, and (3) punitive damages do not serve a deterrent function.¹²⁴ The *Lazenby* court noted that to strike down coverage on public policy grounds would be to rewrite the insurance contract and dash the expectations of the insured, something which "should [not] be done except in a clear case, and the reasons advanced do not make such a clear case."¹²⁵ Notwithstanding *Lazenby*, it seems absurd to protect the contract interests of the insured because to do so would be to allow him to freely contract away the consequences of his own wrongdoing. There appears to be no logical reason for allowing insurance coverage for wrongful acts because: (1) parties should not be permitted to control the risk which they are being insured against, and (2) punishment and deterrence would be undermined.¹²⁶

A limited exception to the prohibition against insurance for punitive damages has been recognized in cases in which the doctrine of *respondeat superior* is applicable.¹²⁷ The leading case, *Sterling Insurance Co. v. Hughes*,¹²⁸ held that public policy was not violated by allowing liability insurance coverage to include punitive damages where the insured principal had not participated in or author-

enough to allow coverage for one and not the other); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 648, 383 S.W.2d 1, 5 (1964).

122. 214 Tenn. 639, 383 S.W.2d 1 (1964).

123. The court cited no authority for this proposition.

124. Arguments two and three were addressed by the Tenth Circuit in *American Sur. Co. v. Gold*, 375 F.2d 523 (10th Cir. 1966) where the court said:

This argument seems to miss the mark, for we may as well say criminal sanctions serve no useful purpose just because they are constantly violated. The question is not so much the efficacy of the policy underlying punitive damages; rather it is a question of the implementation of that policy. Permitting the penalty for the misdeed to be levied on one other than he who committed it cannot possibly implement the policy.

Id. at 527.

125. 214 Tenn. at 648-49, 383 S.W.2d at 5.

126. Haskell, *Punitive Damages: The Public Policy and the Insurance Policy*, 58 ILL. B.J. 780, 789 (1970). Some courts have quibbled whether wanton or reckless conduct can be insured against. The logical solution, in order to uphold the purposes of punitive damages, would be to disallow coverage for any conduct which would give rise to punitive damages.

127. See Haskell, *supra* note 126, at 786-87; D. DOBBS, *supra* note 48, at 216.

128. 187 So. 2d 898, 900 (Fla. Dist. Ct. App. 1966); *cf.* *Commercial Union Ins. Co. v. Reichard*, 404 F.2d 868, 870 (5th Cir. 1968); *LoRocco v. New Jersey Mfrs. Indem. Ins. Co.*, 82 N.J. Super. 323, 332, 197 A.2d 591, 596 (1964); *Esmond v. Liscio*, 209 Pa. Super. 200, 214, 224 A.2d 793, 800 (1966) (dictum). See also *Scott v. Instant Parking Inc.*, 105 Ill. App. 2d 133, 137-38, 245 N.E.2d 124, 126 (1969).

ized the wrongdoing. Since in some jurisdictions principals are held strictly liable in punitive damages for the torts of their agents, it seems reasonable to allow an innocent principal to shift the burden of such a loss to an insurer. It would not be objectionable on public policy grounds because the principal was not guilty of any wrongdoing and deterrence of the principal's conduct is unnecessary.

C. Requirement of Actual Damages

It is generally held as a matter of law that the plaintiff must establish actual damages before he will be permitted punitive damages.¹²⁹ The right to exemplary damages is merely an adjunct to, and dependent upon, compensatory damages.¹³⁰ A major controversy is whether or not an award of nominal damages will support punitive damages. There is a split of authority between courts which refuse to award punitive damages in this situation,¹³¹ and those which allow punitive damages when nominal damages are shown.¹³² The conflict is in part due to the differing circumstances in which punitive damages are sought. First is the case where the plaintiff has no *claim* and is unable to prove actual loss. Second is the situation in which the plaintiff can show an injury, but no *measurable harm*. Consider the following example provided by Pro-

