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Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages

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HAPPY NO MORE: FEDERALISM DERAILED BY THE COURT THAT WOULD BE KING OF PUNITIVE DAMAGES

MICHAEL L. RUSTAD*

INTRODUCTION

Punitive damages debates are as routine in the United States as Fourth of July fireworks displays. Both are part of our culture, and both cause a lot of commotion. Arguably, between the two, the punitive damages display is producing the most noise lately. Corporate America, by employing state-of-the-art media savvy, has turned the cultural debate into a cultural war. Juries are portrayed as insurgent radicals encumbering corporate America with increasingly erratic and unpredictable punitive damages awards.[1] The perception of punitive damages is that of a greed-driven lottery permitting trial lawyers to get rich by "urging juries to hammer deep pocket defendants 'to send a message.'"[2] Punitive damages awards, critics maintain, are another example of how the "profit motive [has] distort[ed] the pursuit of justice in tort cases."[3] Critics of punitive damages also refer to this remedy as "jackpot justice, a system in which anyone can seek punitive damages for almost anything and wind up a multi-millionaire—and perhaps billionaire."[4]

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* Thomas F. Lambert, Jr. Professor of Law & Co-Director of the Intellectual Property Law Concentration, Suffolk University Law School. This Article is dedicated to Judge Guido Calabresi, who has appreciated and encouraged my scholarship on punitive damages from the start. This dedication in no way implies that he is responsible for any of my viewpoints. My study of the multiple functions of punitive damages was inspired by Calabresi's functionalist approach in *The Costs of Accidents*. I am grateful for the research assistance and editorial suggestions of Edward J. Bander, Molly Donohue, Chryss J. Knowles, Patty Nagle, Sandra Paulsson, and Karla Ota. I also wish to thank Diane D'Angelo, a reference librarian at Suffolk, who expertly tracked down eighteenth-century English exemplary damages cases. Finally, I would like to thank Jonathan May, Ben Haley, and the staff of the *Maryland Law Review*. This was a superb job of editing, especially given the historical matter discussed in the Article.

1. *See, e.g.*, CATHERINE CRIER, THE CASE AGAINST LAWYERS 9-10, 196-98 (2002); PHILIP K. HOWARD, THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM 21 (2001); JOHN STOSSEL, GIVE ME A BREAK: HOW I EXPOSED HUCKSTERS, CHEATS, AND SCAM ARTISTS AND BECAME THE SCOURGE OF THE LIBERAL MEDIA (2004).

2. *The Lawsuit Lottery*, LAS VEGAS REV.-J., May 21, 2002, *available at* http://www.reviewjournal.com/lvrj_home/2002/May-21-Tue-2002/opinion/18794145.html.

3. Ken McElroy, *Tort Reform, The Medicine Our Legal System Needs*, AM. FEDERALIST J., Jan. 5, 2003, *at* http://www.federalistjournal.com/columns/kmcelroy/km20030105.htm.

4. Warren Richey, *Court Weighs Limits on "Jackpot" Jury Awards*, CHRISTIAN SCIENCE MONITOR, Dec. 10, 2002, at 2; *see also* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends*

Toward the close of the twentieth century, lawyers for the business community filed scores of amicus briefs in the U.S. Supreme Court urging the imposition of new constitutional controls on the states' mosaic of punitive damages regimes.[5] Despite the unanimity of social science research findings that there is no nationwide punitive damages crisis,[6] the majority of the Court agrees that concerted judicial action is required to contain excessive punitive damages awards.[7]

The first determined and sweeping effort to reshape punitive damages occurred when Justice O'Connor sounded the theme that punitive damages were "skyrocketing" because juries were treating corporations unfairly.[8] In 1991, the Court applied the Substantive Due Process Clause to a high-ratio punitive damages award for the first time in history, and ultimately decided that a punitive damages award against an insurer was "close to the line" of constitutional propriety.[9] In 1993, in a fractured opinion, the Court upheld the consti-

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About the Civil Justice System, 40 ARIZ. L. REV. 717, 726-33 (1998) (discussing punitive damages "atrocity stories").

5. *E.g.*, Brief of Amicus Curiae Business Council of Alabama, BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (No. 94-896); Brief of Amici Curiae American Tort Reform Association et al., TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) (No. 92-479). *See generally* THEODORE B. OLSON & THEODORE J. BOUTROUS, WASH. LEGAL FOUND., THE CONSTITUTIONALITY OF PUNITIVE DAMAGES (1989).

6. The empirical reality is that there is no nationwide crisis requiring radical judicial tort reform. Despite the diversity in research methods and samples, research studies of the law in action agree that there is no punitive damages crisis. *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 17-19; *see also* Theodore Eisenberg, *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in* Exxon Valdez *and* Engle, 36 WAKE FOREST L. REV. 1129, 1136-39 (2001) (summarizing a study showing no increase in punitive damages awards between 1991 and 1996).

7. *See, e.g.*, *Gore*, 517 U.S. 559. A number of U.S. Supreme Court Justices indicated their willingness to consider a due process challenge to punitive damages prior to 1991. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 280 (1989) (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring) ("In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.").

8. *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part); *see also* Pac. Mut. Life Ins., Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting) ("Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category.").

9. *Haslip*, 499 U.S. at 23.

tutionality of a large punitive damages award in a business torts case where the potential harm to the oil industry was great.[10]

Beginning in 1994, the Court has struck down a succession of four large punitive awards against out-of-state corporations.[11] Since 1989, the Court has issued seven opinions reshaping the constitutional contours of punitive damages awarded against corporate defendants.[12] The latest U.S. Supreme Court opinion reshaping the path of punitive damages law was handed down in April of 2003 in *State Farm Mutual Automobile Insurance Co. v. Campbell* (*Campbell II*).[13] The Court struck down a $145 million punitive damages award (approximately fifty-six times the compensatory damages awarded by the jury) as disproportionate to the wrong committed by the insurer.[14] The Court remanded the case to the Utah Supreme Court for review of the award for excessiveness.[15] The Utah Supreme Court's interpretation of the Court's remand order illustrates the difficulty of applying a federal excessiveness review that collides with well-established state procedures for reviewing punitive damages.[16] The Utah Supreme Court acknowledged that its "duty in the face of a remand order demand[ed] unwavering fidelity to the letter and spirit of the mandate," but noted that by assigning it this duty, the Supreme Court had vested it with "discretion to exercise . . . independent judgment" in valuing an appropriate award.[17] Despite the existence of well-established stan-

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10. *TXO*, 509 U.S. at 460-61 (plurality). Again, in *TXO*, Justice O'Connor's dissent, joined by Justice White in full and Justice Souter in part, reiterated a concern over monstrous awards that were assessed against out-of-state corporations and were unfairly "transferring money from 'wealthy' corporations to comparatively needier plaintiffs." *Id.* at 491 (O'Connor, J., dissenting).

11. Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (vacating a multimillion dollar punitive damages award against a Japanese manufacturer on the grounds that Oregon did not provide for a mandated postverdict review of the award for excessiveness); *Gore*, 517 U.S. 559 (reversing a multimillion dollar award against the U.S. subsidiary of a German automobile company on grounds that the award was so excessive as to violate substantive due process); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (vacating a large punitive damages award in a trade dress case because the federal appellate court applied the wrong standard of review); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) [hereinafter *Campbell II*] (reversing an award of $145 million in punitive damages, where full compensatory damages only amounted to $1 million, because such an excessive award would violate the Due Process Clause of the Fourteenth Amendment).

12. *Browning-Ferris*, 492 U.S. 257; *Haslip*, 499 U.S. 1; *TXO*, 509 U.S. 443; *Oberg*, 512 U.S. 415; *Gore*, 517 U.S. 559; *Cooper*, 532 U.S. 424; *Campbell II*, 538 U.S. 408.

13. 538 U.S. 408.

14. *Id.* at 415, 426, 429. The jury originally awarded $2.6 million in compensatory damages. *Id.* at 415.

15. *Id.* at 429.

16. *See* Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409 (Utah 2004).

17. *Id.* at 411-12.

dards in Utah state law for reviewing punitive damages awards, the Utah Supreme Court felt that it was bound to disregard these standards, and to "follow the lead of the Supreme Court and restrict [its] review to the *Gore* guideposts."[18] Utah state law differs from the Supreme Court's excessiveness framework in its use of the wealth of the defendant in calibrating the amount of damages.[19] The conflict between the Court's due process guideposts and state law thus illustrates the confusion created by the Court's constitutionalization of punitive damages.

This Article is inspired by Guido Calabresi's pioneering theory that the law of torts performs multiple functions.[20] For more than two hundred years, the Court deferred to the states' choice of substantive, procedural, and evidentiary rules for tort remedies.[21] Calabresi has argued more recently that the federal courts' incursion into the torts process has been marked by a one-dimensional and simplistic view of tort rights and remedies.[22] In this Article, I focus upon the ways that the United States Supreme Court is forcing the states into a common mold based upon an individualistic retributory jurisprudence bypassing the multiple functions of punitive damages that have evolved over two centuries of Anglo-American jurisprudence.

I call the Court's microanalysis of punitive damages judicial miniaturism[23] because of its myopic focus on one-on-one torts. The Court's judicial miniaturism is reminiscent of Plato's Allegory of the Cave,[24] because the Court is serving as a punitive damages puppeteer who interferes with the ability of the states to constrain corporate wrongdoing.[25] Plato's antidemocratic work, *The Republic*, conceives of

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18. *Id.* at 414. This was the case even though the Utah Supreme Court had, after *Campbell II*, modified these standards "as necessary to fully meet the federal requirements" articulated in *Campbell II* and earlier cases. *Id.*

19. *Id.* at 414 n.3 (citing Crookston v. Fire Ins. Exch., 817 P.2d 789, 808 (Utah 1991)).

20. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) [hereinafter THE COSTS OF ACCIDENTS].

21. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting) (noting that state trial procedure that leaves the decision of the amount of punitive damages "to the discretion of the jury, subject to some judicial review for 'reasonableness,' furnishes a defendant with all the process that is 'due'").

22. *See* Guido Calabresi, The Complexity of Torts—The Case of Punitive Damages 4 & n.1 (Nov. 12, 2003) [hereinafter Complexity] (unpublished manuscript, on file with author).

23. My discussion of judicial miniaturism is inspired by the sociologist John F. Stolte's work. *See* John F. Stolte et al., *Sociological Miniaturism: Seeing the Big Through the Small in Social Psychology*, 27 ANN. REV. SOC. 387 (2001).

24. 2 PLATO, THE REPUBLIC, book VII (Paul Shorey trans., William Heinemann Ltd. & Harvard Univ. Press 1970).

25. According to Professor Marc Cohen:

philosopher-king overseers who apprehend truth and justice through a study of forms.[26] The states' different approaches to punitive damages, in contrast, represent democracy at work to the extent the remedy is responsive to social problems on the local level.[27] Quoting former Chief Justice Burger, Chief Justice Rehnquist observed that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold."[28] Moreover, the Court has recognized that "[i]n our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."[29]

The Rehnquist Court has shown its unhappiness with the federal preemption of state law in nearly every substantive field of law save punitive damages.[30] The Court's punitive damages jurisprudence constitutes a radical departure from what Justice Brandeis described as "one of the happy incidents of the federal system that a single cou-

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> In the allegory, Plato likens people untutored in the Theory of Forms to prisoners chained in a cave, unable to turn their heads. All they can see is the wall of the cave. Behind them burns a fire. Between the fire and the prisoners there is a parapet, along which puppeteers can walk. The puppeteers, who are behind the prisoners, hold up puppets that cast shadows on the wall of the cave. The prisoners are unable to see these puppets, the real objects, that pass behind them. What the prisoners see and hear are shadows and echoes cast by objects that they do not see.

S. Marc Cohen, The Allegory of the Cave, Lecture Notes from the History of Ancient Philosophy Course at the University of Washington, *at* http://faculty.washington.edu/smcohen/320/cave.htm (last updated July 8, 2002).

26. *See* PLATO, *supra* note 24, book VI, at 5 ("Whichever [of the philosophers and nonphilosophers] appear competent to guard the laws and pursuits of society, these we should establish as guardians.").

27. *See* Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 511-12, 517-18 (2002) (arguing that state legislative tort reforms are more democratic than nationalized reforms).

28. Allen v. Illinois, 478 U.S. 364, 375 (1986) (quoting Addington v. Texas, 441 U.S. 418, 431 (1979)).

29. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

30. The Rehnquist Court has struck down numerous federal statutes on the grounds that they intruded upon the province of state law. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Congress had not identified a history and pattern of unconstitutional employment discrimination by the State of Alabama sufficient to abrogate Alabama's Eleventh Amendment immunity); United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress lacked the constitutional authority to enact the Violence Against Women Act, and thus regulate crime on a local level, because the crime did not involve economic activity or interstate commerce); College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that the State of Florida was not subject to a trademark infringement case because the Patent Remedy Act was not a valid exercise of Congress's power to abrogate state sovereign immunity).

rageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[31]

The Court's federalization or centralization of punitive damages undermines the role of states as laboratories of punitive damages reform. The philosopher-king[32] was all-knowing and enlightened because he was not in the darkness of the Cave where ordinary mortals lived.[33] The Court is likely to continue diverting the path of punitive damages as new procedural, evidentiary, and substantive challenges are on the horizon.[34] The Supreme Court's new institutional role as "Punitive Damages Guardian" is yet another example of what Calabresi would regard as "aggressive, willful, statist behavior . . . the very opposite of what a judicious moderate, or even conservative, judicial body should do."[35] Calabresi's *The Costs of Accidents* should be mandatory reading for the Justices of the U.S. Supreme Court, who seem intent on forcing the multiple functions of punitive damages into an individual retributory mold.

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31. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

32. For a discussion of Plato's concept of the philosopher-king, see Frederick Nymeyer, *Progressive Calvinism: On the Peerless Mosaic Law (and the Foolishness of Greek Philosophers)*, PROGRESSIVE CALVINISM, March 1956, *available at* http://www.freerepublic.com/forum/a3a41840b212f.htm.

33. *See* PLATO, *supra* note 24, book VI, at 3-5 ("Since the philosophers are those who are capable of apprehending that which is eternal and unchanging, while those who are incapable of this, but lose themselves and wonder amid the multiplicities of multifarious things, are not philosophers, which of the two kinds ought to be the leaders in a state?").

34. New constitutional challenges to punitive damages are likely given the multiplicity of state punitive damages procedures and substantive standards. One likely candidate for challenge is the use of corporate wealth in setting the amount of damages in the punitive damages equation. States vary widely in the admissibility of the financial status of the defendant in punitive damages litigation. Maryland and Montana, for example, do not permit evidence of the defendant's financial means until a finding of punitive liability has been made. MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a) (2002); MONT. CODE ANN. § 27-1-221(7)(a) (2003). Nevada allows evidence of the financial condition of the defendant to be admitted during the second phase of a bifurcated proceeding, which is mandated in cases where punitive damages are at issue. NEV. REV. STAT. ANN. § 42.005(3)-(4) (Michie 1996). For a discussion of various states' positions, see James McLoughlin, Annotation, *Necessity of Determination or Showing of Liability for Punitive Damages Before Discovery or Reception of Evidence of Defendant's Wealth*, 32 A.L.R. 4th 432 (1984 & Supp. 2004). Another likely corporate challenge is to multiple punitive damages awards in products liability cases. The overkill problem was first identified by Judge Friendly in *Roginsky v. Richardson-Merrell Inc.*, 378 F.2d 832, 840 (2d Cir. 1967). Judge Friendly observed that "multiple punitive awards running into the hundreds" could result in overkill when assessed against a drug manufacturer already subject to "vigorous" FDA regulation and enforcement. *Id.*

35. Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991. Even William Suter, the Clerk of the U.S. Supreme Court, acknowledges the Court's recent decisions limiting punitive damages as an example of judicial activism. Jonathan Ringel, *Bar Inductees Get Candid Glimpse of Supreme Court*, THE RECORDER, Sept. 17, 2003.

Part I of this Article briefly reviews the path of punitive damages law through three stages of development from government oppression to personal torts to sanctions for corporate wrongdoing. Punitive damages as we know the doctrine today originated in eighteenth-century England during the reign of King George III, and was exported to America soon after.[36] Corporate punitive liability proved, in retrospect, to be the most important development as the remedy evolved from punishing individual torts to the social control of corporate wrongdoing.

Part II examines the untold history of how corporate America led the movement to constitutionalize punitive damages, and culminates with a discussion of the Court's unmaking of this valuable state remedy. When and where did the theory arise that the U.S. Supreme Court could regulate punitive damages better than the states? There is an obvious but often undiscussed connection between the Court's constitutionalization of punitive damages and the tort reform agenda of corporate America. Part III examines the ways that the Court's punitive damages jurisprudence is interfering with the sociolegal functions the remedy plays in the states. Part III argues that the Court's judicial miniaturism conflicts with the diverse manifest and latent functions fulfilled by punitive damages in the states.[37] The Court's emphasis on individuated retributive punishment[38] deflects attention from the broader social functions fulfilled by the remedy of punitive damages.[39] Finally, I conclude that the Court should take the next

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36. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 368-69 (1994) [hereinafter *Overview*].

37. Professor David Owen notes how courts generally refer to punishment and deterrence as the only purposes of punitive damages, which "masks the variety of specific functions that punitive damages actually serve." *Id.* at 373.

38. As the Court stated in *Campbell II*, "punitive damages . . . are aimed at deterrence and retribution." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (citing Cooper Indus. Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001)); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); Pac. Mut. Life Ins., Co., v. Haslip, 499 U.S. 1, 19 (1991).

39. There is a school of sociology that deliberately examines the world from a microperspective of the daily details of an individual's life, but the defect of this approach is the tendency to overlook large-scale social forces. Microsociology is the study of the social relationships seen at the individual level focusing upon the self and social interaction generally in face-to-face contact. Department of Sociology, University of Leicester, Microsociology Module Description, *at* http://www.le.ac.uk/sociology/ug/modules/sy1011.html (last updated June 7, 2004). In contrast, macrosociology focuses upon the larger social functions such as "the discovery of structure within the society as a whole, the examination of large scale relationships in society, of the relationships among the structures within the society. Structures set the tone for behavior, the context within which behavior takes place." Richard H. Anderson, Department of Sociology, University of Colorado at Denver, Theory and Research: Approaches in Sociology, *at* http://car-

exit off the substantive due process highway and leave tort reform to the states. The Court should return punitive damages to the fifty experimental laboratories of the states so that this vital remedy can fulfill the broad societal functions of tort law first identified by Judge Calabresi.

I. THE PATH OF PUNITIVE DAMAGES FOR THE COMMON GOOD

The Rehnquist Court, cheered on by corporate America, has launched an "economic liberties" revolution, forcing the states into a common mold to solve a purported punitive damages crisis. For more than two hundred years, the Court deferred to the states' choice of substantive, procedural, and evidentiary rules for assessing and awarding punitive damages. It is a core principle of federalism that the states be given wide discretion to experiment in an area where there is no national consensus.[40] After centuries of common-law development, the Court has discovered that substantive due process requires it to assume the role of punitive damages overseer.[41] The Court has, in effect, federalized a tort remedy that had been the exclusive province of state law. This Part of the Article confirms that the Court has strayed far from core principles of federalism by its punitive damages jurisprudence.[42]

I begin by examining how punitive damages fulfill multiple functions because of the need to adapt to the throes of social or technological change. This brief historical sketch confirms that punitive damages are a legal institution that has been responsive to emergent social problems.[43] The history of punitive damages is divided into three periods: (1) The English Exemplary Damages Era (1763-1793); (2) The Personal Torts Era (1793-1870); and (3) The Corporate Pun-

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bon.cudenver.edu/public/sociology/introsoc/topics/UnitNotes/week02.html (last revised Jan. 13, 2000).