129. See, e.g., *Mobil Bldg. & Loan Assoc. v. Odom*, 232 Ala. 19, 21-22, 166 So. 698, 700 (1936); *Longinotti v. Rhodes*, 215 Ark. 380, 383, 220 S.W.2d 812, 814 (1949); *Chavez v. Times-Mirror Co.*, 72 Cal. App. 694, 697, 237 P. 1085, 1086-87 (1925); *Livingston v. Utah-Colorado Land & Live Stock Co.*, 106 Colo. 278, 279, 103 P.2d 684, 685 (1940); *Kinney v. Cady*, 232 Iowa 403, 412, 4 N.W.2d 225, 229 (1942); *Behymer v. Milgram Food Stores, Inc.*, 151 Kan. 921, 923, 101 P.2d 912, 913-14 (1940); *Clancy v. Reid-Ward Motor Co.*, 237 Mo. App. 1000, 1008-09, 170 S.W.2d 161, 165 (1943); *Brown v. Higby*, 191 Okla. 173, 174-75, 127 P.2d 195, 196 (1942). For an extensive list of cases, see Annot., 17 A.L.R.2d 527, 530-32 (1951).

130. See 17 A.L.R.2d 527 (1951).

131. Holding that a mere "technical" invasion of a right cannot be sufficiently serious to warrant punishment, a number of courts disallow punitive damages when actual damage awards are nominal. See *Anderson v. Alcus*, 42 S.W.2d 294, 296 (Tex. Civ. App. 1931) (holding nominal damages are not compensation for injury done, but rather vindication of the invasion of a technical right, and insufficient to support punitive damages); *Martel v. Hall Oil Co.*, 36 Wyo. 166, 253 P. 862, *reh'g denied*, 36 Wyo. 187, 255 P. 3 (1927) (nominal damages are not actual damages and there is no right to punitive damages); cf. *Ennis v. Brawley*, 129 W. Va. 621, 41 S.E.2d 680 (1946) (holding that nominal damages mean the jury has found no injury and thus any punishment should be left to the criminal law). See, Annot., 17 A.L.R.2d 527, 544 (1951).

132. Cf. *Finney v. Lockhart*, 35 Cal. 2d 161, 217 P.2d 19 (1950) (holding that nominal damages constituted actual damages); *Crystal Dome Oil & Gas Co. v. Savic*, 51 Idaho 409, 6 P.2d 155 (1931) (holding that the mere showing of a violation of a legal right was sufficient to support punitive damages). See Annot., 17 A.L.R.2d 527, 543 (1951).

fessor Dobbs:¹³³

In a negligence case . . . there is no cause of action at all merely because the defendant misbehaves; he may be liable criminally for driving 90 miles per hour down main street, but, unless he causes harm, he is not civilly liable, not even for nominal damages. If he has caused no harm at all in such a case, there is no claim at all against him, and this necessarily excludes any claim for punitive damages. On the other hand, there are cases in which the defendant is liable without causing any *demonstrable* harm, of either pecuniary or any other kind. He may be liable for at least nominal damages, and perhaps substantial damages, for an assault, even though he never succeeds in touching the plaintiff.¹³⁴

Obviously, punitive damages should not be allowed when a cause of action does not exist. But what about the situation where the cause of action does exist, yet results in no pecuniary harm? This may be the situation in which punitive damages are most needed because even though compensable harm is not shown, the defendant's wrongful conduct is nonetheless potentially harmful. If punitive damages are not allowed the admonitory function of tort law is obstructed and wrongful conduct is not deterred.¹³⁵ When a person shoots into a crowd narrowly missing the plaintiff, the plaintiff's actual harm is negligible, yet punitive damages are necessary in order to punish and forestall similar conduct in the future.

Another problem with the actual damage requirement is that juries often find for the plaintiff on the merits and award only exemplary damages, either by mistakenly lumping compensatory and punitive damages together or by failing to assess nominal damages.¹³⁶ Some courts rigidly refuse punitive damages for failure of compensatory damages.¹³⁷ Other courts, applying a more liberal interpretation of the rule, allow punitive damages to stand once it is shown that a cause of action was found to exist.¹³⁸ In *Clark v. McClurg*¹³⁹ the jury awarded only exemplary damages. The appellant challenged the award as violative of the requirement of actual damages. The appellate court held: "[T]he fact that the jury, inadvertently or by some mischance, assessed the entire damages as exemplary, instead of segregating them, constitutes an

133. D. DOBBS, *supra* note 48, at 208.

134. *Id.* (emphasis added).

135. See Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 529 (1957) [hereinafter cited as *Torts*].

136. See *id.* at 529.

137. See, e.g., *Richard v. Hunter*, 151 Ohio St. 185, 85 N.E.2d 109 (1949); *Toler v. Cassinelli*, 129 W. Va. 591, 41 S.E.2d 672 (1946).

138. See, e.g., *Sterling Drug, Inc. v. Benatar*, 99 Cal. App. 2d 393, 400-02, 221 P.2d 965, 970 (1950); *Edwards v. Nulsen*, 347 Mo. 1077, 1086, 152 S.W.2d 28, 32 (1941); *Fauver v. Wilkoske*, 123 Mont. 228, 233-34, 211 P.2d 420, 426 (1949).

139. 215 Cal. 279, 9 P.2d 505 (1932) (en banc).

error of form rather than of substance."¹⁴⁰

Clark states the best reading of the rule: The threshold requirement to support an award of punitive damages is the existence of a cause of action. The alternative reading that punitive damages are conditioned upon actual pecuniary injury, undermines the deterrent function of punitive damages. Professor Dobbs surmized that the alternative reading of the rule is just an indirect criticism of the doctrine of punitive damages itself: "If the criticisms [of punitive damages] are not persuasive enough to warrant rejection of all punitive awards, then there is no reason to make them depend upon the award of actual damages, except in the sense that the plaintiff must have some cause of action before recovery is appropriate."¹⁴¹

D. Requirement That Punitive Award be Commensurate with Compensatory Award

After a plaintiff has shown "actual" damage, many courts seek to limit the punitive award by requiring it to be commensurate with the actual damage award.¹⁴² The trend, however, appears to be a movement against the ratio rule.¹⁴³

A ratio rule flies in the face of the procedure in most jurisdictions which allows evidence of the defendant's wealth to be admitted and used to gage punishment.¹⁴⁴ This procedure requires the punitive award to be calculated so as to tailor punishment by basing the award on the defendant's ability to pay, while the ratio rule requires proportioning the award to any compensation granted.¹⁴⁵ Evidence of wealth maximizes punishment while the ratio approach attempts to control the amount of the award. Furthermore, the ratio rule is an unnecessary mechanism to curb jury abuse and control punitive awards because courts already have the ability to lessen excessive awards.¹⁴⁶

It appears that most courts reject the idea that the ratio rule

140. *Id.* at 284, 9 P.2d at 507.

141. D. DOBBS, *supra* note 48, at 210.

142. This is seen as a way of curbing jury abuse due to the great flexibility given a jury in fashioning relief. *Cf.* Hall Oil Co. v. Barquin, 33 Wyo. 92, 155-58, 237 P. 255, 277-78 (1925) (court observed that a lack of proportion between actual and punitive indicated passion and prejudice). *See* Annot., 17 A.L.R.2d 527, 548-49 (1951).

143. *See, e.g.*, Bucher v. Krause, 200 F.2d 576, 587-88 (7th Cir. 1952); Pinckard v. Dunnivant, 281 Ala. 533, 538, 206 So. 2d 340, 344 (1968); United Const. Workers v. Laburnum Const. Corp., 194 Va. 872, 895, 75 S.E.2d 694, 709 (1953), *aff'd*, 347 U.S. 656 (1954).

144. *See supra* note 63-65 & accompanying text.

145. *See* D. DOBBS, *supra* note 48, at 210-11.