40. *Cf. Gore*, 517 U.S. at 614-19 (appendix to opinion of Ginsburg, J., dissenting) (surveying sixteen states that capped the size of punitive damages, another thirteen states requiring awards to be split with the state, and twelve states mandating bifurcation of the punitive and compensatory phases of the trial).

41. *See supra* notes 11-12 and accompanying text.

42. In *Gore*, Justice Scalia argued that "[t]he Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair.'" 517 U.S. at 606 (Scalia, J., dissenting).

43. That is, punitive damages are a part of society's structure, and they serve important societal functions. *See* InformationBlast, Functionalism (Sociology) ("Structural-functionalism takes the view that society consists of parts (e.g., police, hospitals, schools, and farms), each of which has its own function.") *at* http://www.informationblast.com/Functionalism_(sociology).html (last visited Feb. 12, 2005).

ishment Era (1870 to Present). During each era, the signature of punitive damages has been punishment and deterrence of conduct inimical to the public interest. In the first two periods, punitive damages punished oppressive personal torts. In the more recent corporate punishment era, punitive damages expanded further to punish impersonal wrongdoing committed by artificial persons.[44] The punitive damages backlash is a part of a larger campaign to downsize the civil justice system into a semi-comatose state.

A. English Exemplary Damages (1763-1793)

Punitive damages were prefigured in the remedy of exemplary damages in eighteenth-century England.[45] Courts used words like "fraud, malice, gross negligence, or oppression" to describe the predicate for exemplary damages.[46] The remedy of exemplary damages was also decoupled from the amount of compensatory damages because it disregarded the principle of compensation and "the amount of relief [was] left to the discretion of the jury."[47]

The English doctrine of exemplary damages originated as a means to punish the abuse of governmental power in the 1763 companion cases *Wilkes v. Wood*[48] and *Huckle v. Money*,[49] which arose out of the government's prosecution of the publishers and printers of *The North Briton*, a newspaper that had been critical of the government. In *Wilkes*, John Wilkes, the publisher of *The North Briton* and a member of Parliament, sued the Secretary of State for trespass, after the Secretary

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44. The debate over the constitutionality of punitive damages exclusively focuses upon the due process rights of institutional defendants rather than professional or individual defendants. David Owen divided punitive damages defendants into three categories, each possibly requiring different treatment: "(1) individual defendants; (2) professional defendants; and (3) institutional defendants." David G. Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 105 (1982). These classes of punitive damages defendants vary in the power they wield, as well as in society's expectations about how that power should be used. *Id.* This Article focuses upon corporate punitive liability rather than individual or professional defendants. The bulk of the law of punitive damages when it comes to individual or professional defendants remains fixed and enduring. In contrast, the law of punitive damages against corporate or institutional defendants is in the throes of change.

45. *See* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1287 (1993) [hereinafter *Historical Continuity*].

46. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, OR AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF COMPENSATION RECOVERED IN SUITS AT LAW 38 (Arno Press 1972) (1847).

47. *Id.* at 488.

48. 98 Eng. Rep. 489 (K.B. 1763).

49. 95 Eng. Rep. 768 (K.B. 1763).

issued a general warrant for the search of Wilkes's house.[50] *Huckle* involved a lower-level employee of the paper who was arrested and detained under the general warrant.[51] Lord Justice Camden coined the term "exemplary damages" to describe a large award where the actual damage was slight.[52] His choice of the word "exemplary" reflects the role the remedy played in moderating abuses of power. He noted that the jury was well within its discretion in expressing social disapproval to government agents who were heedless to civil liberties:

> To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.[53]

The sting of the shilling[54] was thus levied against the King's agents for their wrongful conduct. The availability of exemplary damages in cases such as *Wilkes* and *Huckle* played a significant role in establishing the salutary principle that no one, no matter how powerful, was above the law. English courts have since upheld punitive damages against other "oppressive, arbitrary or unconstitutional action by the servants of the government."[55] The first exemplary damages awards were part of a larger story of the rule of law. While the remedy originated to

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50. 98 Eng. Rep. at 490.

51. 95 Eng. Rep. at 768.

52. In *Huckle*, Lord Camden described the severity of the government's wrongdoing and concluded that exemplary damages were appropriate:

> [T]hey saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.

Id. at 769.

53. *Id.*

54. Thomas F. Lambert, Jr., *The Case for Punitive Damages (Including Their Coverage by Liability Insurance)*, 35 AM. TRIAL LAW. ASS'N 164, 164 (1974) (noting that the historical justification for punitive damages was for the "chastising shilling").

55. Rookes v. Barnard, 1 All E.R. 367, 410 (H.L. 1964). For example, exemplary damages were awarded against the government for the brutal flogging of an innocent soldier in *Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766). In *Benson*, the soldier received a £150 judgment against his colonel, who ordered the flogging to vex a fellow officer. *Id.* Lord Mansfield held that though the damages "were very great, and beyond the proportion of what the man had suffered," the defendant's motion for a new trial should be denied because the injury was inflicted out of pure spite by a fellow soldier. *Id.* Thus, the exemplary damages principle served the function of restraining the arbitrary and unfair abuse of executive power.

punish misdeeds by government officials, it soon evolved to punish wealthy elites who abused their position of power by breaching mores[56] of the local community. From the beginning, a defendant's financial condition or ability to pay an exemplary damages award was always a factor to be taken into account by the factfinder.[57]

As the court explained in *Merest v. Harvey*,[58] English exemplary damages also fulfilled the function of keeping the community peace by preventing the practice of dueling to settle disputes.[59] In *Merest*, an exemplary damages award of £500 was upheld against a contemptuous aristocrat who trespassed on the plaintiff's land and fired at his birds while using intemperate and insulting language.[60] The court reasoned that it was well within the bounds of its discretion to uphold the award given the nature of the defendant's conduct. One justice noted that a court reviewing a £500 exemplary damages award in another case upheld the award where the defendant committed the rude act "of merely knocking a man's hat off."[61]

More generally, the exemplary damages remedy served to protect the social order by punishing conduct breaching normative boundaries of acceptable behavior considered critical to a community's survival. The misuse of official power was the gist of the exemplary damages assessed in *Forde v. Skinner*,[62] where the manager of an orphanage ordered that a young girl's head be shaved in an unjustified,

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56. The sociological concept of "mores" refers to norms that reflect the fundamental values of the group, versus mere "folkways," which are customary ways of doing things in a culture but not critically important to the culture's survival. These terms were coined in WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS (1906). Professor Sumner notes that:

> [F]olkways are the right ways to satisfy all interests, because they are traditional, and exist in fact. [Folkways] extend over the whole of life. There is a right way to catch game, to win a wife, to make one's self appear, to cure disease, to honor ghosts, to treat comrades or strangers, to behave when a child is born, on the warpath, in council, and so on in all cases which can arise.

Id. at 28. The mores constitute the social code. Mores include

> the notion of what ought to be done, for all should cooperate to bring to pass, in the order of life, what ought to be. All notions of propriety, decency, chastity, politeness, order, duty, right, rights, discipline, respect, reverence, cooperation, and fellowship, especially all things in regard to which good and ill depend entirely on the point at which the line is drawn, are in the mores.

Id. at 231.

57. *See Rookes*, 1 All E.R. at 411 ("[T]he means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages.").

58. 128 Eng. Rep. 761 (C.P. 1814).

59. *Id.*

60. *Id.*

61. *Id.*

62. 172 Eng. Rep. 687 (Horsham Assizes 1830).

spiteful act.[63] In *Sears v. Lyons*,[64] a defendant laid poisoned barley on his neighbor's premises for the sole purpose of destroying his poultry.[65] As Thomas Lambert emphasizes, the imposition of exemplary damages in such cases also helped to preserve community social order "by permitting the insulted plaintiff to take his revenge in the courtroom rather than in the alley."[66]

An example of the role that exemplary damages played in the preservation of social order can be found in the imposition of exemplary damages to punish aggravated torts threatening the family, the social institution so central to pre-industrial society. This is evidenced by the frequent imposition of exemplary damages in seduction cases. In *Tullidge v. Wade*,[67] exemplary damages were awarded to a family for the insult of the seduction of their daughter.[68] In *Elliot v. Nicklin*,[69] exemplary damages were imposed in an action for seduction of a young woman, when the defendant was masquerading as an honorable suitor.[70]

The adjectives and phrases used by English courts to describe the type of conduct that merits an assessment of exemplary damages include "malicious, vindictive, high handed, wanton, willful, arrogant, cynical, oppressive, and contumelious disregard of the plaintiffs' rights."[71] Thus, English exemplary damages serve as fines designed "to hit the defendant hard if he has disregarded the rights of others and show that that sort of conduct does not pay."[72]

B. American Punitive Damages for Personal Torts (1793-1870)

The U.S. Supreme Court, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, sketched a history of punitive damages in its holding that federal appellate courts must apply a de novo standard when conducting excessiveness reviews of punitive damages, rather than the more deferential standard of abuse of discretion used in reviewing compensatory damages.[73] In its decision, the Court argued that puni-

63. *Id.*
64. 171 Eng. Rep. 658 (K.B. 1818).
65. *Id.*
66. Lambert, *supra* note 54, at 168.
67. 95 Eng. Rep. 909 (K.B. 1769).
68. *Id.*
69. 146 Eng. Rep. 719 (Ex. D. 1818).
70. *Id.*
71. British Midland Tool Ltd. v. Midland Int'l Tooling, 2 B.C.L.C. 523, 601 (Ch. 2003) (citation omitted).
72. Loudon v. Ryder, 2 Q.B. 202, 209 (1953).
73. 532 U.S. 424, 437-38 n.11 (2001).

tive damages in the nineteenth century performed a compensatory role and served as the functional equivalent of today's remedies for "contemporary categories of personal injury, such as emotional distress, loss of enjoyment of life, and the like."[74]

To this day, Michigan's exemplary damages fulfill a purely compensatory role.[75] *Scripps v. Reilly*,[76] for example, involved a libelous newspaper story about the plaintiff, entitled "How a Sneak Made Love."[77] The *Scripps* court described the extracompensatory role of exemplary damages in that state:

> Where the act done is one which from its very nature must be expected to result in mischief, or where there is malice, or willful or wanton misconduct, carelessness or negligence so great as to indicate a reckless disregard of the rights or safety of others, a new element of damage is allowed, viz.: for injury to the feelings of the plaintiff.[78]

Reflecting the *Scripps* reasoning, the Court in *Cooper* used its historical account of punitive damages history to construct its schizoid standards of review for compensatory and punitive damages.[79] However, the underlying evidence for that historical account does not in fact support the Court's conclusion that early punitive damages served the singular purpose of compensating intangible injuries.[80] Anthony Sebok's substantive review of early American cases confirms that punitive damages were never single-minded:

> The cases can be placed into six categories: (1) compensation for emotional suffering; (2) compensation for insult; (3) personal vindication; (4) vindication of the state; (5) punishment to set an example; and (6) punishment to deter. While these categories overlap to some extent, and the decisions

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74. Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 180 (2003) (discussing *Cooper*, 532 U.S. at 437-38 n.11).

75. *E.g.*, Peisner v. Detroit Free Press, Inc., 364 N.W.2d 600, 604-05 (Mich. 1984) (holding that punitive and exemplary damages are compensatory in nature under the state's libel laws); Jackovich v. Gen. Adjustment Bureau, Inc., 326 N.W.2d 458, 464 (Mich. Ct. App. 1982) (differentiating between punitive and exemplary damages and holding that while the former are not allowed under Michigan law, the latter are available "to compensate plaintiffs for humiliation, sense of outrage and indignity").

76. 38 Mich. 10 (1878).

77. *Id.* at 20.

78. *Id.* at 23.

79. *See* Sebok, *supra* note 74, at 179-81.

80. *Id.* at 180-81.

> often suggest that more than one rationale is being adopted, the differences between the categories are worth noting.[81]

Moreover, Professor Sebok's analysis of the key cases cited in a leading torts treatise of the early twentieth century casts doubt on the Court's argument that punitive damages were chiefly a precursor to the modern tort of the intentional infliction of emotional distress.[82] The Sections that follow examine a larger subset of early punitive damages cases that confirm that punitive damages fulfilled multiple social functions, rather than the single function of compensating intangible injuries.

1. Remedies for Conduct Violative of Local Norms.—The first American exemplary damages award grew out of an aggravated breach of promise to marry case.[83] In that case the court reasoned that exemplary damages were properly imposed for misconduct "of the most atrocious and dishonourable nature."[84] Other early decisions imposed punitive damages awards not just to punish the defendant but to protect "society against a violation of personal rights and social order."[85] For example, a New Jersey court upheld an exemplary damages award in *Stout v. Prall*,[86] a case where the defendant debauched the plaintiff's daughter.[87] The court observed that the remedy was designed to "recompense the plaintiff for the cruel and severe injury of disturbing the peace of his family, and destroying his parental prospects."[88] The court upheld a £100 award on grounds that the defendant

> disgraced a family, ruined the hopes of a father, and injured a girl of reputation. If he suffers, he will suffer justly, and to his own wickedness will he be indebted for it. [The court] said it was time to put a stop to these monstrous violations of morality and honour, and . . . wished it to be known, that the peace of families was not to be invaded, or innocence betrayed with impunity. In this case [the court] thought the youth of the girl, (not being above 17) and her good reputation, aggravated the conduct of the defendant.[89]

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81. *Id.* at 197.

82. *See id.* at 190-92 (discussing cases cited in 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 484-87 (Fred B. Rothman & Co. 1980) (1906)).

83. Coryell v. Colbaugh, 1 N.J.L. 77 (1791).

84. *Id.* at 77.

85. Voltz v. Blackmar, 64 N.Y. 440, 444 (1876).

86. 1 N.J.L. 79 (1791).

87. *Id.*

88. *Id.* at 80.

89. *Id.*

In cases such as these, exemplary damages exacted punishment against those social deviants who violated social norms, but not necessarily the criminal law,[90] and served as a remedy designed to keep the community peace as an alternative to dueling or self-help.[91] Punitive damages were first formulated to redress personal torts that violated the collective conscience[92] of the local community. In addressing "offences against morals to which the law has annexed no penalty as public wrongs,"[93] punitive damages were not just levied to punish the harm done to a single plaintiff, but to the entire society.[94] Thus, punitive damages even became an "instrument of public correction."[95] For example, in *Voltz v. Blackmar*, the court acknowledged the use of punitive damages, in addition to acting as compensation, to be "a punishment to the defendant, and . . . a protection to society against a violation of personal rights and social order."[96]

During the pre-Civil War period, punitive damages could be assessed to protect the slave trade and to guarantee the chattel status of slaves fleeing to free states. In *Oliver v. Kaufman*,[97] the estate of a slave owner sued the defendants for tortiously harboring twelve slaves and

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90. *Cf.* McBride v. McLaughlin, 5 Watts 375, 376 (Pa. 1836) (holding that exemplary damages may be appropriate to punish wrongdoers in cases involving "offenses against morals to which the law has annexed no penalty as public wrongs").

91. Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931). According to Morris, punitive damages can be regarded as the functional equivalent of an "orderly, legal retaliation . . . to be preferred to a private vengeance, which will disturb the peace of the community." *Id.*

92. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 70-110 (George Simpson trans., The Free Press 1947) (1893) (describing the function of crime and punishment as promoting a sense of social solidarity).

93. *McBride*, 5 Watts at 376.

94. Today's U.S. Supreme Court is in the process of individuating punitive damages by seeking to recalibrate the amount of awards to the amount necessary to punish the harm done to a single tort victim, instead of basing them on the harm that was levied on the local community or larger society. This microanalysis of punishment is an approach favored by some academic commentators. *E.g.*, Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 587 (2003). Colby concludes that the

> practice of punishing the defendant, in a single case brought by a single victim, for the full scope of societal harm caused by its entire course of wrongful conduct—which I will refer to as awarding "total harm" punitive damages—has led countless judges and commentators to worry about the potential for excessive multiple punishment: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment.

Id.

95. *McBride*, 5 Watts at 376.

96. 64 N.Y. 440, 444 (1876).

97. 18 F. Cas. 657 (E.D. Pa. 1850) (No. 10,497).

helping them escape in Cumberland County, Pennsylvania.[98] The court observed that in harboring cases, a master could not only recover the full value of the slave rescued by abolitionists, but also exemplary or punitive damages.[99]

In an Arkansas case, a slave owner brought a trespass action against another for whipping a number of the slave owner's slaves.[100] The plaintiff alleged that the whipping left the slaves unable to work for a certain time.[101] The court cited an Alabama decision that permitted a jury to "measure the damages, not merely by the value of the slave, but to give smart money" where appropriate.[102] These cases demonstrate that conduct punishable by exemplary damages reflected the social norms of the local community, which defined slaves as personal property.

2. Moderating Abuses of Power by Individuals.—In early punitive damages cases, there was no fixed standard for measuring damages because each case rested on its own facts. Vindictive damages were awarded where there were "peculiar circumstances of aggravation; as in the case of extreme cruelty, provocation or insult, wantonness or malice."[103] In the early history of punitive damages, courts gave the jury vast discretion in setting the amount of the award.[104] Punitive damages were calibrated to the enormity of defendant's offense, not the level of the plaintiff's damages. A North Carolina court stated, for example, that punitive "damages should be in proportion to the degree of malice," not to the compensatory damages awarded to the plaintiff.[105]

Evidence of a defendant's wealth was broadly admissible in libel cases because, on one hand, a defendant's wealth, social rank, and

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98. *Id.* at 659.

99. As the court noted:

> In case of a rescue of a captured fugitive, or of an illegal interference to hinder such recapture, when the master had it in his power to effect it, the defendant would be liable, not only to the penalty, but also to pay the full value of the slave thus rescued, and even punitive or exemplary damages, as in other actions for a tort. But where the offense alleged is harboring or concealing, the plaintiff, if he would recover more than nominal damages, must show that the slave was lost to him in consequences of such illegal harboring or concealing.

Id. at 661-62.

100. Henry v. Armstrong, 15 Ark. 162, 163 (1854).

101. *Id.*

102. *Id.* at 167 (citing Wheat v. Croom, 7 Ala. 349 (1845)).

103. Merrills v. Tariff Mfg. Co., 10 Conn. 384, 386 (1835).

104. *See, e.g.*, Pullman Palace-Car Co. v. Lawrence, 22 So. 53, 60 (Miss. 1897).