146. *See* discussion on remittitur at note 66 *supra*.

requires a fixed mathematical ratio between the two awards.¹⁴⁷ The ambiguity of the rule, however, has resulted in reversals of awards only slightly in excess of actual damages,¹⁴⁸ and affirmances of awards many times as great as actual damages.¹⁴⁹

As a matter of sound tort policy, the ratio rule is questionable. It undermines the deterrent effect of punitive damages by stressing the *actual resultant harm* rather than the *social undesirability* of the defendant's conduct. Compensatory damages may be the only guide for determining punitive damages, but even if they are the only guide, it does not mean that their value as a gauge of punitive damages is enhanced.

To place the two in formulaic relation . . . is to deny any real function to punitive damages, for where the jury's formula for compensatory damages permits large recovery, punitive damages are needed least. Turned around, the argument is also sound: If punitive damages have a core function, it exists in the case in which compensatory damages are nominal or small.¹⁵⁰

To summarize, the major problem with the ratio test is that the actual injury sustained may bear little relationship, if any, to the amount of an award which would be an effective deterrent. It is the act which causes the injury that should be the focal point, not the consequences of the act. Again, in the hypothetical case where someone shoots into a crowd, should the civil punishment and deterrence provided through punitive damages be less severe in the first case where no actual injury occurs than in the second case where someone is killed? Does the fact that one's intent is not accomplished suggest that he should be punished less severely? Reason suggests that if society is to forestall such conduct in the future, damages should be awarded not according to the seriousness of the *harm*, but, instead, according to the seriousness of the *act*. Focusing on the harm serves only the reparative function of the law, not the admonitory function.

The anomaly of the ratio award is best seen by studying its effects. When a potentially harmful act results in a slight injury, a plaintiff receives small compensatory and small punitive damage

147. *Torts*, *supra* note 135, at 530.

148. *See, e.g.*, *Hunter v. Kansas City Rys.*, 213 Mo. App. 233, 244-45, 248 S.W. 998, 1002-03 (1923); *Mitchell v. Randal*, 288 Pa. 518, 522, 137 A. 171, 173 (1927); *Ridner v. York Haven Water and Power Co.*, 251 Pa. 18, 26-27, 95 A. 803, 806 (1915).

149. *Cf. Johnson Publishing Co. v. Davis*, 271 Ala. 474, 490, 124 So. 2d 441, 453 (1960) (held punitive damages may greatly exceed compensatory damages); *Tynberg v. Cohen*, 76 Tex. 409, 417, 13 S.W. 315, 316-17 (1890) (ratio of 40:1 was not unreasonable); *Malco, Inc. v. Midwest Aluminum Sales*, 14 Wis. 2d 57, 66, 109 N.W.2d 516, 521 (1961) (fifteen times compensatory damages is not unreasonable per se).

150. *Childres, Remedies*, 1965 ANN. SURV. AM. L. 289, 291 (1966).

awards; the defendant is deterred and punished only slightly.¹⁵¹ When the same act results in significant harm, the plaintiff receives a substantial compensatory damages award, which, alone, should deter the defendant, and, also, a substantial punitive damage award. The defendant in the latter situation may be punished *too severely* when the award as a whole is considered. Thus, the ratio rule "may limit punitive damage awards when they should be severe, and result in heavy punitive damages when they should be lenient."¹⁵² If punitive damages are to remain an effective means of controlling future conduct, the admonitory purpose must not be vitiated through rigid adherence to a ratio rule. Rather than applying the ratio test, courts should balance the following factors in fashioning appropriate relief: (1) severity of *threatened* harm,¹⁵³ (2) degree of reprehensibility of the defendant's conduct,¹⁵⁴ (3) profitability of conduct,¹⁵⁵ (4) wealth of defendant,¹⁵⁶ and (5) possible criminal sanctions.¹⁵⁷

E. Mass Disaster Litigation

The problem of multiple suits against one defendant for the same act has caused considerable stir and prompted courts and commentators to search for solutions.¹⁵⁸ An injury to multiple plaintiffs coupled with multiple punitive damage awards could bankrupt a defendant. Another consequence of uncoordinated suits could be that plaintiffs litigating early could exhaust a defendant's assets with punitive damage awards, leaving subsequent

151. Morris, *supra* note 8, at 1182.

152. *Id.*

153. If the potential harm flowing from the defendant's conduct is slight, he should receive only a small punitive damage award. If, however, the potential for harm is grievous, a more severe sanction is warranted. Mallor & Roberts, *supra* note 11, at 667.