105. Gilreath v. Allen, 32 N.C. 58, 60 (1849).

influence were relevant to the issue of the extent of injury.[106] A libelous statement from a wealthy or powerful defendant caused more damage in the community than a servant's scurrilous slur. While evidence of wealth was generally inadmissible in most civil actions, it was always material evidence in punitive damages cases where it was admissible to calibrate the amount of punitive damages or "to graduate the punishment."[107] On the other hand, larger damage awards for the wealthy also related directly to goals of punishment; the wealthier the defendant, the larger the punitive damages award:

> [A] verdict of a few dollars, which would operate as a punishment, if assessed against a poor man, would utterly fail to have that effect upon a man of wealth. Verdicts for punitive damages ought, therefore, to be graduated according to the ability of the offender to pay. Nothing else would be just or reasonable. It is also clear that a man of high standing and of great intelligence, as well as wealth, ought to be punished for the same offense in a degree different from the poor and obscure. This is certainly true in view of the fact that such verdicts for damages are intended to be held up as examples to restrain the repetition of offenses.[108]

In contrast, if a plaintiff "offers no evidence of the defendant's wealth with a view of enhancing [punitive damages], he in effect says, 'I ask no damages against the defendant except as a mere individual, without any regard to his property or estate.'"[109] In an 1825 slander case, the Connecticut Supreme Court admitted evidence offered by the plaintiff that the defendant "was a man of property, being worth from 10,000 to 15,000 dollars."[110] The plaintiff's counsel argued that the amount of exemplary damages, which "would be sufficient to silence a poor man's slanders, would have no effect but to excite and envenom those of a rich man."[111] The court agreed, observing:

> Great wealth is generally attended with correspondent influence; and little influence is the usual concomitant of little property. The declarations of a man of fortune concerning the character of another, like a weapon thrown by a vigorous hand, will not fail to inflict a deeper wound than the same

106. Barkly v. Copeland, 15 P. 307, 310 (Cal. 1887).

107. *Id.*

108. Guengerech v. Smith, 34 Iowa 348, 349-50 (1872) (Beck, C.J., dissenting).

109. *See* Mullin v. Spangenberg, 112 Ill. 140, 145 (1884) (upholding a $5,000 award against a policeman who choked a grocer who had objected to the brutal treatment of a prisoner).

110. Bennett v. Hyde, 6 Conn. 24, 25 (1825).

111. *Id.* at 26.

> declarations made by a man of small estate, and, as a consequence not uncommon, of small influence. Property, therefore, may be, and often is, attended with the power of perpetrating great damage, and, in the estimate of a jury, becomes an interesting enquiry.[112]

The court thus ruled that the plaintiff in a slander case could prove the wealth of the defendant or "the amount of the defendant's property to aggravate damages; and, on the other hand, that the defendant may recur to the same evidence for the purpose of mitigating them."[113] Punitive damages thus served to temper potential abuses of power by the wealthy, and concomitantly to vindicate reputational interests in the local community.

In *Marshall v. Taylor*,[114] the California Supreme Court upheld a large exemplary damages award in a seduction-by-trickery case.[115] In that case, a wealthy, middle-aged owner of a seaside resort impregnated his sixteen-year-old employee after plying her with wine.[116] Upholding the exemplary damages award, the court observed:

> In actions of the character under present investigation where the plaintiff is a young girl, poor and friendless, and the defendant a man of mature years, married and wealthy, it may well be said that the contest is an unequal one; for her youth and poverty are often weapons of victory, and form a citadel of strength in the minds of jurors, which is impregnable to successful attack by the opposition. Thus in her weakness lies her strength, while a defendant's wealth, his family and his gray hairs are elements which, when placed before the jury, often tend only to his own destruction.[117]

The court did not view the sexual relationship between employer and employee as "a cold, deliberate transfer of virtue for a consideration,"[118] but instead noted that the seduction was a product of the guile of the seducer: "the expressions of friendship, the promises, the wine, weapons of the seducer, were all there."[119] In couching its opinion in those terms, the court demonstrated the view of punitive damages as a form of social control against unequal gender relationships of power.

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112. *Id.* at 27.
113. *Id.*
114. 98 Cal. 55 (1893).
115. *Id.*
116. *Id.* at 56-58.
117. *Id.* at 58.
118. *Id.* at 61.
119. *Id.* at 62.

Contemporary commentary confirms that punitive damages were seen as an important tool in controlling the conduct of the wealthy. An 1852 article noted that allowing only compensatory damages makes wrongdoing "a mere question of profit and loss" for the rich.[120] As the article went on to note:

> It has been a very frequent complaint in England, that the small fines imposed for drunkenness and disorderly conduct, afford no check to these indulgences by the rich. It is very obvious, therefore, that to allow mere pecuniary satisfaction for wrongs, in the present state of society, would be to put the laws under the control of the wealthier classes.[121]

As the cases and commentary show, the punitive damages remedy played an important role in moderating and mediating abuses of power by wealthy actors. At common law, courts considered the financial condition and circumstances of the defendant as material evidence; it was well accepted that damages sufficient to punish a day laborer would be nothing but a slap on the wrist for a wealthy corporation.[122] The early cases thus confirm that the jury could consider not only all the circumstances of aggravation attending the wrongful act, but in some measure, the wealth of the defendant.

3. Punitive Damages as a Means of Punishing Harmful Conduct Not Reached by Criminal Process and a Supplement to the Criminal Law.—Punitive damages also served to punish socially harmful conduct, on the borderline of crime and tort, not prosecuted by public officials. The Connecticut Supreme Court suggested, for example, that courts might predicate exemplary damages in libel cases upon "principles [of] . . . justice and propriety [and allow] somewhat of a penal sanction, in cases, in which the most atrocious calumny is not punishable in a criminal prosecution."[123] Similarly, the Pennsylvania Supreme Court noted that punitive damages are appropriate to punish "offenses against morals to which the law has annexed no penalty as public wrongs."[124]

The need to use punitive damages as a supplement to the criminal law operated in *Edwards v. Leavitt*.[125] In this Vermont case, two

120. *Vindictive Damages*, 4 AM. L.J. 61, 75 (1852).

121. *Id.*

122. Belknap v. Boston & Me. R.R. Co., 49 N.H. 358, 374 (1870).

123. Bennett v. Hyde, 6 Conn. 24, 28 (1825). Moreover, in addition to supplementing the criminal code, the court contended that the punitive damages served as an "additional shield against the malice of the calumniator." *Id.*

124. McBride v. McLaughlin, 5 Watts 375, 376 (Pa. 1836).

125. 46 Vt. 126 (1873).

neighbors in the small Northeast Kingdom town of Walden, Vermont got into an altercation over a barn they shared.[126] A fight broke out between the men when one of them sought to place additional hay in the upper portion of the barn.[127] One of the men then struck his neighbor with a pitchfork; he "fracture[d] one bone, and [with] another blow on his head, ma[de] a wound two and one half inches long, cutting to the bone."[128] The Vermont Supreme Court rejected the defendant's argument that exemplary damages were not recognized in cases where a criminal prosecution was pending.[129] The court reasoned:

> It has long been settled in this state, and correctly settled upon sound reasons, that in actions of this character the jury may give exemplary damages. It is not an innovation of the common law, it is the common law.[130]

The use of punitive damages as a supplement to the criminal law, to punish particularly violent conduct likely to carry serious criminal punishment, was common. Courts upheld punitive damages in aggravated assault cases, such as the $2,750 punitive damages award upheld by the Illinois Supreme Court in *Drohn v. Brewer*.[131] In *Drohn*, the rather brutal defendant struck the plaintiff "with a padlock a number of heavy blows upon the head, inflicting several severe wounds on the skull, which caused erysipelas, from which the plaintiff suffered several months."[132] Courts in other cases awarded punitive damages as well due to aggravating circumstances: (1) "[a]ssaults with weapons likely to produce serious injury"; (2) "[a]ssaults on women or on feeble or invalid persons"; (3) "[a]ssaults on children"; (4) "[a]ssaults by officers"; (5) "[a]ssault by one as a member of a crowd or mob"; (6) excessive force when "[r]emoving trespassers"; and (7) "[u]nauthorized surgical operations."[133] Awards in these instances demonstrate the importance of punitive damages as an adjunct to the criminal law in serving the goal of punishing socially undesirable and harmful behavior.

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126. *Id.* at 127.

127. *Id.* at 127-28.

128. *Id.* at 128.

129. *Id.* at 135.

130. *Id.*

131. 77 Ill. 280, 281 (1875).

132. *Id.*

133. R.E.H., Annotation, *Punitive or Exemplary Damages for Assault*, 16 A.L.R. 771, 845-55 (1922).

4. Protecting the Family as a Social Institution.—As in England, early punitive damages in the United States protected the family as a social institution, and courts often upheld damages awards for tortious conduct directed at young, female members of a family. Chief Justice Gibson of the Pennsylvania Supreme Court acknowledged that it was not the loss of the daughter's service that was the real gravamen of actions in response to such conduct.[134] Punitive damages were given not only for the loss of the daughter's prospect for a decent marriage, but also, and importantly, for the comfort and honor of the injured family.[135]

a. Breach of Promise to Marry.—The first category of actions for which families could recover exemplary damages included actions for breach of the promise to marry, usually in connection with seduction. "[A]ggravated damages, whether compensatory for a special loss suffered by plaintiff, or as a punishment to the defendant," were held to be appropriate in these cases.[136] These cases were the singular exception to the rule that punitive damages were not allowed in breach of contract cases.[137] To recover exemplary damages, however, the plaintiff needed proof that the defendant's conduct was wanton and in willful disregard of her rights.[138] The appropriateness of punitive damages depended in part on whether the plaintiff and her family "lost any social advantages" or "suffered any mortification," and whether the defendant himself "had any social standing."[139]

The essence of a breach of promise to marry action, therefore, is to compensate the spurned woman and her family for all losses in not having the marriage contract fulfilled.[140] The damages proximately caused by the breach of the promise to marry "embrace the injury to the feelings, affections and wounded pride, as well as the loss of marriage."[141] Exemplary damages were also levied in these cases partially

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134. McBride v. McLaughlin, 5 Watts 375, 376 (Pa. 1836).

135. *Id.*

136. Morgan v. Muench, 156 N.W. 819, 823 (Iowa 1916) (affirming a $15,000 award for breach of promise to marry).

137. Hoy v. Gronoble, 34 Pa. 9, 11 (1859) ("It is an allowance of vindictive damages, which is not permitted in actions for a breach of contract, with very rare exceptions, perhaps in none, except the single case of breach of promise of marriage.").

138. *Morgan*, 156 N.W. at 823.

139. *Id.*

140. Reed v. Clark, 47 Cal. 194, 199 (1873).

141. *Id.*

because of the difficulty of calibrating the value of wounded feelings and mental anguish suffered by the plaintiff.[142]

b. Alienation of Affections.—Courts also protected the family institution by allowing punitive damages for the tort action of alienation of affections, which was intended to compensate injured feelings caused by the defendant's conduct that resulted in the breakup of the family unit. The essence of an alienation of affections case is a civil action by one spouse against a third party for interfering with the family unit.[143] There were, however, jurisdictional differences between the purposes of exemplary damages in alienation of affections cases. Some jurisdictions assessed exemplary damages to punish and deter outsiders who destroyed conjugal affection, while others viewed the remedy as a means to compensate for wounded feelings.[144]

The latter rationale operated in *Ford v. Cheever*,[145] an alienation of affections action brought against a saloon keeper for selling the plaintiff's habitually drunk husband excessive amounts of liquor and thereby rendering him in a drunken stupor that led to his death.[146] The widow recovered a verdict of $1,500, which included exemplary damages.[147] Ordering a new trial, the Michigan Supreme Court ruled that the new jury had to be instructed that exemplary damages are not for punishment, but to assuage the injured or wounded feelings of the plaintiff.[148]

The compensatory aspect of exemplary damages was also present in *Williams v. Williams*,[149] where a daughter-in-law deserted by her husband sued her mother-in-law for alienating the affections of her hus-

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142. *Id.* The court in *Reed* noted that one solution to the inaccuracy of calculating these damages was to permit "great latitude" in the introduction of evidence. *Id.* Such evidence would include how many of the plaintiff's close friends and family knew of the marriage and its breach, since broad knowledge by social acquaintances would lead to greater "annoyance and mutual suffering." *Id.*

143. L.C. Warden, Annotation, *Punitive or Exemplary Damages in Action by Spouse for Alienation of Affections or Criminal Conversation*, 31 A.L.R.2d 713, 716 n.8 (1953).

144. *See id.* at 715-17, 715 n.7 (summarizing early cases where punitive damages were awarded for alienation of spousal affection).

145. 63 N.W. 975 (Mich. 1895).

146. *Id.* at 975-76.

147. *Id.*

148. *See id.* at 976 ("While it may not be error to refer to exemplary damages as such, yet it has never been the policy of the court to permit juries to award captiously any sum which may appear just to them, by way of punishment to the offender, but rather to award a sum in addition to the actual proven damages, as what, in their judgment, constitutes a just measure of compensation for injury to feelings, in view of the circumstances of each particular case." (citing Scripps v. Reilly, 38 Mich. 10 (1878))).

149. 37 P. 614 (Colo. 1894).

band.[150] The mother-in-law was assessed an exemplary award of $12,500 for using "contrivances, by coaxing and threats of disinheriting" the plaintiff in order to break up her son's marriage.[151] The daughter-in-law and her husband had been induced by the mother-in-law to leave their home in New York to move to Denver.[152] After the couple arrived in Denver, the husband deserted his wife when the mother-in-law had fraudulently transferred all of his stocks, bonds, and other valuables to her name.[153] The Colorado Court of Appeals viewed the defendant's actions as a "cruel, bitter, unholy persecution," and the judge described it as a case of a "weak, vacillating, purposeless son . . . [who] was controlled by a dominating woman, to the end that the tie which bound him might be severed."[154] The Colorado Supreme Court echoed this sentiment, and found that the mother-in-law demonstrated "a wanton and reckless disregard of the plaintiff's rights and feelings," which was the proper foundation for exemplary damages under Colorado law.[155]

c. Punitive Liability for Criminal Conversation.—In the 1828 case of *Sanborn v. Neilson*,[156] the New Hampshire Supreme Court upheld an exemplary damages award against the defendant in a criminal conversation case that arose out of an eleven-year sexual relationship with the plaintiff's wife.[157] The tort of criminal conversation was a civil action in which a cuckold sued his wife's lover to assuage his wounded feelings and the affront to the family as a social unit. Rejecting the defense that the plaintiff's wife was a woman of easy virtue, the court observed that "in order to constitute a defence of this kind, it must be shown that the wife was permitted, by the husband, to live openly and publicly in a state of common prostitution."[158] Regardless, evidence of the plaintiff's own infidelity as well as his knowledge of his wife's indiscretions could mitigate any exemplary damages awarded.[159]

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150. *Id.* at 614.

151. *Id.*

152. *Id.* at 615.

153. *Id.*

154. *Id.* at 621.

155. *Id.* Similarly, in a 1922 Colorado case, a daughter-in-law obtained a $15,000 award including exemplary damages against her husband's parents for causing their son to desert her. McAllister v. McAllister, 209 P. 788, 788 (Colo. 1922).

156. 4 N.H. 501 (1828).

157. *Id.* at 502-03.

158. *Id.* at 510.

159. *Id.*

5. Institutional Liability for Punitive Damages.—During this period, punitive damages were rarely imposed against institutional defendants for gross negligence or recklessness. For example, in *Wardrobe v. California Stage Co.*,[160] the California Supreme Court reversed an exemplary damages award to a passenger injured when a top-heavy stagecoach overloaded with passengers overturned.[161] The trial court instructed the jury to impose damages to prevent future "recklessness in the conduct of stages to the great peril of passengers."[162] The court found the plaintiff's action as a means of recovering damage for his individual injury, "and not as public prosecut[ion] to vindicate the wrongs of the community."[163] The court thus refused to allow the plaintiff to recover damages "laid for the benefit of the public."[164]

There were exceptions to this general trend. For example, in *Whipple v. Walpole*,[165] punitive damages were assessed against a town for failing to maintain a bridge, which caused the crippling of the plaintiff's horses.[166] Similarly, in *South & North Alabama Railroad Co. v. McLendon*,[167] the Alabama Supreme Court held that a rider of a horse could recover punitive damages for a railroad company's gross negligence in maintaining a bridge.[168] The front feet of the plaintiff's mare broke through the bridge as he was crossing, throwing the plaintiff.[169] The court found that "the falling of the mare's feet through the bridge was caused by the breaking of the plank which formed the covering of the bridge, and which was decayed."[170] The court permitted punitive damages and did not even require the plaintiff to show that the railroad had knowledge of the defect in the bridge because "[t]he corporation should have employed watchful diligence in keeping the bridge in proper repair."[171]

6. Conclusions.—In early American cases, exemplary damages not only avenged the aggravated tort, but the affront to the common

160. 7 Cal. 118 (1857).
161. *Id.* at 120.
162. *Id.*
163. *Id.*
164. *Id.* The court also noted the general rule against imposing punitive damages against a principal on the basis of his agent's conduct. *Id.*
165. 10 N.H. 130 (1839), *overruled by* Woodman v. Nottingham, 49 N.H. 387 (1870).
166. *Id.* at 132-33.
167. 63 Ala. 266, 266 (1879).
168. *Id.*
169. *Id.* at 267.
170. *Id.* at 267-68.
171. *Id.* at 275.

morality.[172] The French sociologist, Emile Durkheim, defined collective conscience as the "totality of beliefs and sentiments common to the average members of a society."[173] In pre-industrial societies, crimes and quasi-criminal conduct can be seen as a violation of the collective conscience.[174] Punitive damages in early America were reflective and supportive of the collective conscience of the day—they served to remedy violations of the collective conscience and protect social institutions such as the family. Judge Calabresi notes that the U.S. Supreme Court has "looked at punitive damages and their function too single-mindedly."[175] This Section has demonstrated that the Court's single-minded hypothesis of early punitive damages solely as a remedy for mental distress was incorrect.[176]

C. *Corporate Punitive Damages (1870-Present)*

By the end of the nineteenth century, punitive damages had evolved into a means of social control against the reckless endangerment of the public by the proprietors of railroads, streetcars, coal mines, and other industrial enterprises.[177] In the late nineteenth century and the early twentieth century, the emphasis on punitive damages shifted from personal torts to corporate torts committed by the

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172. *See* Grey, *supra* note 27, at 519 ("Although tort law thus moved away from the criminal law, it remains rooted in seeking to punish those who violate societal norms.").

173. DURKHEIM, *supra* note 92, at 38-39.

174. *Id.*

175. Calabresi, Complexity, *supra* note 22, at 4 n.1.

176. *See also* William L. Murfee, Sr., *Exemplary Damages*, 12 CENT. L.J. 529, 530 (1881) (classifying early American exemplary damages cases by nature of injury, such as harm to plaintiffs' domestic relations, reputational interests, property interests, and liberty interests).

177. For example, Mississippi juries assessed punitive damages against railroads and other carriers for a variety of negligent and malicious actions, including: wrongfully ejecting passengers, *e.g.*, Tri-State Transit Co. of La. v. Worley, 20 So. 2d 477 (Miss. 1945), Williams v. S. R.R. Co., 64 So. 969 (Miss. 1914), Ill. Cent. R.R. Co. v. Reid, 46 So. 146 (Miss. 1908); carrying passengers past their stations, *e.g.*, Ill. Cent. R.R. Co. v. Ramsay, 127 So. 725 (Miss. 1930), Mobile & O. R.R. Co. v. Moreland, 61 So. 424 (Miss. 1913); accosting patrons in insulting fashions, *e.g.*, Ill. Cent. R.R. Co. v. Hickman, 111 So. 588 (Miss. 1927), Ill. Cent. R.R. Co. v. Cox, 100 So. 520 (Miss. 1924), Mobile, J. & K. C. R.R. Co. v. Kranfield, 46 So. 71 (Miss. 1908), Richberger v. Am. Exp. Co., 18 So. 922 (Miss. 1896); failing to stop when signaled, *e.g.*, Burns v. Ala. & V. R.R. Co., 47 So. 640 (Miss. 1908), S. Ry. Co. v. Lanning, 35 So. 417 (Miss. 1903); failing to care for known sick, *e.g.*, Ill. Cent. R.R. v. Smith, 59 So. 87 (Miss. 1912); refusing to carry the blind, *e.g.*, Ill. Cent. R.R. v. Smith, 37 So. 643 (Miss. 1904); allowing insults and fights, *e.g.*, Gulf, Mobile & N. R.R. Co. v. Thornberry, 188 So. 545 (Miss. 1939), New Orleans, St. Louis & Chi. R.R. Co. v. Burke, 53 Miss. 200 (1876); willful delaying of passengers, *e.g.*, Ill. Cent. R.R. v. Hawkins, 74 So. 775 (Miss. 1917); and obstructing highway crossings, *e.g.*, Ill. Cent. R.R. v. Engle, 60 So. 1 (Miss. 1912). *See* Alfred G. Nichols, Jr., Comment, *Punitive Damages in Mississippi—A Brief Survey*, 37 MISS. L.J. 131, 138-39 (1965) (collecting these cases).

agents of industrial corporations. Punitive damages were reconceptualized and transferred from a remedy designed to punish one-on-one torts to a remedy designed to deal with conduct that recklessly endangered the public. The first awards imposed against common carriers were based on vicarious liability for the intentional torts of employees,[178] and these generally came during the second half of the nineteenth century.[179] For example, a twenty-year-old female school teacher was awarded $1,000 in exemplary damages after being kissed five or six times by a harassing railroad conductor.[180] Similarly, in *Goddard v. Grand Trunk Railway*,[181] punitive damages were awarded to a railway passenger subjected to "coarse, profane, and grossly insulting" language by a brakeman.[182] The brakeman retained the passenger's ticket and denied that he ever received it, then accused the passenger of boarding without paying.[183] "[T]he brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot."[184] He then leaned over the plaintiff and "brought his fist close down to his face, and shaking it violently, told him not to yip, if he did he would spot him, that he was a damned liar, that he never handed him his ticket."[185] The jury was instructed that the case was a proper one

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178. Vicarious punitive liability for the reckless acts of agents was well established by the 1850s. For example, the Iowa Supreme Court upheld a punitive damages award against a stagecoach company for employing a known drunkard as a driver in *Frink & Co. v. Coe*, 4 Greene 555, 560 (Iowa 1854). *See also* Peck v. Neil, 19 F. Cas. 79 (C.C.D. Ohio 1842) (No. 10,892) (ruling that stagecoach company was liable for exemplary damages based upon the recklessness of their driver). *But see* Wardrobe v. Cal. Stage Co., 7 Cal. 118, 120 (1857) (holding that exemplary damages could not be imposed against a stagecoach company for the negligence of its employee).

179. *See, e.g.*, Chesapeake & Ohio Ry. Co. v. Osborne, 30 S.W. 21 (Ky. 1895) (upholding a $1,000 punitive damages award against a railroad company when its employee, while working on a train leased to another company, forcibly ejected a passenger from a moving car); Mo. Pac. Ry. Co. v. Martino, 18 S.W. 1066 (Tex. 1892) (upholding a $2,020.45 punitive damages award against a railroad company whose conductor struck and threatened a female passenger).

180. Craker v. Chi. & N.W. Ry. Co., 36 Wis. 657, 659-61 (1875). Although the Wisconsin Supreme Court, in reviewing the award, explicitly stated that exemplary damages could not be assessed against the railroad company for the unauthorized acts of its employee, the court held that the company could be liable for "compensatory damages," including damages for mental suffering, and it refused to set aside the award. *Id.* at 675-79. This seems a clear case of exemplary damages masquerading as compensatory damages.

181. 57 Me. 202 (1869).

182. *Id.* at 212.

183. *Id.*

184. *Id.*

185. *Id.*

for exemplary damages, and they returned a verdict of nearly $5,000.[186]

Although punitive damages were available under the doctrine of respondeat superior, the general rule was that they could not be assessed against a corporation for the acts of its agents unless there was proof of the company's involvement, approval, or ratification. In *Hagan v. Providence & Worcester Railroad Co.*,[187] a railroad passenger was wrongfully ejected from a railroad car.[188] The plaintiff gave his ticket to the conductor in the first-class car but subsequently entered into the second-class car.[189] The ticket collector in the second-class compartment did not believe the passenger and had him forcefully ejected at the next stop.[190] The plaintiff sought exemplary damages from the railroad for its agent's actions.[191] The trial judge instructed the jury on vicarious punitive liability:

> [P]unitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct, authorizing it or approving it, either before or after it was committed.[192]

1. Shifting the Focus to Corporate Wrongdoing.—By the late nineteenth and early twentieth century, the focus of punitive damages had shifted from individual wrongs to wrongs "committed by corporate agents typically involving defective operations or gross carelessness in the production of goods or services."[193] Corporate wrongdoers such as common carriers had the potential of causing potential injury to large numbers of the general public.[194] High-handed or arrogant cor-

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186. *Id.* at 203-04.

187. 3 R.I. 88 (1854).

188. *Id.* at 88-89.

189. *Id.* at 88.

190. *Id.* at 88-89.

191. *Id.* at 89.

192. *Id.* at 90. Agreeing with the instruction, the court observed that in cases where "the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's act," the principal should not be liable for punitive damages. *Id.* at 91.

193. TVT Records v. Island Def Jam Music Group, 279 F. Supp. 413, 421 (S.D.N.Y. 2003). *See generally* Seymour D. Thompson, *Liability of Corporations for Exemplary Damages*, 41 CENT. L.J. 308, 308 (1895).

194. *See, e.g.*, Frink & Co. v. Coe, 4 Greene 555, 559 (Iowa 1854) ("The alarming increase of railroad, steamboat and stage disasters, the frightful destruction of life, and limbs and property, call loudly for a strict enforcement of the most exemplary rules in reference to common carriers.").

porate policies by common carriers also became the basis for punitive damages by the first part of the nineteenth century.[195]

This reconceptualizaton also served to buttress civil liberties. For example, in a Texas case, a railroad was punished for a conductor's "excessive force and violence" in ejecting a woman passenger "from the car of the whites, and removing her to that of the negroes."[196] Similarly, in a California case, punitive damages were awarded against a streetcar company whose conductor refused to let a passenger board and stated, "We don't take colored people in the Cars."[197]

Courts imposed punitive damages for other deliberate or reckless conduct as well. For example, in *Pine Bluff & Arkansas River Railway Co. v. Washington*,[198] a female passenger received $2,000 in punitive damages after a railroad brakeman deliberately shot her in the arm.[199] The court observed that because it was "the duty of the brakeman to look after the comfort and safety of the passengers," he breached the public trust, thus justifying exemplary damages.[200]

Legislation also played a role in this reconceptualization. The Kentucky wrongful death statute, for example, which was enacted in 1854, provided for punitive damages for conduct that was predicated upon gross negligence or recklessness:

> That if the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid.[201]

2. Corporate Punitive Liability for Reckless Indifference and Deception.—In cases involving carriers, punitive damages were typically imposed where there was "'reckless indifference to the safety of . . . passengers,' or 'intentional misconduct' on the part of the agents and officers of the company."[202] For example, in *Frink & Co. v. Coe*, puni-

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195. *See* Rustad & Koenig, *Historical Continuity*, *supra* note 45, at 1294-97.

196. Int'l & G. N. Ry. Co. v. Miller, 28 S.W. 233, 234 (Tex. Civ. App. 1894), *aff'd*, 29 S.W. 235 (Tex. 1895).

197. Pleasants v. N. B. & M. R.R. Co., 34 Cal. 586, 589 (1868).

198. 172 S.W. 872 (Ark. 1915).

199. *Id.* at 872-73.

200. *Id.* at 874.

201. Chiles v. Drake, 29 Ky. 146, 150 (1859) (quoting ch. 964, 1853 Ky. Acts 175).

202. Maysville & Lexington R.R. Co. v. Herrick, 13 Bush 122, 127 (Ky. 1877).

tive damages were awarded against a stagecoach company for employing a known drunkard to drive a stagecoach between Chicago and Rock Island, Illinois.[203] The Iowa Supreme Court upheld exemplary damages awarded to a passenger seriously injured when the stagecoach was involved in an accident:

> In a case of gross negligence on the part of a stage proprietor, such as the employment of a known drunken driver, and where a passenger has been injured in consequence of such negligence, we think exemplary damages should be entertained.[204]

The shift in emphasis for punitive damages resulted from the role corporations such as railroads, streetcar companies, coal mines, and utilities played in causing an unprecedented epidemic of death and serious injuries. Legal historian William Nelson describes an era where accidents overshadowed diseases:

> In the nineteenth century, approximately 10% of all coal miners died in mine accidents during the course of their careers, while at the turn of the century one in every 5000 factory employees died annually from accidents. The worst victims of all were railroad employees: in 1901, one out of every 399 railroad employees was killed in an accident, while one out of every 26 was injured. For train crews in that year, one out of every 137 was killed, which translated into a nearly 20% probability of accidental death over a twenty-five year career. These high accident rates resulted from coupling industry's "cavalier attitude" that "[t]here's a dozen [new workers] waiting when one drops out" as a result of "his own bad luck," with the real "hazards of axles, mules, stinging insects, boiling laundry kettles, tetanus-inducing rusty implements and barbed wire, impure water, and spoiled food." Given the pattern of accidents and illness, it is not surprising that as late as 1920 average life expectancy in the United States was only 54.1 years.[205]

The *Frink* court upheld punitive damages against the stagecoach proprietor with this epidemic of accidents in mind. The court observed that the carnage caused by new modes of transportation created appalling social problems:

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203. 4 Greene 555, 555 (Iowa 1854).

204. *Id.* at 559.

205. William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-1980*, 47 BUFF. L. REV. 117, 174-75 (1999) (footnotes omitted) (alterations in original).

> The alarming increase of railroad, steamboat and stage disasters, the frightful destruction of life, and limbs and property, call loudly for a strict enforcement of the most exemplary rules in reference to common carriers.[206]

Courts were nevertheless divided as to the conditions for finding corporate complicity with punitive damages. As one contemporary commentator observed, some courts continued to follow the rule that

> exemplary damages may be awarded against a corporation under circumstances where such damages would be awarded against an individual, if the injurious act was previously authorized or subsequently ratified, by the board of directors or other governing body of the corporation—in which case the act is deemed to be the act of the corporation, in the same sense as when a natural person acts for himself without the intervention of an agent.[207]

Railroad derailment cases were a leading example of the potential for corporate decisions to endanger the public, not just the individual plaintiff. However, courts were split as to whether conduct akin to "reckless indifference" was required to sustain a punitive damages award. For example, in *Maysville & Lexington Railroad Co. v. Herrick*, the Kentucky Supreme Court concluded that

> The absence of slight care in the management of a railroad train, or in keeping a railroad track in repair, is gross negligence; and to enable a passenger to recover punitive damages, in a case like this, it is not necessary to show the absence of all care, or "reckless indifference to the safety of . . . passengers," or "intentional misconduct" on the part of the agents and officers of the company.[208]

In *Rutherford v. Shreveport & Houston Railroad Co.*,[209] the Supreme Court of Louisiana found that punitive damages could not be assessed against the defendant in a derailment case, absent elements of willful or wanton disregard of the company's obligations to its passengers.[210] Similarly, in an Alabama derailment case in which the injured passenger sought punitive damages for the railway's "failure to keep in good and safe condition the switch at the point of the accident," the court observed that although the railroad had failed to properly maintain

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206. *Frink*, 4 Greene at 559.
207. Thompson, *supra* note 193, at 309.
208. 13 Bush 122, 127 (Ky. 1877).
209. 6 So. 644 (La. 1889).
210. *Id.*

the track, if the failure to remedy the defect constituted simple negligence, no punitive damages could be awarded.[211]

Danger to public safety was the sine qua non of the punitive damages awarded in *Denver & Rio Grande Railway v. Harris*.[212] In *Harris*, the Supreme Court of the Territory of New Mexico affirmed a trial court's allowance of punitive damages against the officers of a railroad whose forcible seizure of another railway in the territory resulted in serious injury to the plaintiff.[213] The U.S. Supreme Court upheld the punitive damages award with the following observation:

> The doctrine of punitive damages should certainly apply in a case like this, where a corporation, by its controlling officers, wantonly disturbed the peace of the community, and by the use of violent means endangered the lives of citizens in order to maintain rights, for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country.[214]

In another notable case, a steamboat company was assessed punitive damages in a Connecticut court for failing to assist a passenger injured by the company's negligence.[215] The plaintiff had broken his leg after an insufficiently secured chain-box struck and knocked him overboard while he was on the deck of the steamboat.[216] The steamboat's employees did not seek medical attention for the plaintiff, and left him on the dock.[217]

These cases demonstrate that the conduct punishable by punitive damages varies with the functions the remedy is permitted to play. Punitive damages may serve as a remedy to control corporate conduct on the borderline between crime and tort that endangers the larger society. In this vein, they were used to counter unreasonable risks of harm caused by railroads, utilities, and streetcar companies.

3. Twentieth-Century Expansion of Punitive Damages.—In the early decades of the twentieth century, punitive damages evolved to punish companies for deceptive "business practices or relations of corpora-

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211. Richmond & D. R. Co. v. Vance, 9 So. 574, 575-76 (Ala. 1898).
212. 122 U.S. 597 (1887).
213. *Id.* at 598-99.
214. *Id.* at 610.
215. Hall v. Conn. River Steamboat Co., 13 Conn. 319 (1839).
216. *Id.* at 320-21.
217. *Id.* at 321; *see also* Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893) (noting that "[t]he recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized").

tions with customers, employees and the public in general, as . . . their competitive behavior with other enterprises."[218] By the late nineteenth century, punitive damages were already being imposed for oppressive practices by creditors. The Supreme Court of Alabama stated that exemplary damages were appropriate if a creditor's use of a garnishment was "vexatious, as well as wrongful."[219] The remedy expanded to include sharp business practices, as in a 1900 Minnesota case where the McCormick Harvesting Machine Company maliciously placed a lien on a farmer's seed grain knowing full well that a secured creditor had no such right to exempt property.[220] Similarly, in *Aetna Life Insurance Co. v. Love*,[221] the court upheld a $2,000 punitive damages award against an insurer who wrongfully ordered an autopsy of a policyholder before paying benefits under an insurance policy.[222]

After the Second World War, as the American economy became more complex and bureaucratic, punitive damages expanded to counter new dangers from environmental pollution,[223] defective products,[224] substandard medicine,[225] employment discrimination[226]

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218. TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 420-21 (S.D.N.Y. 2003); *see also* Clancy v. Reid-Ward Motor Co., 170 S.W.2d 161, 165 (Mo. Ct. App. 1943) (upholding a punitive damages award against a seller who fraudulently turned back odometers); Jones v. W. Side Buick Auto. Co., 93 S.W. 2d 1083, 1089 (Mo. Ct. App. 1936) (same); Saberton v. Greenwald, 66 N.E.2d 224, 228 (Ohio 1946) (holding that punitive damages could be recovered where a watchmaker fraudulently sold a used watch as new).

219. Hays v. Anderson, 57 Ala. 374, 378 (1876) (quoting Barber v. Ferrill, 57 Ala. 446, 448 (1876)).

220. Matteson v. Munroe, 83 N.W. 153, 153-54 (Minn. 1900); *see also* Thompson v. Modern Sch. of Bus. & Correspondence, 190 P. 451 (Cal. 1920). In *Thompson*, a correspondence school was punished for a fraudulent scheme that involved enticing students to enroll in a bogus program based upon the false promises of a guaranteed salary and job placement. *Id.* at 451-54. The plaintiffs received actual damages of $235 and "community damage," as well as exemplary damages, amounting to $5,000. *Id.* at 451. For a summary of cases discussing whether punitive damages can be awarded in tort cases based on fraudulent sales transactions, see K.A. Drechsler, Annotation, *Punitive or Exemplary Damages in Action in Tort Based on Fraudulent Sale*, 165 A.L.R. 614 (1946).

221. 149 S.W.2d 1071 (Tex. Civ. App. 1941).

222. *Id.* at 1078.

223. *E.g.*, Espinoza v. Roswell Tower, Inc., 910 P.2d 940 (N.M. Ct. App. 1995) (affirming punitive damages imposed against defendants who failed to comply with environmental regulations for the disposal of asbestos).

224. *E.g.*, Dorsey v. Honda Motor Co. Ltd., 655 F.2d 650 (5th Cir. 1981) (upholding punitive damages against Honda for poor design of the passenger compartment of a subcompact car).

225. *See generally* Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters"*, 47 RUTGERS L. REV. 975 (1995).

226. *E.g.*, Kolstad v. Am. Dental Assoc., 527 U.S. 526 (1999) (holding that punitive damages can be awarded in employment discrimination cases, even if the employer's conduct is not shown to be independently egregious).

and other corporate misbehavior. So profound an impact punitive damages have had on corporate conduct that the movement to constitutionalize punitive damages was a response to the increase in vicarious awards against corporations.[227] Corporate malfeasance costs Americans hundreds of billions of dollars annually and causes an untold number of preventable deaths and injuries. Increasingly, the legal sanctions used to deter and punish corporations blend tort and criminal remedies. The path of punitive damages has been impelled by the need for a flexible civil remedy to patrol corporate wrongdoing on the borderline between criminal law and the law of torts. Fortunately, a number of early forward-looking decisions punished companies that threatened the public safety or the social order.

In Part I, three points have been made about the history of punitive damages. The first is that exemplary damages evolved as a remedy for government oppression. This chapter of the history of exemplary damages is a story of how tort law buttressed civil liberties. The second point is that the remedy was imported into the United States to punish extremely aggravated torts. The level of exemplary or vindictive damages was based on the enormity of defendant's conduct rather than compensation to the plaintiff. The third point is that punitive damages evolved to constrain corporate misconduct towards the end of the nineteenth century. The story of punitive damages is in many respects part of an older story geared toward making corporations accountable for their policy decisions. Part I has confirmed that not only the functions, but the conduct punishable by punitive damages, varied by historical period. The earliest applications of punitive damages were directed at malicious, willful, or other intentional acts by individual offenders that upset the public order. The remedy of punitive damages evolved to express societal disapproval for fraudulent conduct or intolerable rates of injuries and deaths. The next Part is a study of the corporate backlash against punitive damages.