154. The need for deterrence increases as the defendant's conduct becomes more reckless. The court should look at past conduct and defendant's awareness of the hazard. *Id.* at 667.

155. Punitive damage awards must remove the profit incentive of defendant. Defendant should be forced to disgorge profits and pay additional sums. *Id.* at 667-68.

156. *See supra* notes 63-65 & accompanying text.

157. In order to effectuate the purpose of punitive damages and still allow for criminal sanctions, a court should look at the defendant's total potential punishment and determine if punitive damages are appropriate. Mallor & Roberts, *supra* note 11, at 668.

158. *See generally* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968); Schulkin, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797 (1979); Note, *Punitive Damages in Product Liability Cases*, 16 SANTA CLARA L. REV. 895 (1976).

plaintiffs without even a compensatory award. The problem is particularly evident in the products liability situation where hundreds or thousands of individual plaintiffs situated in numerous states bring different actions in various state and federal courts.¹⁵⁹ Some control is needed in this area to assure full compensation without bankrupting the defendant or preventing him from marketing new products which would be socially beneficial. The problem is to formulate a solution which adequately punishes and deters a defendant, but at the same time allows adequate compensation to all meritorious plaintiffs.

Too frequently a culpable defendant is relieved of civil punishment because he injured multiple plaintiffs, when he would have been assessed punitive damages had he injured only one.¹⁶⁰ Abolition of punitive damages in mass disaster litigation would not adequately serve the retributive needs of society. Although the imposition of compensatory damages to hundreds of plaintiffs may punish a defendant quite severely, it must be noted that there is no public policy argument against liability insurance for compensatory damages, and to the extent such insurance is available, punitive and deterrent effects will be avoided.¹⁶¹ Therefore, even in mass disaster litigation punitive damages are vital. But the substantial risk of excessive damages demands control as the litigation progresses.¹⁶²

Given the problem of litigation in various forums, it would be impracticable, if not impossible, to combine all suits into one.¹⁶³

159. Schulkin, *supra* note 158, at 1799.

160. *Cf. Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) (punitive damages denied altogether); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (punitive damage award was reduced from \$500,000 to \$250,000 because many untried cases were pending); *Ostopowitz v. Wm. S. Merrell Co.*, No. 5879-1963 (N.Y. Sup. Ct., Westchester County, Jan. 11, 1967) (punitive damages reduced from \$850,000 to \$100,000 because the jury did not know of other cases pending).

161. Even if insurance is insufficient to pay all claims, many potential plaintiffs will not bring suit due to the economical burden placed on them in a suit without punitive damages.

These are the "forgotten plaintiffs" who are left without redress under a system that only permits compensatory damages. These are precisely the plaintiffs helped by punitive damages awards, for such awards make litigation of minor claims economical and, as the number of substantial recoveries are increasingly publicized, they help to inform both injured consumers of their rights and lawyers of the desirability of litigating such claims.

Owen, *supra* note 158, at 1323.

162. For a general survey of the proposed solutions to this problem by various commentators, see Schulkin, *supra* note 158, at 1800-08.

163. One author, however, has proposed that Congress could provide legislation that would allow for such lawsuits. This suggests to all defendants to bring a "reverse class-action" suit for the determination of an appropriate punitive

An alternative solution would be to allow the judge to assess punitive damages in view of the total punishment to which a defendant is subject, giving great weight to prior awards in mitigation. This has been criticized as giving a windfall to initial plaintiffs.¹⁶⁴ Still, it must be remembered that *no* plaintiff has a *right* to punitive damages. Awarding of damages lies completely within the jury's discretion.¹⁶⁵ Punitive damages are made not for the benefit of an individual plaintiff, but for the benefit of society, and subsequent plaintiffs are not deprived of a personal or property right. Although the first plaintiff may receive a windfall, it may be justified because of the enormous amount of diligence, imagination, and financial resources that the individual must expend to "blaze the trail," and prove the defendant's misconduct. It may well be that subsequent plaintiffs merely ride to favorable settlements and verdicts on the coattails of initial plaintiffs.¹⁶⁶

Another problem with this approach is that the jury is placed in the position of having to predict future jury awards.¹⁶⁷ Aside from this obvious difficulty, admissibility of evidence regarding past and pending cases may cause several other adverse effects. First, the jury may be unduly prejudiced by the punitive awards given by other juries and "jump on the bandwagon."¹⁶⁸ Also, the jury may

damage award. Under the plan, the plaintiffs would still bring compensatory damage claims in the forum of their choice, but they would have to join the large punitive suit if they wanted a share of the punitive damage award. The award of punitive damages would be held for a period of time and then distributed pro rata. Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195, 252 (1977-78).

164. See, *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967); *Volpert v. Summa Corp.*, 389 F. Supp. 1348, 1351 (D. Hawaii 1975).

165. See, e.g., *Stoody Co. v. Royer*, 374 F.2d 672, 680 (10th Cir. 1967); *Denham v. Southwestern Bell Tel.*, 415 F. Supp. 530, 535 (W.D. Okla. 1976); *White v. B.K. Trucking Co.*, 405 F. Supp. 1068, 1071 (W.D. Okla. 1975); *Louisville & N. R.R. v. Street*, 164 Ala. 155, 158-59, 51 So. 306, 307 (1909); *Smith v. Hill*, 12 Ill. 2d 588, 595, 147 N.E.2d 321, 325 (1958).

166. See *Owen*, *supra* note 158, at 1325.

Thus, while courts must be especially vigilant to control the very real, but by no means certain, risk of excessive punishment in mass disaster cases, the initial plaintiffs in appropriate cases should receive punitive damages awards that reward their efforts. Plaintiffs following soon thereafter, whose successful prosecutions of punitive damages claims confirm the first award, should be permitted to recover enhanced punitive damages awards for similar reasons. Thereafter, however, punitive damages recoveries should probably be limited to reasonable costs of litigation.

Id.

167. See *Schulkin*, *supra* note 158, at 1806-07.

168. Professor Morris suggests that this could open pandora's box:

[F]or juries might assume that since the defendant has once been found guilty, their verdict must necessarily be against him. They might also fail to see that the defendant has already been punished

tend to confuse the purpose of punitive damages by focusing its award on "defendant's conduct vis-a-vis the plaintiff."¹⁶⁹ Again, this would be an incorrect interpretation of the purpose of punitive damages: The award benefits society as a whole by deterring future conduct, and the plaintiff's receipt of the award is merely a means to that end. The folly of requiring the trier of fact to predict subsequent outcomes is best seen by the MER/129¹⁷⁰ cases where the judges reduced the punitive awards because of the possibility of multiple litigation.

V. CONCLUSION

Punitive damages are a necessary tool in the effective control of socially undesirable conduct. Although the criminal law serves as the major source of deterrence in society, it is not all inclusive and, as such, limits society's control over behavior. Punitive damages must be allowed to fill the gaps the criminal law leaves open. Persons should not be allowed to profit at the expense of society without at least the risk of severe sanctions. Punitive damages will at a minimum cause people to reconsider the potential effects of their actions before engaging in potentially harmful conduct. While punitive damages should not be allowed to duplicate the criminal law, they should be allowed as a supplement.

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in part, and might feel it their duty to punish him more severely because of the injury to others than the plaintiff.

Morris, *supra* note 8, at 1195 n.40.

169. Hoffman v. Sterling Drug, Inc., 374 F. Supp. 850, 856 (M.D. Pa. 1974). Here the court held that the plaintiff could not receive punitive damages representing the impact of a defective drug on the whole society but instead must focus on defendant's conduct vis-a-vis the plaintiff.

170. See *supra* notes 109, 160 and accompanying text.