II. THE CONSTITUTIONALIZATION OF PUNITIVE DAMAGES

A. The States as Tort Remedy Laboratories

Punitive damages have historically followed Justice Brandeis's suggestion that the states serve as laboratories for experimentation. The remedy of punitive damages is a mosaic that reflects the history of state tort law, which in turn reflects local conditions. This remedy is

227. *See generally* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993) [hereinafter *Selective Distortion*].

the perfect laboratory for state experimentation, for after two hundred years of imposing punitive damages, there remains no national consensus about the vocabulary for civil punishment, let alone the purposes of punitive damages. The Oregon Court of Appeals, for example, views punitive damages as a "legal spanking" administered to bad actors that violate societal norms.[228] Many jurisdictions use the term "punitive damages," but other states use the terms "exemplary damages," "vindictive damages," or "smart money" to refer to punishment and deterrence through the common law.[229]

1. States That Never Recognized Punitive Damages.—The states have historically had the complete discretion to decide how and when to apply the remedy of punitive damages and under what conditions. Nebraska courts never embraced the remedy of punitive damages, whereas New Hampshire repudiated the doctrine in a 1986 tort reform statute.[230] Three other states, Washington, Louisiana, and Massachusetts, refuse to recognize common-law punitive damages and only recognize the remedy if specifically authorized by statute.[231] In the civil-code jurisdiction of Louisiana, "only compensatory damages, and not punitive damages, may be recovered in an action for tort."[232] Prior to 1996, Louisiana provided for punitive damages under several statutes, such as for the reckless transportation of hazardous or toxic substances.[233] Similarly, punitive damages are only available in Massachusetts under the state's wrongful death statute, which is generally

228. Waddill v. Anchor Hocking, Inc., 27 P.3d 1092, 1099 (Or. Ct. App. 2001).

229. *See, e.g.*, Cowen v. Winters, 96 F. 929, 935 (6th Cir. 1899) (observing that the doctrine is well settled that, in actions of tort, the jury "may award exemplary, punitive, or vindictive damages, sometimes called 'smart money'" (quoting Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893))). Colorado also follows the English convention of using the term "exemplary damages" rather than punitive damages. COLO. REV. STAT. ANN. § 13-25-127(2) (West 1997). Alabama alternatively refers to either punitive damages or vindictive damages. ALA. CODE § 6-5-186 (1993). When New Hampshire recognized the doctrine, it used all the various terms to refer to punitive damages. Fay v. Parker, 53 N.H. 342 (1872). New Hampshire later abolished the remedy of punitive damages by legislative decree. N.H. STAT. ANN. § 507:16 (1997).

230. Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574-75 (Neb. 1989) (recognizing that punitive damages violate provisions of the Nebraska Constitution); N.H. REV. STAT. ANN. § 507:16; Panas v. Harakis, 529 A.2d 976, 986 (N.H. 1987) (stating that punitive damages are prohibited but that compensatory damages may take into account the nature of the act).

231. Fisher Props, Inc. v. Arden-Mayfair, Inc., 276 P.2d 8, 23 (Wash. 1986); Int'l Harvester Credit Corp. v. Seale, 518 So. 2d 1039, 1041 (La. 1988); Santana v. Registrars of Voters, 502 N.E.2d 132, 135 (Mass. 1986).

232. Breaux v. Simon, 104 So. 2d 168, 170 (La. 1958).

233. LA. CIV. CODE ANN. art. 2315.3 (West 1997). This law was repealed by 1996 La. Acts, 1st Ex. Sess., No. 2, § 1.

compensatory in effect, but which also contains a penal element.[234] Washington does not allow punitive damages on the grounds that the doctrine violates public policy and is "unsound in principle."[235]

2. Punitive Damages Backlash in the States.—Consistent with the new federalism,[236] the business community has convinced state legislators to scale back punitive damages. Since 1986, a total of thirty-one states enacted one or more new restrictions on the recovery of punitive damages.[237] In 2003 alone, Arkansas, Colorado, Idaho, Mississippi, Montana, and Texas instituted new limitations on punitive damages.[238] The most recent reform of punitive damages came in 2004 when Mississippi capped punitive damages on a sliding scale calibrated to the net worth of the defendant.[239]

States that recognize the remedy of punitive damages have almost always required formal procedures for conducting an excessiveness review of the amount of punitive damages.[240] The postverdict procedures of the states tend to be far more extensive than the review mandated by the U.S. Supreme Court.[241] A quiet revolution has been occurring in the states, which makes it more difficult for plaintiffs to recover punitive damages. The states provide defendants with a dazzling array of procedural and substantive protections in punitive dam-

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234. *See* Burt v. Meyer, 508 N.E.2d 598, 600-02 (Mass. 1987).

235. Maki v. Aluminum Bldg. Prods., 436 P.2d 186, 187 (Wash. 1968).

236. The new federalism of the Burger/Rehnquist Court has increased the role of the states as important laboratories for experimentation. *See, e.g.*, A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 874-79 (1976).

237. Am. Tort Reform Ass'n, *Tort Reform Record*, July 13, 2004, at 17, *available at* http://www.atra.org/files.cgi/7802_Record6-04.pdf.

238. *Id.* at 18-19, 21, 23-24, 28.

239. MISS. CODE ANN. § 11-1-65(3) (Supp. 2005).

240. *E.g.*, ALA. CODE § 6-11-23(b); ARK. CODE ANN. § 16-64-124 (Michie 1987); COLO. REV. STAT. ANN. § 13-21-102(2) (West Supp. 2003); FLA. STAT. ANN. § 768.73(1)(d) (West Supp. 2004); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003); MONT. CODE ANN. § 27-1-221(7)(c); VA. CODE ANN. § 8.01-38.1 (Michie Supp. 2003); Las Palmas Assoc. v. Las Palmas Ctr. Assoc., 1 Cal. Rptr. 2d 301, 321-22 (Ct. App. 1991); Pitts Truck Air, Inc. v. Mack Trucks, Inc., 328 S.E.2d 416, 418 (Ga. Ct. App. 1985); O'Dell v. Basabe, 810 P.2d 1082, 1090 (Idaho 1991); Med. Mut. Liab. Ins. Soc'y of Md. v. Evander, 609 A.2d 353, 370 (Md. App. 1992); Bradley v. Hubbard Broad., Inc., 471 N.W.2d 670, 678-79 (Minn. Ct. App. 1991); Republic Ins. Co. v. Hires, 810 P.2d 790, 792-93 (Nev. 1991); State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 605-06 (Tex. App. 1991).

241. *See, e.g.*, ALA. CODE § 6-11-23(b) (requiring the trial court to conduct a postverdict hearing upon motion of either party, where the court must independently reassess the "nature, extent, and economic impact" of punitive damages awards); COLO. REV. STAT. ANN. § 13-21-102(2) (permitting the court to set aside or reduce punitive damages awards, notwithstanding the jury's verdict, if the court assesses that the purposes of punitive damages (such as deterrence) have been achieved).

ages litigation because of the tort reform movement.[242] States have enacted a wide-ranging number of procedural rules protecting defendants in punitive damages litigation.[243] A growing number of states bifurcate punitive damages from the compensatory damages phase of the trial in order to protect the rights of defendants. For example, while most states permit the use of wealth in determining the size of punitive damages,[244] with bifurcation they can place restrictions that prevent the abuse of such potentially inflammatory evidence during the assessment of compensatory damages.[245]

The vast majority of the states have increased the standard of proof for punitive damages from preponderance of the evidence to clear and convincing evidence.[246] Colorado is alone among the states

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242. The state tort reforms have been spearheaded by the same corporate and insurance groups seeking relief from excessive damage awards in the U.S. Supreme Court:

> Numerous business interests have combined in every state to limit the remedy of punitive damages. For example, the Product Liability Coordinating Committee (PLCC) was formed in 1987 to coordinate the activities of eight organizations: The American Tort Reform Association (ATRA), the Product Liability Alliance, the Business Roundtable, the United States Chamber of Commerce, the National Association of Manufacturers, the Chemical Manufacturers Association, the Coalition for Uniform Product Liability Laws, and the National Federation of Independent Businesses.

Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 724 n.245 (1996). ATRA-sponsored state groups have introduced comprehensive tort reform legislation scaling back punitive damages in a number of states. *See* Michael Bradfor, *Tort Reform Proponents See Boost from Bush Plan*, BUS. INS., Feb. 17, 1992, at 2 ("ATRA will be heading back to 20 state legislatures in an effort to protect tort reform gains in recent years or fight bills that would expand liability."); *see also* Rustad & Koenig, *Selective Distortion*, *supra* note 227, at 148 (documenting corporate America's amici participation in the constitutionalization of punitive damages).

243. *See supra* note 240.

244. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a) (making evidence of the defendant's financial means admissible for determining punitive damages in personal injury cases, but only after there has been a finding of liability); MONT. CODE ANN. § 27-1-221(7) (noting that if there has been a finding of liability for punitive damages, the court must consider the defendant's financial condition and net worth in a separate proceeding).

245. Bifurcation divides the trial into the compensatory damages phase and the punitive damages phase. The purpose of bifurcation is to protect the defendant from unfair prejudice that might result if the jury hears evidence for determining the amount of punitive damages that would be inadmissible for determining compensatory damages. Courts generally restrict the use of the financial evidence of the defendant to the second phase of the trial. *E.g.*, CAL. CIV. CODE ANN. § 3295(d) (West 1997); MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a); MONT. CODE ANN. § 27-1-221(7); NEV. REV. STAT. § 42.005(4); UTAH CODE ANN. § 78-18-1(2) (2002); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992).

246. ALA. CODE § 6-11-20(a); ALASKA STAT. § 09.17.020(b) (Michie 2004); CAL. CIV. CODE ANN. § 3294(a); FLA. STAT. ANN. § 768.73(2)(b); GA. CODE ANN. § 51-12-5.1(b) (2000); IND. CODE ANN. § 34-51-3-2 (Michie 1998); IOWA CODE ANN. § 668A.1(1)(a) (West 1998); KAN. STAT. ANN. § 60-3701(c) (1994); KY. REV. STAT. ANN. § 411.184(2) (Banks-Bald-

requiring plaintiffs to prove the predicates for punitive damages "beyond a reasonable doubt."[247] The remainder of this Part examines how the Court came to constitutionalize punitive damages at a time when the states were open for business as laboratories for tort reform.

3. Early Supreme Court Precedents Upholding Common-Law Civil Punishment.—The U.S. Supreme Court's first opinions on the doctrine of exemplary damages arose in admiralty with the case of *The Amiable Nancy*.[248] In that case Justice Joseph Story found the seizure of a Haitian vessel and the theft of its cargo by an armed American privateer as "a case of gross and wanton outrage, without any just provocation or excuse."[249] Justice Story would have found an ample justification for punishment of this egregious marine trespass "in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct."[250] Because the ship owners had "neither directed [the attack], nor countenanced it, nor participated in it in the slightest degree," Justice Story ruled that vindictive damages could not be awarded.[251]

In *Day v. Woodworth*,[252] the Court noted that in tort actions:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.[253]

The *Day* Court acknowledged that "if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question [of the propriety of punitive damages] will not

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win 2003); MINN. STAT. ANN. § 549.20, subd. 1(a) (West 2000); MONT. CODE ANN. § 27-1-221(5); NEV. REV. STAT. ANN. § 42.005(1); N.D. CENT. CODE § 32-03.2-11(1) (2003); OHIO REV. CODE ANN. § 2315.21(D)(3) (Anderson Supp. 2003); OKLA. STAT. ANN. tit. 24, § 9 (West 1987); OR. REV. STAT. § 31.730(1) (2003); S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 21-1-4.1 (Michie 1987); UTAH CODE ANN. § 78-18-1(1)(a); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986); Masaki v. Gen. Motors Corp., 780 P.2d 566, 575 (Haw. 1989); Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me. 1985); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 657 (Md. 1992); *Hodges*, 833 S.W.2d at 901; Wangen v. Ford Motor Co., 294 N.W.2d 437, 457-68 (Wis. 1980).

247. COLO. REV. STAT. ANN. § 13-25-127(2).

248. 16 U.S. (3 Wheat.) 546 (1818).

249. *Id.* at 558.

250. *Id.*

251. *Id.* at 559.

252. 54 U.S. (13 How.) 362 (1851).

253. *Id.* at 371.

admit of argument."[254] The Court concluded that juries had always been given the discretion of deciding the level and appropriateness of imposing punitive damages:

> By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.[255]

Following *Day*, the United States Supreme Court routinely dismissed constitutional challenges to corporate punitive damages awarded by juries in the states.[256] Justice Scalia was the first to observe that punitive damages and the American law of torts were well established in 1868 when the Fourteenth Amendment was adopted, and that it was "just as clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount."[257] Moreover, a recent review of the history of the Supreme Court's decisions "dealing with substantive due process challenges to punitive damages awards reveals that it had not struck down an award since 1915."[258]

In *Missouri Pacific Railway Co. v. Humes*,[259] for example, the defendant railroad appealed a judgment awarded under a Missouri state statute that permitted a plaintiff to recover double damages for the killing of a mule.[260] The Court rejected the railroad's argument that the Missouri statute violated the company's rights under the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of Missouri's constitution.[261] On the due process claim the Court noted that "[t]he discretion of the jury in such cases is not con-

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254. *Id.*

255. *Id.*

256. *See* LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 3.1, at 47 & n.7 (4th ed. 2000) (collecting cases).

257. Pac. Mut. Life Ins., Co. v. Haslip, 499 U.S. 1, 26-27 (1991) (Scalia, J., concurring).

258. Neil B. Stekloff, Note, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards after* BMW v. Gore, 29 CONN. L. REV. 1797, 1797-98 (1997) (observing that the historical record is at odds with the *BMW* Court's view that substantive due process limits the size of punitive damages).

259. 115 U.S. 512 (1885).

260. *Id.* at 513.

261. *Id.* at 523.

trolled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice."[262] The Court then quoted from *Day*, and again observed that in the "common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured."[263]

B. Nineteenth-Century Efforts to Constitutionalize Punitive Damages

The railroads were at the center of the first due process challenges to punitive damages in the late nineteenth century.[264] Fourteenth Amendment due process challenges were frequently mounted at any attempt to regulate railroads through exemplary damages. The Arkansas Supreme Court upheld an exemplary damages statute against a railway's constitutional challenge to a large punitive damages award in *St. Louis, I. M. & S. Railway Co. v. Paul*.[265] Under the statute, the court awarded damages to a group of day laborers who the railway terminated without paying their wages, and the railroad challenged the constitutionality of the Arkansas statute as an interference with its property rights in violation of the Fourteenth Amendment.[266]

The Arkansas statute also provided for double damages, which were challenged by the railway on due process grounds as unreasonably excessive.[267] The court ruled that the exemplary damages provision permitting the "doubling [of] the value of the property destroyed, or of the damage caused, upon refusal of the railway company, for thirty days after notice of the injury committed, to pay the actual value of the property," was constitutional.[268] This and many other constitutional disputes of the late nineteenth century and early twentieth century prefigured today's constitutional challenges to the imposition of punitive damages by juries in state courts.[269]

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262. *Id.* at 521.

263. *Id.* (quoting Day v. Woodworth, 54 U.S. 362, 371 (1851) (internal quotation marks omitted)).

264. For background on how the railroad industry forced significant innovations in the law in areas of federalism, tort, labor, corporate law, eminent domain and land use, and civil rights, see JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW vii (2001).

265. 40 S.W. 705 (Ark. 1897).

266. *Id.* at 705.

267. *Id.* at 708.

268. *Id.* at 708-09.

269. *See* Colby, *supra* note 94, at 643-47 (discussing early constitutional challenges to punitive damages).

Early attacks on the remedy sometimes focused on the need for greater procedural protections for defendants.[270] The argument was also made that punitive damages were a windfall paid to private individuals.[271] Defendants also argued that punitive damages should be tried under the beyond a reasonable doubt standard rather than the usual standard of preponderance of the evidence.[272] Finally, defendants challenged the sufficiency of jury instructions and frequently argued that courts wrongfully gave unfettered discretion to award punitive damages.[273]

C. *The Constitutional Rights of Corporate Persons*

The novel argument that corporations enjoy constitutional rights, like natural persons, was first advanced by corporate attorneys representing the railroads, mining companies, and other powerful interests.[274] By its express terms, the Fourteenth Amendment proscribes the states from abridging the "privileges or immunities of citizens" or depriving any "person of life, liberty, or property, without due process of law."[275]

The Supreme Court was skeptical of early attempts to accord corporations the status of "citizens" or "persons" under the Constitution. For example, in the 1858 case of *Covington Drawbridge Co. v. Shepherd*,[276] Chief Justice Roger Taney reasoned that corporations could not be considered citizens:

> Now, no one, we presume, ever supposed that the artificial being created by an act of incorporation could be a citizen of a State in the sense in which that word is used in the Constitution of the United States, and the averment [in another case that a corporation *itself* was a citizen] was rejected because the matter averred was simply impossible.[277]

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270. *See, e.g.*, Fay v. Parker, 53 N.H. 342, 384-97 (1872).

271. For example, a commentator in 1881 argued that "even if it be allowable to fine the defendants in a civil court, there seems no reason why the plaintiff should be the recipient." Edward C. Eliot, *Exemplary Damages*, 29 AM. L. REG. 570, 573 (1881).

272. *See, e.g.*, Murphy v. Hobbs, 5 P. 119, 121 (Colo. 1884).

273. *See, e.g.*, Hanna v. Sweeney, 62 A. 785, 785 (Conn. 1906) (accepting the defendant's argument that a certain instruction left too much discretion with the jury for determining punitive damages). *See generally Fay*, 53 N.H. 342.

274. *E.g.*, Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889) (accepting the defendant-railroad company's argument that it received constitutional due process protection).

275. U.S. CONST. amend. XIV, § 1, cl. 2.

276. 61 U.S. 227 (1857).

277. *Id.* at 233-34.

Corporate attorneys would nonetheless make the argument later that the Court should strike down various state regulations through an expansive reading of Article IV's Privileges and Immunities Clause.

In *Paul v. Virginia*,[278] an insurance agent appealed his conviction in a Virginia state court for issuing a fire insurance policy on behalf of a foreign insurance company without a license to sell insurance in Virginia.[279] Although the Virginia state statute at issue did not require domestic companies to obtain such licenses,[280] the U.S. Supreme Court rejected the insurance agent's argument that requiring a license for agents of out-of-state companies violated the Privileges and Immunities Clause.[281] The Court reasoned that "Corporations are not citizens within [the] meaning [of the Privileges and Immunities Clause]."[282] The Court refused to extend the concept of citizens from natural persons to "artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."[283] The Court's refusal to extend constitutional rights to artificial corporations in turn stymied any argument that corporations were entitled to due process rights.[284]

The Court summarily rejected substantive due process challenges to punitive damages throughout the late nineteenth century. In an 1877 case, Justice Miller wrote about the tendency of unsuccessful corporate defendants to seek refuge in the Court; he observed that "there exists some strange misconception of the scope of this provision as found in the fourteenth amendment."[285] Justice Miller criticized the tendency of every unsuccessful litigant in state courts to seek refuge in the highest court despite "the merits of the legislation on which such a decision may be founded."[286]

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278. 75 U.S. (8 Wall.) 168 (1868).

279. *Id.* at 169.

280. *Id.* at 170.

281. *Id.* at 182.

282. *Id.* at 177.

283. *Id.*

284. The contemporary understandings of due process were expressed by Justices Curtis and Field. Justice Curtis, citing Lord Coke, described the phrase, "due process of law" as "intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (citing 2 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50); *see* Magna Carta ch. 39 (1215), *reprinted in* J.C. HOLT, MAGNA CARTA 461 (1965). Similarly, Justice Field noted that the original purpose of due process of law in England was "in cases where life, liberty and property were affected . . . to secure the subject against the arbitrary action of the Crown, and to place [citizens] under the protection of the law." Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 519 (1885).

285. Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

286. *Id.*

In 1866, things changed dramatically for corporations pursuing such challenges. In striking down a state tax on railway beds, the Court in *Santa Clara County v. Southern Pacific Railroad Co.*[287] revisited the question of whether corporations were persons entitled to protection under the Fourteenth Amendment.[288] For the first time in American history, the Court held that corporations are persons within the meaning of the Fourteenth Amendment's Equal Protection Clause.[289]

The concept of corporate personhood was so clear to the Court that it declined to hear oral argument on the issue:

> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.[290]

Corporate personhood was too well established to be questioned by the turn of the century, when the Court in *Smyth v. Ames*[291] observed: "That corporations are persons within the meaning of this amendment is settled."[292] Empowered by these decisions, corporations mounted frequent equal protection challenges to new state statutes regulating their activities. The Court's recognition of corporate personhood made it possible for companies to challenge both statutes and the common law on substantive due process grounds. This helped to usher in the economic liberties age of *Lochner v. New York*.[293]

With *Lochner*, the Court in 1905 began reading far-reaching economic liberties and property rights into the Due Process Clause. In that case, the Court struck down an 1895 New York statute limiting the working hours of bakery employees to a maximum of ten hours a day and sixty hours per week.[294] An employer that was found guilty of

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287. 118 U.S. 394 (1885).

288. *Id.* at 396.

289. *Id.*

290. *Id.* Just two years later, in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, a mining corporation appealed a judgment of the Supreme Court of Pennsylvania, which held that a state license tax imposed on foreign corporations maintaining offices within the state did not violate the Commerce Clause or the Privileges and Immunities Clause. 125 U.S. 181, 184, 187 (1888). The Court held that while the corporation was not a citizen under Article IV's Privileges and Immunities Clause, it was a person for the purposes of the Fourteenth Amendment. *Id.* at 187-89.

291. 169 U.S. 466 (1898).

292. *Id.* at 522.

293. 198 U.S. 45 (1905).

294. *Id.* at 46.

violating the statute challenged his conviction on the grounds that the statute violated equal protection as well as his liberty interest under the Due Process Clause.[295]

Justice Peckham, writing for the majority, held that the state legislature exceeded its police power authority in enacting a statute limiting the hours of employment for bakery employees.[296] He reasoned that the "right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[297] Justice Holmes dissented, arguing that "a constitution is not intended to embody a particular economic theory."[298] Justice Holmes contended that the majority was simply investing the Due Process Clause with an ideological predisposition to such a theory.[299]

In the first decades of the twentieth century, the Court employed its conservative theory of economic liberties to strike down numerous state and federal regulations.[300] The *Lochner* Court's expansive reading of the Due Process Clause armed corporate attorneys with the power to reduce state regulation to a semi-comatose state. The discredited era of Lochnerism was ended by the sociolegal upheaval of the Great Depression:

> In the 1930s, economic pressures from the Depression, political opposition by the Roosevelt Administration, and intellectual assaults by the Legal Realists highlighted the anti-majoritarian character of judicial review. The Supreme Court's invalidation of popular New Deal legislation made it especially vulnerable to such criticisms. By the late 1930s, the new Justices had to define a role for the judiciary that did not offend their earlier criticisms of the *Lochner* era Court. This was not simply a matter of appearance or strategy; a strong consensus existed that the previous Court had acted improperly in striking down needed social and economic legislation. In fact, since the mid-1930s, discussions about constitutional law have been dominated by a desire to devise

295. Id. at 47, 59.

296. *Id.* at 58.

297. *Id.* at 53.

298. *Id.* at 75 (Holmes, J., dissenting).

299. *Id.* (Holmes, J., dissenting).

300. *See, e.g.*, Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

a role for the Supreme Court that avoids the evils of Lochnerism.[301]

Justice Scalia was one to compare the Rehnquist Court's punitive damages jurisprudence to Lochnerism. He noted that during the *Lochner* era the Court suddenly discovered the Due Process Clause to be a "secret repository of all sorts of other, unenumerated, substantive rights."[302] The Due Process Clause is subject to judicial activism precisely because it "can never be . . . precisely defined. '[U]nlike some legal rules . . . [it] is not a technical conception with a fixed content unrelated to time, place and circumstances.'"[303] Just as the Due Process Clause "is not intended to embody a particular economic theory,"[304] it should not be used to require the states to adopt a particular theory of punitive damages.

D. Early Due Process Challenges to Punitive Damages

During the *Lochner* period, substantive due process was successfully used to strike down state regulations, but never to reverse punitive damages awards. Corporate attorneys mounted early due process challenges to the imposition of punitive damages.[305] Hugo Black, later to become a legendary U.S. Supreme Court Justice, made a substantive due process argument to defend a corporate defendant in *Louis Pizitz Dry Goods Co., Inc. v. Yeldell*.[306] In *Yeldell*, a jury awarded $9,500 under Alabama's wrongful death statute, which permitted pu-

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301. Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 63 (1989) (footnotes omitted).

302. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 470 (1993) (Scalia, J., concurring) (comparing the suggestion that punitive damages defendants had an unenumerated substantive due process right under the Fourteenth Amendment to reasonable punitive damages to the economic liberty cases decided after *Lochner*); *see also* Thomas M. Melsheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329, 336 (1994) (noting that "substantive limits on [punitive damages] awards are . . . reminiscent of the Court's jurisprudence in the *Lochner* era").

303. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

304. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

305. In a minority of jurisdictions, individual plaintiffs successfully argued that the imposition of punitive damages after a criminal prosecution violated the constitutional prohibition against double jeopardy. *See, e.g.*, Huber v. Teuber, 10 D.C. (3 MacArth.) 484 (1879) (holding that punitive damages could not be imposed for an aggravated assault partly because the defendant could also be punished criminally); Taber v. Hutson, 5 Ind. 322, 325 (1854) (holding that the defendant would be placed in double jeopardy if subject to the imposition of both civil and criminal punishment); Borkenstein v. Schrack, 67 N.E. 47 (Ind. App. 1903) (holding that exemplary damages could not be recovered under the torts of assault and battery because the defendant was subject to criminal prosecution).

306. 274 U.S. 112 (1927).

nitive damages to be recovered.[307] The basis of the claim against the dry goods store was that it was negligent in failing to maintain a store elevator whose defect led to the death of a customer.[308] Arguing that vicarious punitive liability violated his corporate client's due process rights and anticipating late-twentieth-century arguments, Black reasoned that it was unfair to punish the company for the actions of employees.[309] He contended that vicarious liability for punitive damages violated a company's Fourteenth Amendment rights.[310] The U.S. Supreme Court upheld the statute. The Court found that the statute was passed for the purpose of preventing death by wrongful act or omission, and therefore did not unconstitutionally deprive the employer of property without due process of law.[311] The Court concluded that vicarious punitive liability was not "so novel in the law or so shocking 'to reason or to conscience' as to afford in itself any ground for the contention that it denies due process of law."[312] Today this well-established remedy has been federalized by the U.S. Supreme Court.

E. The Rehnquist Court's Constitutionalization of Punitive Damages

In *Washington v. Glucksburg*,[313] Chief Justice Rehnquist outlined the two aspects of substantive due process analysis: "First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.' . . . Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."[314] Chief Justice Rehnquist described substantive due process protections as encompassing those specific freedoms enumerated by the Bill of Rights and the liberty interest specially protected by the Due Process Clause, which encompasses the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to the right to refuse medical treatment.[315]

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307. *Id.* at 113-14.
308. *Id.* at 113.
309. Alabama's wrongful death statute permitted wide discretion on the part of the jury: "This statute authorizes the recovery of damages from either a principal or an agent, in such amount as the jury may assess, for wrongful act or negligence causing death." *Id.* at 113.
310. *Id.* at 114.
311. *Id.* at 116.
312. *Id.*
313. 521 U.S. 702 (1997).
314. *Id.* at 720-21 (citations omitted).
315. *Id.* at 720.

Corporate freedom from excessive punitive damages is not included in Chief Justice Rehnquist's list of substantive due process rights. In each of the cases challenging the constitutionality of punitive damages, representatives of corporate America have not only been "Friends of the Court," but highly partisan "Lobbyists of the Court."[316] Hundreds of amicus briefs were filed by habitual corporate defendants in the punitive damages constitutional cases.[317] Every conceivable sector of the business, the media, and the insurance industries has signed on to briefs urging the Court to intervene in state law. The corporate community first joined forces in an organized fashion in their amicus briefs in *Browning-Ferris Industries Inc. v. Kelco Disposal Inc.*[318] In *Pacific Mutual Life Insurance Co. v. Haslip*, twenty-five amicus briefs supported the petitioner.[319] In each punitive damages case, amici submitted briefs arguing that judicial tort reform was required to deal with the explosion of punitive damages claims.[320]

The anti-punitive damages corporate briefs dismiss the well-established body of empirical work confirming that there is no punitive damages crisis warranting judicial intervention. The corporate briefs eschew empirical evidence about real-world punitive damages, preferring ginned-up "junk social science" and studies prepared for litigation to build their case for radical judicial surgery.[321] The Court has been predisposed to accept hyperbolic assertions about the punitive damages crisis because the judiciary has been targeted for "reeducation" about punitive damages.[322] Corporate groups sponsor seminars in which the goal is to reeducate the judiciary about the defects of our civil justice system.[323] Finally, members of the Supreme Court are not only exposed to anti-punitives discourse in amicus briefs, but these themes are echoed in a larger cultural war against punitive damages. Tort reform advocacy organizations such as the Heritage Foundation are on a mission to reshape judicial consciousness about punitive

316. *See* Rustad & Koenig, *Selective Distortion*, *supra* note 227, at 121-22.

317. *See, e.g., id.* at 122-31.

318. 492 U.S. 257 (1989); Rustad & Koenig, *Selective Distortion*, *supra* note 227, at 125-26 & n.156 (documenting that sixteen amicus curiae briefs signed by a who's who of American industry were filed in support of the petitioner's view that the punitive damages award in that case was an excessive fine violating the Eighth Amendment).

319. 499 U.S. 1 (1991); Rustad & Koenig, *Selective Distortion*, *supra* note 227, at 126 & n.159.

320. Rustad & Koenig, *Selective Distortion*, *supra* note 227, at 126-27.

321. *Id.* at 127-28.

322. *Id.* at 141.

323. *Id.* at 141 n.248 (noting how tort reformers sponsor tort reeducation programs for judges as well as the general public).

damages.[324] Richard Willard, an avowed tort reformer, acknowledged the goal of judicial reeducation:

> We also need to change the attitudes of our courts. Activist judges, not legislatures, have made most of the changes in tort law doctrine that have produced the liability crisis. . . . Judges and juries must recognize that civil damage awards are not a free lunch.[325]

More recently, Exxon funded studies, performed by academics and cited extensively in State Farm's principal brief as well as numerous amicus briefs supporting the defendant insurance company in the *Campbell* case.[326] The empirical research funded by Exxon has already been useful in other excessiveness challenges.[327] In November of 2003, a Montgomery, Alabama jury handed down $11.8 billion in punitive damages and $63.6 million in compensatory damages against Exxon/Mobil in a royalties dispute over payments for oil field leases.[328] In this high-ratio case, the State of Alabama was awarded the second largest punitive damages award to a single plaintiff in history.[329] This case has the potential of reviving constitutional challenges based upon the Eighth Amendment's excessive fines clause given that the plaintiff is the State of Alabama.[330] Justices of the U.S.

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324. *Id.* at 141.

325. Richard K. Willard, *Wheel of Fortune: Stopping Outrageous and Arbitrary Liability Verdicts*, POL'Y REV., Spring 1986, at 40, 43.

326. *See* Alan Zarembo, *Studies to Suit Need*, L.A. TIMES, Dec. 3, 2003, at A1 ("In a separate U.S. Supreme Court case involving State Farm Insurance, leading corporations filed a brief that repeatedly cited Exxon-funded research. The plaintiffs, backed by 21 academics, countered with a lengthy attack on the studies.").

327. *Id.*

328. *See* Dee McAree, *Punitives War Has New Battleground; Exxon Loses a Huge Verdict in Alabama*, NAT'L L.J., Nov. 24, 2003, at 1 (discussing Alabama v. Exxon Corp., CV-99-2368 (Ala. Cir. Ct. Nov. 14, 2003)).

329. *Id.* Speaking about this case, Andrew Frey, lead counsel for the corporate defendant in *BMW v. Gore*, argued that a "case with $63 million in compensatory damages that is a fight between a state and big business, where it is at least arguable whether there should be punitives or not, does not seem to me to have the ingredients to justify a high punitive ratio." *Id.* at 15.

On post-trial motions the court remitted the punitive award to $3.5 billion, found that the true ratio of punitives to compensatory damages was only 3.75:1 because the total harm caused by the defendants was $930 million, and concluded that the award was constitutional. *See* Laura Clark Fey et al., *The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends After* State Farm v. Campbell, 56 BAYLOR L. REV. 807, 837 (2004).

330. In several of the punitive damages cases before the Court, the amici cited empirical research funded and produced in-house by Texaco. Rustad & Koenig, *Selective Distortion*, *supra* note 227, at 144. Texaco was assessed the largest punitive damages award other than the Exxon case in the famous Pennzoil case. *See* Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1136 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987). The Texaco punitive damages study

Supreme Court are not immune from the human tendency to draw questionable normative arguments from distorted data. The Court has begun to unmake the state law of punitive damages as a response to the widespread perception that punitive damages are out of control in the business community.

1. BMW v. Gore.—By 1991 the Court had upheld a large punitive award with the cautionary observation that the high-ratio award was "close to the line" of constitutional propriety.[331] In 1993, the Court upheld the constitutionality of punitive damages in a business torts case in which scores of corporate amici urged the Court to give the defendant relief from excessive punitive damages.[332] A year later the Court reversed a large punitive damages award in a products liability case by ruling that the defendant's procedural due process rights were violated by an amendment to Oregon's state constitution that precluded post-trial reviews for excessiveness.[333]

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distorted data by reporting mean punitive awards versus medians, the use of percentages without reporting absolute numbers, and failing to disaggregate data. Rustad & Koenig, *Selective Distortion, supra* note 227, at 143-48. The Texaco Study was published by the Washington Legal Foundation, another anti-punitive damages amici, and distributed widely by a third amicus filing organization, the American Tort Reform Association; it was widely cited by amici supporting the petitioner in *TXO*. *Id.* at 144.

331. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991). In *Haslip*, for the first time in history the Court considered the question of whether a high-ratio punitive damages award violated substantive due process. *Haslip* arose out of a bad faith insurance settlement case, in which a dishonest insurance agent pocketed his clients' premiums rather than sending them to Pacific Mutual Life Insurance Company, and he concealed from his customers the fact that his dishonesty had caused their policies to lapse. *Id.* at 5. Cleopatra Haslip, the principal plaintiff, learned of the agent's malfeasance only after her hospital bill was rejected by the insurance company. *Id.* After unsuccessfully attempting to resolve the matter, she and her co-employees sued both the dishonest agent and Pacific Mutual. *Id.* at 5-6. The jury returned a general verdict of $1,040,000 for Haslip, which included a compensatory damages award of $200,000, with out-of-pocket expenditures of less than $4,000. *Id.* at 7 & n.2. As in *Browning-Ferris*, numerous business groups filed amicus briefs claiming that punitive damages were out of control and required judicial intervention by the Court to restore the balance. For a complete list of amicus brief signatories on behalf of Pacific Mutual, see Rustad & Koenig, *Selective Distortion, supra* note 227, at 126-27 & n.160.

332. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993). In *TXO*, Justice O'Connor's dissent, joined by Justice White in full and Justice Souter in part, reiterated her concern that excessive awards against out-of-state corporations were unfairly "transferring money from 'wealthy' corporations to comparatively needier plaintiffs." *Id.* at 491 (O'Connor, J., dissenting). In *TXO*, amici represented many sectors of "the nation's business community—from Allstate Insurance Co. to the Monsanto Co.—[which] argue[d] that [punitive damages] . . . continue to run wild, and there is a need for specific standards." Marcia Coyle, *Punitives at Issue, Yet Again, Justices Examine Either "Mirage" or "Crisis"*, NAT'L L.J., Mar. 29, 1993, at 1.

333. Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994).

At common law, of course, punitive damages could be reduced or reversed on evidentiary errors, juror bias, or passion or prejudice, but never, until 1996, on the grounds that the size of an award alone violated a defendant's due process rights.[334] Core federalist principles encourage the states to experiment with normative as well as procedural reforms of tort law. The states are achieving a mounting consensus entirely within the tradition of federalism that punitive damages need to be tailored to local conditions. Yet, with the reversal of awards on due process grounds, the Court's punitive damages jurisprudence reveals a certain suspicion about the states' ability to protect the substantive rights of corporate persons.[335]

In *BMW of North America, Inc. v. Gore*, a 5-4 majority found a $2 million punitive damages award to be excessive and violative of the Due Process Clause of the Fourteenth Amendment.[336] The *Gore* Court paid homage to federalist principles in acknowledging that "[s]tates necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."[337] The Court also stated that "legislative judgments concerning appropriate sanctions for the conduct at issue" are entitled to "substantial deference."[338] The Court then proceeded to violate those federalist principles by substituting its concept of punitive damages for more than two centuries of state law development.[339] The Court supplanted state law procedures and evidentiary rules with an entirely new federal constitutional framework.[340] The Court announced three guideposts to determine whether exemplary damages are disproportionate to compensatory damages: (1) "the degree of reprehensibility of the nondisclosure;" (2) "the disparity between the harm or potential harm . . . and [the] punitive damages award;" and (3) "the difference between [the] remedy and the civil penalties authorized or imposed in comparable cases."[341] Justice

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334. *See* Jane Massey Draper, Annotation, *Excessiveness or Inadequacy of Punitive Damages in Cases Not Involving Personal Injury or Death*, 14 A.L.R.5th 242 (1993) (collecting and examining state and federal cases in which courts reviewed punitive damages for excessiveness or inadequacy).

335. *See* TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 417-18 (S.D.N.Y. 2003) (citing, for example, Justice O'Connor's dissenting opinion in *Haslip*).

336. 517 U.S. 559, 562-63 (1996).

337. *Id.* at 568.

338. *Id.* at 583 (quoting Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

339. *Id.* at 599 (Scalia, J., dissenting).

340. *Id.* at 614-19 (appendix to opinion of Ginsburg, J., dissenting) (listing the states' prior legislative activity with respect to placing limits on punitive damages).

341. *Id.* at 575.

Scalia, however, criticized these guideposts as "mark[ing] a road to nowhere; they provide no real guidance at all."[342] Justice Ginsburg further observed that "[t]he Court's readiness to superintend state-court punitive damages awards is all the more puzzling in view of the Court's longstanding reluctance to countenance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings."[343]

2. State Farm Mutual Automobile Insurance Co. v. Campbell.— The Court's latest stop on the "road to nowhere" occurred in April of 2003, when it decided *State Farm Mutual Automobile Insurance Co. v. Campbell* and struck down a $145 million punitive damages award on the grounds that the award was so excessive as to violate the insurer's rights under the Due Process Clause of the Fourteenth Amendment.[344] The case arose from a coverage dispute between State Farm and its insured, Curtis Campbell, who was the defendant in a wrongful death action stemming from an auto accident.[345] State Farm made a decision to contest Campbell's liability in the wrongful death action, and declined to settle all claims against Campbell for the limits of his insurance policy.[346] State Farm also ignored the advice of one of its own investigators and, taking the case to trial, assured the Campbell family that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel."[347] The Campbells faced financial ruin resulting from State Farm's decision; the jury returned a judgment for $185,849, "far more than the amount offered

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342. *Id.* at 605 (Scalia, J., dissenting). Justice Scalia's concern was that the federal guideposts not only supplanted well-established state law, but would cause confusion in the states:

> The legal significance of these "guideposts" is nowhere explored, but their necessary effect is to establish federal standards governing the hitherto exclusively state law of damages. Apparently (though it is by no means clear) all three federal "guideposts" can be overridden if "necessary to deter future misconduct,"—a loophole that will encourage state reviewing courts to uphold awards as necessary for the "adequat[e] protect[ion]" of state consumers. By effectively requiring state reviewing courts to concoct rationalizations—whether within the "guideposts" or through the loophole—to justify the intuitive punitive reactions of state juries, the Court accords neither category of institution the respect it deserves.

Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so.

343. *Id.* (Scalia, J., dissenting) (citations omitted) (alterations in original).
Id. at 613 (Ginsburg, J., dissenting).

344. 538 U.S. 408 (2003).

345. *Id.* at 412-13.

346. *Id.* at 413.

347. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1142 (Utah 2001).

in settlement."[348] State Farm not only refused to cover the damages in excess of the policy limits, but their counsel refused to post a bond allowing the Campbells to appeal this judgment.[349] He advised them instead that they should place "for sale" signs on their property to satisfy the judgment, or afford the appeal.[350] The Campbells then filed suit against State Farm for its bad faith settlement practices.[351]

At trial, the plaintiffs contended that State Farm should be punished for its national policy to cap claim payments and for fraudulent settlement practices.[352] The Campbells were awarded $2.6 million in compensatory damages and $145 million in punitive damages.[353] The trial court reduced the compensatory award to $1 million and the punitives award to $25 million.[354] On appeal, the Utah Supreme Court reinstated the entire punitive damages award after applying the *Gore* guideposts.[355] The Utah Supreme Court examined the record, and found State Farm's conduct to be reprehensible as shown by evidence of its fraudulent business practices, its wealth, and its clandestine activities that made it likely that it would only be caught in "one out of every 50,000 cases as a matter of statistical probability."[356] The Utah Supreme Court uncovered overwhelming evidence that State Farm systematically targeted economically vulnerable policyholders to pad its bottom line.[357] The court also found systematic evidence of State Farm's national policy decision to deliberately cheat or shortchange its customers.[358]

The U.S. Supreme Court granted the defendant's writ of certiorari.[359] The Court, in a 6-3 decision, reversed the judgment of the Utah Supreme Court, and held that the high-ratio punitive damages award violated the defendant's substantive due process rights.[360] The Court acknowledged that there were sufficient grounds for punitive damages given the trial court's finding "that State Farm's employees altered the company's records to make Campbell appear less culpa-

348. *Campbell II*, 538 U.S. at 413.
349. *Id.*
350. *Id.*
351. *Id.* at 413-14.
352. *Id.* at 414-15.
353. *Id.* at 415.
354. *Id.*
355. *Id.*
356. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1153 (Utah 2001).
357. *See id.* at 1148 (citing evidence of the insurer's systematic pattern of unfair settlement practices targeting vulnerable policyholders, such as the poor and the elderly).
358. *See id.* (describing the series of tactics used by State Farm to defraud customers).
359. *Campbell II*, 538 U.S. at 416.
360. *Id.* at 429.

ble."[361] Another aggravating circumstance was the insurer's disregard of "the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded."[362] The Court acknowledged that it was appropriate for the jury to punish State Farm, but found that the $145 million punitive damages award went beyond the state's legitimate objectives in punishing and deterring the insurer for its reprehensible conduct.[363] The Court second-guessed the Utah Supreme Court, stating that a "more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives."[364]

The Court's single-minded view of retribution undermines state sovereignty and misreads the multiple functions of punitive damages as they have evolved over two centuries of Anglo-American jurisprudence.[365] The Court has imposed a highly restrictive framework in its analysis of retributory punishment. To determine whether the defendant's conduct is reprehensible, the Court must ask whether: (1) "the harm caused was physical as opposed to economic"; (2) "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) "the target of the conduct had financial vulnerability"; (4) "the conduct involved repeated actions or was an isolated incident"; and (5) "the harm was the result of intentional malice, trickery, or deceit, or mere accident."[366] The Court also seems to require more than one of these factors to be present: "the existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."[367]

In *Campbell II*, the Court criticized not only the size of the punitive damages award levied against State Farm, but also the trial court's evidentiary rulings as to State Farm's national policies.[368] The Court castigated the lower court for permitting the trial lawyer to use evidence of punitive damages "as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."[369] The Court failed to consider that it is critical to the func-

361. *Id.* at 419.
362. *Id.*
363. *Id.* at 423-24.
364. *Id.* at 419-20.
365. *See, e.g., id.* at 425 (stating that the Court's holding defers to state goals, but then proceeding to dismantle state law).
366. *Id.* at 419.
367. *Id.*
368. *Id.* at 420-21.
369. *Id.*

tion of deterrence that the insurer, and others not before the court, be admonished about the dire consequences of implementing a national policy that shortchanges policyholders.[370]

The Court also formulated a test for reviewing the reasonableness of high-ratio punitive damage awards: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or in this case, of 145 to 1."[371] Justice Kennedy, writing for the majority, observed that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[372] The *Campbell II* Court also created a questionable presumption that compensatory damages also contain a punitive component. The Court cited no empirical findings supporting its observation that where compensatory damages compensate for emotional distress, "such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation."[373]

The punitive damages in *Campbell II* were ruled an arbitrary and unconstitutional deprivation because the insurer's conduct failed both the reprehensibility and the high-ratio tests.[374] However, the Court eschewed a mathematical ratio test: "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."[375] Thus, one net effect of the Court's recent punitive damages jurisprudence is to replace communitarian principles of punitive damages developed over centuries with an individualistic retributive model predicated upon *lex talonis*.[376]

Finally, the Court in *Campbell II* limited the type of evidence that may be used to show that punitive damages are appropriate and the manner in which states may determine what is punishment enough to deter the defendant and others from repeating their misconduct.

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370. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981) (noting that one purpose of punitive damages is to deter persons other than the defendant from engaging in wrongful activities).

371. *Campbell II*, 538 U.S. at 425 (citations omitted).

372. *Id.*

373. *Id.* at 426 (quoting RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1979)).

374. *Id.* at 425.

375. *Id.*

376. *See* Davida A. Williams, Note, *Punishing the Faithful: Freud, Religion, and the Law*, 24 CARDOZO L. REV. 2181, 2201 (2003) ("Another concept associated with the retributivist philosophy is the concept of *lex talonis*, the idea of exact retaliation or proportionality. Accordingly, punishment must be in the exact degree of the crime, neither too harsh nor too lax; otherwise moral equilibrium will not be restored." (footnote omitted)).

With calls to increase these limitations continuing, there will be no shortage of future issues for the Court to ponder when it comes to punitive damages. In *Campbell II*, for example, corporate amici urged the Court to eliminate the variable of the defendant's wealth from the punitive damages equation.[377] While the Court in *Campbell II* did not accept that argument, it did express its disfavor with using wealth as a factor in calculating damages.[378] One wonders if that may be the next limitation the Court places on punitive damages.

*3. Post-*Campbell II *Remand Orders.*—In 2003, the business community ranked the Court's decision in *Campbell II* as the single most important decision of the year for corporate America.[379] The insurance industry and product manufacturers were the chief financial beneficiaries of the Court's nationalization of punitive damages, as the Court granted certiorari in many cases for the sole purpose of remanding to state courts for reconsideration in light of *Campbell II*.[380] In *Campbell II*'s wake, punitive damages awards against a who's who of corporate defendants have been vacated: Philip Morris, Exxon, Chrysler, Ford Motor Company, and National Union Fire Insurance.[381] For example, the $5 billion punitive damages award in the Exxon Valdez oil spill disaster was vacated,[382] as was a $290 million

377. Brief of the American Tort Reform Association as Amicus Curiae in Support of Petitioner at 28, State Farm Mut. Auto. Ins. Co. Inc. v. Campbell, 538 U.S. 408 (2003) (No. 01-1289).

378. *Campbell II*, 538 U.S. at 427.

379. *E.g.*, Marcia Coyle, *Business Cases Cut Wide Swath; So Far, 18 of the 38 Cases on the Docket Could Impact Employers*, NAT'L L.J., Sept. 29, 2003, at 8.

380. *See, e.g.*, Nat'l Union Fire Ins. Co. v. Textron Fin. Corp., 538 U.S. 974 (2003) (vacating a punitive damages award in an insurance bad faith case and remanding for reconsideration in light of *Campbell II*); Anchor Hocking, Inc. v. Waddill, 538 U.S. 974 (2003) (vacating a punitive damages award in a products liability action and remanding for reconsideration in light of *Campbell II*).

381. It should come as no surprise that State Farm and several of the corporate defendants who had their punitive damages verdicts vacated are financial supporters of the tort reform movement. *See* Trisha L. Howard, *Lawyers Strike Back at Interest Groups; They Say the Groups Who Have Criticized Donations to Judges Promote Corporate, Not Public Interests*, ST. LOUIS POST-DISPATCH, Oct. 11, 2002, at C1 (noting that the American Tort Reform Association "counts as its primary supporters such companies as Caterpillar, Exxon, General Electric, Philip Morris and State Farm Insurance").

382. Sea Hawk Seafoods, Inc. v. Exxon Corp., No. 30-35166, No. 03-32519, 2003 U.S. App. LEXIS 18219 (9th Cir. Aug. 18, 2003), *vacating and remanding In re* Exxon Valdez, 236 F. Supp. 2d 1043 (D. Alaska 2002); *see* Joseph J. Chambers, *In re* Exxon Valdez: *Application of Due Process Constraints on Punitive Damages Awards*, 20 ALASKA L. REV. 195, 198 (2003) ("On August 18, 2003, before the parties even submitted appellate briefs, the Ninth Circuit vacated the district court's judgment and remanded the case so that the district court could reconsider its decision in light of *State Farm Automobile Insurance Company v. Campbell*, decided by the Supreme Court in April of 2003.").

award against Ford Motor Company[383] and a $3 million punitive damages award against Chrysler Corporation.[384] Phillip Morris received what was, in effect, a multimillion dollar gift from the Court's vacating of a $79.5 million punitive damages award against the tobacco giant in the wake of *Campbell II*.[385] Punitive damages have been slashed by state courts in nearly every case on remand from the U.S. Supreme Court, and, interestingly, many of the corporate defendants whose punitive damages were vacated are underwriters of tort reform in Congress and state legislatures.[386]

The Court's constitutional theory of punitive damages is another example of how corporate America is successful in the "politics of recognition."[387] The corporate community's continual barrage of anti-punitive damages rhetoric is correlated with the nationalization of punitive damages. The next Part examines the specific ways that the Court's individual retributory model interferes with the multiple social functions of punitive damages that have evolved over two centuries of Anglo-American jurisprudence.

III. THE MULTIPLE AND LATENT FUNCTIONS OF PUNITIVE DAMAGES

> We must not make a scarecrow of the law,
> Setting it up to fear the birds of prey,
> And let it keep one shape till custom make it
> Their perch and not their terror.[388]

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383. Ford Motor Co. v. Romo, 538 U.S. 1028 (2003), *vacating and remanding* 122 Cal. Rptr. 2d 139 (Ct. App. 2002).

384. Chrysler Corp. v. Clark, 540 U.S. 801 (2003), *vacating and remanding* 310 F.3d 461 (6th Cir. 2002).

385. Philip Morris USA v. Williams, 540 U.S. 801 (2003), *vacating and remanding* 51 P.3d 670 (Or. Ct. App. 2002). On remand, the Oregon Court of Appeals reinstated the award. 92 P.3d 126 (Or. Ct. App. 2004). The Supreme Court of Oregon has since decided to review the case. 104 P.3d 601 (Or. 2004).

386. *See supra* note 381.

387. Victor Schwartz, counsel for the American Tort Reform Association and senior editor of the Prosser casebook, claims that "American business faces a world of unended, unbounded threat of punitive damages." Stephen Wermiel, *Fit Punishment? High Court Will Get Chance to Put Limits on Punitive Damages*, WALL ST. J., Sept. 28, 1990, at A1. Monsanto's Richard Mahoney claims that "[t]he punitive-damages system makes it too easy for lawyers to persuade a jury—possessing little scientific background but believing in the possibility of a risk-free society—to enrich plaintiffs and contingent-fee lawyers with multimillion-dollar windfalls." Richard J. Mahoney, *Business Forum; Punitive Damages; It's Time to Curb the Courts*, N.Y. TIMES, Dec. 11, 1988, at 3; *see also* Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17 (criticizing the system of punitive damages in the context of the *Exxon Valdez* case).

388. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, sc. 1, ll.1-4, at 32 (Grace Ioppolo ed., Applause 2001) (1623).

In the 2003 term, the Supreme Court willingly gave State Farm relief from its punitive damages liability, but it rejected a constitutional challenge to a draconian criminal sentence in *Lockyer v. Andrade*.[389] The defendant in that case stole five videotapes, worth a total of $84.70, from a K-Mart in Ontario, California.[390] Two weeks later he stole videotapes worth $68.84 from another K-Mart in Montclair, California.[391] Andrade was charged with petty theft for shoplifting $150 worth of videotapes, but because he had prior convictions, the charge was prosecuted as a felony.[392]

Andrade was sentenced to two consecutive terms of a twenty-five-year sentence for the petty thievery; California's three strikes law provides that "any felony can constitute the third strike, and thus can subject a defendant to a term of 25 years to life."[393] The defendant's prior crimes were possession of marijuana and relatively minor theft offenses.[394] The Court, in a 5-4 decision upholding the three strikes law, was unmoved by the argument that the imposition of two twenty-five-year prison terms for stealing $150 worth of videotapes was grossly disproportionate to the offense.[395]

The *Andrade* Court ruled that the gross disproportionality principle of federal constitutional law applies only to extraordinary cases and that it was not an unreasonable application of law to affirm Andrade's sentence.[396] Justice Souter's dissent stated that "the Eighth Amendment prohibition against cruel and unusual punishment to terms of years is articulated in the 'clearly established' principle acknowledged by the Court: a sentence grossly disproportionate to the offense for which it is imposed is unconstitutional."[397] In *Campbell II*, the Court held that the corporate coffers must be protected against excessive civil judgments, but the Court in *Andrade* refused to overturn two twenty-five-year sentences for a petty criminal.[398]

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389. 538 U.S. 63 (2003).
390. *Id.* at 66.
391. *Id.*
392. *Id.* at 67.
393. *Id.*
394. *Id.* at 66-67.
395. *Id.* at 77.
396. *Id.*
397. *Id.* at 77 (Souter, J., dissenting).
398. The Court's upholding of this draconian criminal sentence might have even violated Article 3 of the European Convention of Human Rights, as well as Article 5 of the United Nations Declaration of Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11) (1988), *available at* http://www.echr.coe.int/Convention/WebConvenENG.pdf; Universal Declaration of Human Rights, art. 5, G.A. Res. 217 A, U.N. GAOR, 3d Sess., U.N. Doc. A/311 (1948); *see also* Recent Case, 114 Harv. L. Rev. 648, 652 n.38 (2000) (noting the international trend

During each October Term, the Court is flooded with petitions from corporate wrongdoers seeking relief from punitive damages.[399] The United States Supreme Court receives over seven thousand petitions for certiorari per year and accepts fewer than one hundred.[400] Much of the Court's docket each year is comprised of cases involving criminal procedure, general business law, and challenges to new federal regulations.[401] Given how few cases the Court decides, it is striking that the Court has decided seven cases on the constitutionality of the state law remedy of punitive damages in a decade and a half. The Court's recent punitive damages jurisprudence is particularly surprising given the appreciation that the Court has for the balance between state and federal government in the other subject areas of its docket.[402] Corporate due process under tort law has won its place on the Court's docket alongside cases considering the rights of natural persons in such high-profile issues as the death penalty, abortion, school prayer, and rights of criminal defendants. A leading first-year casebook in constitutional law observes that the Court's punitive damages decisions have "revived substantive due process in the area of economic liberty."[403] Today's law students are learning about corporate due process rights in punitive damages litigation alongside cases such as *Griswold v. Connecticut*[404] and *Roe v. Wade*.[405] The constitutionalization of punitive damages is an unprecedented project to convince the Court to "unmake" the tort law remedy of punitive damages.[406] In the

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towards recognition of lengthy incarceration on death row as cruel and excessive punishment). Yet, the Court was content to defer to the state's expansive view of criminal punishment.

399. Historically, the Court was reluctant to read the Due Process Clause very broadly. Many have argued, however, that the Due Process Clause be viewed "as a means of bringing to the test of the decision of [the Supreme Court] the abstract opinions of every unsuccessful litigant in a State court, of the justice of the decision against him." Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 520 (1885) (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877)).

400. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 11 (2003).

401. *Id.* at 11-13.

402. For example, Justice O'Connor comments how the Rehnquist Court has "given a more expansive interpretation of the Eleventh Amendment, and that in turn has produced more cases in that area." *Id.* at 13.

403. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 478 (14th ed. 2001).

404. 381 U.S. 479 (1965).

405. 410 U.S. 113 (1973).

406. *See generally* Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with 'New' Torts*, 49 DEPAUL L. REV. 455 (1999) (arguing that the California Supreme Court has served to "unmake" tort law in such diverse areas as products liability, liability for third-party misbehavior, and the negligent infliction of emotional distress).

1960s, the Court was a "tort unmaker"[407] of state law for information-based torts.[408] The Court's undue emphasis on individual harm is reminiscent of AT&T's advertising slogan of "Reach Out and Touch Someone." After *Campbell II*, the U.S. Supreme Court requires plaintiffs to prove a nexus between certain aspects of a company's aggravated misconduct and the plaintiffs' specific injury.[409] In *Campbell II*, the Court ruled that an insurer's lawful, out-of-state conduct could only be considered in assessing punitive damages if such misconduct had a "nexus to the specific harm suffered by the plaintiff."[410] The Court's punitive damages jurisprudence tacitly assumes that international corporations reach out to harm specific plaintiffs rather than implement broad policies that harm diffuse groups of individuals.

The Court's myopic preoccupation with individual retribution illustrates the process I call "judicial miniaturism," inspired by sociologist John Stolte, who coined the term "sociological miniaturism" to describe sociological social psychology, which is a form of microsociology.[411] The Court's microanalysis of individual retributive justice overlooks the macrosociological functions of punitive damages that have evolved over two centuries of Anglo-American jurisprudence. Under the *Campbell II* Court's retributive punishment model, the inquiry is solely on whether a tortfeasor is deserving of punishment and whether the amount of the award is equal to the harm done to the individual plaintiff rather than the impact on the larger society.[412]

Sociologist Robert Merton's theory of manifest and latent functions provides a useful heuristic device in explaining the multiple functions of punitive damages.[413] Manifest functions are those that are intended and have recognizable consequences for the social system, as compared to latent functions that are beneath the surface and

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407. That history of "unmaking" state law and replacing it with newly made federal law began before the 1960s. *See generally* Andrew L. Kaufman, *Benjamin Cardozo as Paradigmatic Tort Lawmaker*, 49 DEPAUL L. REV. 281 (1999). Cardozo openly acknowledged and defended the practice of judge-made law. *Id.* at 281-82.

408. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (unmaking tort law by constructing the public official doctrine, which limited the state law tort of defamation).

409. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

410. *Id.*

411. Stolte et al., *supra* note 23, at 388; *see also* SPENCER E. CAHILL, INSIDE SOCIAL LIFE: READINGS IN SOCIAL PSYCHOLOGY & MICROSOCIOLOGY ix (3d ed. 2001) (noting that microsociology focuses on "the daily details of how actual people create and sustain the social relationships, organizations, and systems that macrosociology studies in the abstract").

412. *See Campbell II*, 538 U.S. at 422-23 (noting how the lower court improperly awarded punitive damages based upon harms unrelated to those suffered by the Campbells).

413. *See generally* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (rev. ed. 1957).

neither intended nor recognized by participants.[414] In the context of punitive damages, the manifest functions of punishment and deterrence are the avowed goals of the remedy.[415] In contrast, the subgoals are the latent functions that fulfill societal purposes often not recognized or articulated in court opinions.[416] This Part explores how the Court's miniaturist view of punitive damages deflects attention away from the broader societal goals and subgoals of tort law remedies first identified by Calabresi in *The Costs of Accidents.* The Court's single-minded preoccupation with retributory punishment has distracted it from considering the broader social functions of punitive damages first identified by Calabresi. As Calabresi would readily acknowledge, confirmation hearings for U.S. Supreme Court justices or other federal judges do not address a nominee's knowledge or competence to make or unmake the nuanced functions of punitive damages.[417]

A. The Court's Miniaturization of Punitive Damages

The *Campbell II* Court focused entirely upon the individual-based retributory goal of punishment in contrast to the broad societal functions of punitive damages in the states. The Court is correct that retribution was a key component in numerous primitive legal systems. Retributory punishment was well established in the Babylonian Hammurabi Code.[418] However, by the time of Twelve Tables, even Roman

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414. *Id.* at 51.

415. *E.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991).

416. *See* MERTON, *supra* note 413, at 63 (describing "latent functions" as "unintended and unrecognized consequences"); *see also* Loudon v. Ryder, 2 Q.B. 202, 209 (1953) (upholding £5,500 exemplary damages award and observing that a more subtle effect of the award is to act as a fine designed "to hit the defendant hard if he has disregarded the rights of others and show that that sort of conduct does not pay").

417. *See* Guido Calabresi, 21st Century Judging and Tort Law, Keynote Address to the AALS Conference on Torts, The Judge's New Robe: Rethinking the Judicial Role for the 21st Century Torts (June 20, 2003) *available at* http://www.aals.org/profdev/torts/program.html [hereinafter 21st Century Judging and Tort Law].

418. Charles F. Horne, The Avalon Project at Yale University, The Code of Hammurabi: Introduction, *at* http://www.yale.edu/lawweb/avalon/medieval/hammint.htm (last modified Feb. 22, 2005). Hammurabi "was the ruler who chiefly established the greatness of Babylon, the world's first metropolis. Many relics of Hammurabi's reign ([1795-1750 BC]) have been preserved, and today we can study this remarkable King . . . as a wise law-giver in his celebrated code . . . ." *Id.* (alternations in original). Multiple fines calibrated to the enormity of the offense were integral to the Hammurabi Code:

> The commonest of all penalties was a fine. This is awarded by the Code for corporal injuries to a *muskinu* or slave (paid to his master); for damages done to property, for breach of contract. The restoration of goods appropriated, illegally bought or damaged by neglect, was usually accompanied by a fine, giving it the form of multiple restoration. This might be double, treble, fourfold, fivefold,

law had already transcended the purely retributive model in favor of a code that blended compensatory and punitory functions.[419] Retribution is a primitive form of punishment because its focus is not specifically on the individual, but rather on the individual and his kinship group.[420] Because the kinship units are at the heart of *gemeinschaft* society, retributory punishment involves the family as a unit, not just the aggrieved plaintiff.[421] The flaw of retributory punishment is the difficulty of finding equivalence between the degree of injury and the correct level of punishment to restore justice.[422]

In recent years, the Supreme Court has also subordinated deterrence to retribution, a departure from its earlier constitutional jurisprudence. In his concurring opinion in *TXO Products Corp. v. Alliance Resources Corp.*, Justice Kennedy contended that the Court's concern should focus on whether an award reflects jury bias, prejudice, or passion, and is not tempered with a genuine consideration of deterrence and retribution.[423] In *TXO*, the Court's concern with deterrence was demonstrated by the plurality's examination of the relationship between punitive damages and compensatory damages.[424] The plurality refused to limit its due process inquiry to the reasonableness of the relationship between punitive damages and actual damages.[425] Rather, their inquiry also considered the potential harm of the defendant's conduct "as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."[426]

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sixfold, tenfold, twelvefold, even thirtyfold, according to the enormity of the offence.

Babylonian Law, *in* 3 ENCYCLOPEDIA BRITANNICA 120 (11th ed. 1910); *see also* THE CODE OF HAMMURABI (L.W. King trans. 1915), *available at* http://www.yale.edu/lawweb/avalon/medieval/hamcode.htm (last modified Feb. 22, 2005) (imposing a thirtyfold fine for stealing cattle, sheep, an ass, pig, or goat if it belonged to either god or the court, and a tenfold fine if the property belonged to a freed man of the king; thieves with no financial resources were put to death).

419. *See* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 210 (1962) (noting the essential distinction under Roman law between penal actions, which commonly resulted in payment of more than compensation, and "reipersecutory" actions, which commonly resulted in payment of compensation only). The Twelve Tables acted as "both a statute and a code"; they consisted of twelve bronze tablets that contained the basis of Roman law. *Id.* at 15.

420. Lynn H. Nelson, Lectures in Medieval History, Kansas University, Medieval Law: Minima Non Curat Lex, *available at* http://www.ku.edu/kansas/medieval/108/lectures/law.html (Jan. 1, 2001).

421. *Id.*

422. *Id.*

423. 509 U.S. 443, 467-69 (1993) (Kennedy, J., concurring).

424. *See id.* at 459-62.

425. *Id.* at 460.

426. *Id.*

Uncapped punitive damages are therefore required to protect the society against the potential harm that might result from concealed antisocial conduct.[427]

The Court began to marginalize the function of deterrence in *Cooper*, where it stated that "deterrence is not the only purpose served by punitive damages."[428] Even before that case the Court had observed that "punitive damages are imposed for purposes of retribution and deterrence."[429] The Court's endorsement of retributory punitive justice in *Campbell II* is thus a one-dimensional theory at odds with the multiple functions fulfilled by the remedy under state law.[430] The compulsory ascension of retribution above general punishment and deterrence in the punitive damages equation is likely to create confusion in the states.[431]

B. The Manifest Functions of Punitive Damages

At early common law, juries awarded "punitory, vindictive, or exemplary damages; in other words, [juries could] blend together the interests of society and of the aggrieved individual, and give[ ] damages, not only to recompense the sufferer, but to punish the offender."[432] Despite the difference in terminology, punitive damages serve three basic manifest functions in most jurisdictions: (1) to pun-

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427. *See* Fed. Deposit Ins. Corp. v. W.R. Grace & Co., 877 F.2d 614, 623 (7th Cir. 1989) ("The most straightforward rationale for punitive damages . . . is that they are necessary to deter torts or crimes that are concealable.").

428. Cooper Indus., Inc., v. Leatherman Tool Group, Inc., 532 U.S. 424, 439 (2001).

429. Pac. Mut. Life Ins. Co. v. Haslip, 449 U.S. 1, 19 (1991).

430. Even in *Campbell II* the Court did state that it recognized both the retributive and deterrent functions of punitives. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). On the other functions of punitive damages, see Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982) (arguing that punitive damages serve the functions of "(1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff's attorneys' fees"); Owen, *Overview*, *supra* note 36, at 374 (arguing that modern punitive damages fulfill the roles of "(1) education, (2) retribution, (3) deterrence, (4) compensation and (5) law enforcement" (footnotes omitted)).

431. *See* 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 4.13, at 4-15 (Cum. Supp. 2004) ("In by far and away the vast majority of jurisdictions which sanction awards of non-compensatory, punitive damages, the reason advanced for allowing those damages is that they will affect punishment and deterrence. The two questions which then must obviously arise are: Punishment of whom? Deterrence of whom?").

432. Pegram v. Stortz, 244 6 S.E. 485, 498 (W. Va. 1888) (quoting SEDGWICK, *supra* note 46, at 39).

ish the defendant (punishment); (2) to deter the defendant (specific deterrence); and (3) to deter others (general deterrence).

1. Punishment Function.—The Court's judicial miniaturism protects corporate defendants much like the discredited *Lochner*-era jurisprudence, in which the Court struck down scores of corporate regulations by investing the due process clause with an economic liberties theory. The retributive function of punitive damages[433] identified by the Court conflicts with the punishment and deterrence functions of punitive damages followed by most state courts.[434] In most jurisdictions, punitive damages are awarded in the jury's discretion "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future."[435] Punitive damages in Maryland, for example, "are awarded in an attempt to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of the serious risk of monetary liability."[436] The purpose of Texas's exemplary damages "is similar to that for criminal punishment, and like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize risk of unjust punishment."[437]

States vary significantly in their philosophies of civil punishment as well as in their standards for imposing punishment. Punitive damages in the states often reflect social mores of the local jurisdiction. A state's legitimate interests in punishing unlawful conduct and deterring its repetition varies, depending upon the economic base. A federal court applying Alaska law, for example, imposed a $5 billion punitive damages award against Exxon for knowingly permitting a relapsed alcoholic sea captain to direct the operation of a supertanker carrying fifty-three million gallons of oil through Prince William Sound's prime fishing area.[438]

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433. *See* DAN B. DOBBS, THE LAW OF TORTS § 381, at 1063 (2000) ("The idea of punishment or retribution is that it is just for the defendant to suffer for his misconduct. The idea of deterrence is quite different. It is that a sufficient sum should be exacted from the defendant to make repetition of the misconduct unlikely.").

434. *See* Rustad & Koenig, *Historical Continuity, supra* note 45, at 1318 ("The punishment and deterrence functions are the most frequently cited rationales for the remedy of punitive damages." (footnote omitted)).

435. RESTATEMENT (SECOND) OF TORTS § 908(1).

436. Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 650 (Md. 1992).

437. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16-17 (Tex. 1994) (footnote omitted).

438. *In re* Exxon Valdez, 236 F. Supp. 2d 1043, 1046 (D. Alaska 2002); *see also In re* Exxon Valdez, 296 F. Supp. 2d 1071, 1110 (D. Alaska 2004) (applying *Campbell II* guidelines in remitting a $5 billion punitive damages award to $4.5 billion).

Punitive damages vindicate different interests in a state with a large agricultural sector than in one where software licensing, high technology or Internet businesses drive the state economy. A jury in Alabama, for example, awarded punitive damages in a case where a large agribusiness firm systematically cheated hundreds of chicken farmers by underweighing their chickens.[439] Arizona, which has a large health-oriented population, imposes punitive damages by statute for willful misconduct in health spa contracts.[440] California places a high value on the confidentiality of medical information, and provides punitive damages for unlawful disclosure by providers.[441] California, as the center of the U.S. entertainment industry, also imposes punitive damages for the unauthorized commercial use of a deceased personality's name, voice, or likeness.[442] California uses the sanction of punitive damages to protect its considerable fine art holdings from being altered or destroyed,[443] and finally, the remedy of punitive damages for rent skimming protects the large numbers of new immigrants to California.[444]

2. *Specific and General Deterrence.*—Punitive damages, like criminal sentences, are predicated upon a model of deterrence. Deterrence in turn is based on the assumption that defendants engage in misconduct only after rationally weighing benefits and potential costs.[445] Calabresi was the first writer to apply the criminal law concepts of specific and general deterrence to tort remedies.[446] Specific deterrence assesses a price to a particular wrongful act whereas general deterrence fulfills the larger function of vindicating the broader societal interest by making wrongful acts more expensive and less at-

439. Braswell v. Conagra, Inc., 936 F.2d 1169 (11th Cir. 1991).

440. ARIZ. REV. STAT. ANN. § 44-1796.C (West 2003).

441. CAL. CIV. CODE § 56.35 (West Supp. 2004).

442. *Id.* § 3344.1(a)(1).

443. *Id.* § 987(e)(3).

444. *Id.* § 891(a).

445. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981). In *Grimshaw,* Ford's decision to expose consumers to the risk of an exploding gas tank was based on an unethical "cost-benefit analysis" that balanced egregiously undervalued "human lives and limbs against corporate profit." *Id.* at 384. Profit maximizers must know that the worst-case scenario (with punitive damages in place) is more serious than merely paying only what was owed in the first place (compensatory damages and a criminal sanction), plus legal expenses. Under California law, the maximum criminal penalty for violating federal automobile safety standards would have been $1,000 per vehicle (and up to a maximum of $800,000), an amount dwarfed by Ford's net worth of $7.7 billion and its after-tax income of $983 million. *Id.* at 388-89.

446. *See generally* THE COSTS OF ACCIDENTS, *supra* note 20.

tractive to potential wrongdoers.[447] Calabresi transformed the way we think about punitive damages as a tort remedy with multiple goals and subgoals.[448] One of these goals in particular, the concept of general deterrence, may be seen as fulfilling a societal purpose.[449]

There are many obvious parallels between the general deterrence function of punitive damages and the criminal side of the law. Plea-bargaining in criminal law resembles the informal process of settlement that occurs when a trial lawyer has uncovered "smoking gun" documents demonstrating corporate concealment. On the criminal side of the law, sentencing occurs in a separate proceeding, in which the court determines punishment according to the circumstances of the case. Sentencing guidelines under federal criminal law provide more specific guidance in setting punishment. On the civil side, many states have enacted the procedural reform of bifurcation that separates the compensatory stage from the punitive damages proceeding.[450] Bifurcation ensures that the jury does not consider evidence material to punitive damages but highly prejudicial to the issue of compensatory damages.[451] In each case, the focus is on whether society is protected by the punitory sanction.

Punitive damages have traditionally been imposed to deter the wrongdoer and have historically not depended upon the amount of actual damage, but rather upon the enormity and the circumstances

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447. *Id.* at 26-27.

448. *See id.* at 26-31. I am also inspired by Judge Calabresi's keynote address at the AALS Torts Conference, in which he discussed the multiple functions of punitive damages. Calabresi, 21st Century Judging and Tort Law, *supra* note 417.

449. The $10 million punitive damages award affirmed by the Supreme Court in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), is an example. The award in *TXO* was predicated upon not only the actual harm suffered by the plaintiff but the potential harm of the defendant's course of conduct, the degree of bad faith displayed by the defendant, and whether the conduct was part of a "larger pattern of fraud, trickery and deceit." *Id.* at 462. The $10 million punitive award was a message of general deterrence to the entire oil and gas industry, not to engage in predatory business practices.

450. *See supra* notes 244-245 and accompanying text.

451. Bifurcation of punitive damages separates the adjudication of punishment from the issue of compensatory damages. Bifurcation is another example of the states serving as laboratories of experimentation with tort reform. A number of states bifurcate only the determination of the amount of punitive damages from the rest of the trial. *E.g.*, CAL. CIV. CODE § 3295(d); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (stating that courts in products liability cases must determine punitive damages after the finder of fact has determined compensatory damages). A few states bifurcate any proceedings on punitive damages from proceedings on compensatory damages. *E.g.*, MINN. STAT. ANN. § 549.20, subd. 4; MISS. CODE ANN. § 11-1-65(1)(b), (d) (2002). The bifurcation of punitive damages prevents the jury from hearing potentially inflammatory evidence such as the wealth of the corporate defendant, until punitive liability is established. Some states have compulsory bifurcation, while in other states either party may request bifurcation. For more on state bifurcation procedures, see *supra* notes 244-245 and accompanying text.

of the wrong.[452] It is optimal that punitive damages are roughly proportional to the enormity of the wrong rather than to actual damages, which may be slight.[453] Insurance bad faith cases like the *Campbell* case illustrate well the consequences of the misuse of asymmetric information inherent in the relationship of insurer and insured.

The concepts of specific and general deterrence were also articulated in the asbestos products liability case of *Jackson v. Johns-Manville Sales Corp.*[454] In that case, the Fifth Circuit addressed as a basis for punitive damages societal disfavor with the asbestos manufacturers' failure to warn workers of the consequences of unprotected exposure to asbestos dust.[455] The court noted that punitive damages are awarded "both as an expression of society's disfavor of their action 'and as an example so that others may be deterred from the commission of similar offenses.'"[456] Quite to the contrary, the *Campbell II* Court explicitly criticized the plaintiff's use of evidence of the insurer's "national scheme to meet corporate fiscal goals by capping payouts on claims company wide."[457]

The *Campbell II* Court thus subordinated the role of general deterrence in its view that punitive damages may not be used as a platform to punish larger corporate policies. In fact, the Supreme Court did not distinguish between the general or specific deterrence functions in its *Campbell II* opinion, despite the fact that these functions have long been recognized in the common law.[458] Meanwhile, the *Campbell II* Court's second due process guidepost focuses on the math-

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452. *See, e.g.*, Donovan v. Consolidated Coal Co., 88 Ill. App. 589, 598 (1899) (noting that punitive damages are imposed by way of punishment of the wrongdoer and do not "depend upon . . . the amount of actual pecuniary damage sustained, but depend wholly upon the motive, purpose and condition of mind and heart of the wrongdoer and the circumstances and manner of his doing the wrong").

453. For example, punitive damages were assessed against an insurance company that taught its adjusters to chisel payments on claims because policyholders were unlikely to discover or strenuously object to such petty losses. Hawkins v. Allstate Ins. Co., 733 P.2d 1073 (Ariz. 1987); *see also* Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1, 2 (7th Cir. 1972) (upholding an award against a life insurer for its practice of using "economic coercion" to "compromise" valid claims); Moore v. Am. United Life Ins. Co., 197 Cal. Rptr. 878 (Ct. App. 1984) (upholding punitive damages against a company engaged in a bad faith insurance scheme); Delos v. Farmers Ins. Group, Inc., 155 Cal. Rptr. 843, 857 (Ct. App. 1979) (affirming an award against insurer for a "nefarious scheme to mislead and defraud thousands of policyholders").

454. 781 F.2d 394 (5th Cir. 1986).

455. *Id.* at 403.

456. *Id.* (quoting Snowden v. Osborne, 269 So. 2d 858, 860 (Miss. 1972)).

457. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 420 (2003) (quoting Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.2d 1134, 1143 (Utah 2001)).

458. As the Court noted in *Campbell II*, "Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful con-

ematical ratio between actual or potential harm suffered and punitive damages.[459] The Court explicitly stated that high-ratio punitive damages awards are disfavored:

> Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.[460]

Although declining to impose a fixed cap that a punitive damages award cannot exceed, the Court has imposed a de facto cap. The Court's informal single-digit ratio between punitive damages and compensatory damages will likely have a chilling effect upon the imposition of high-ratio punitive damages awards in the cases where the harm to society is significantly greater than the level of compensatory damages. The Court does acknowledge the possibility of high-ratio punitive damages when compensatory damages are low, but when compensatory damages are substantial, "perhaps [punitive damages] only equal to compensatory damages" may be appropriate.[461]

3. Augmented Compensation.—The *Campbell II* Court's reprehensibility analysis is entirely incompatible with jurisdictions that recognize punitive damages as a form of additional compensation. The punitive damage remedy has always played an exclusively compensatory role in Connecticut[462] and Michigan.[463] If punishment and deterrence are not part of these states' punitive damages equations, there is little question that courts in these states will be at a loss to apply the *Campbell II* principles. Reviewing courts in Connecticut and Michigan will

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duct.'" *Id.* at 416 (quoting RESTATEMENT (SECOND) OF TORTS § 903). "By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." *Id.*

459. *Id.* at 424-25.

460. *Id.* at 425 (citation omitted).

461. *Id.*

462. In Connecticut, an award of punitive damages is imposed to pay a plaintiff's litigation expenses. Collens v. New Canaan Water Co., 234 A.2d 825, 831-32 (Conn. 1967) (stating that punitive damages were purely compensatory and may not exceed plaintiff's litigation expenses, minus taxable costs); *see also* Gagne v. Town of Enfield, 734 F.2d 902, 904 (2d Cir. 1984); Bates v. McKeon, 650 F. Supp. 476, 481 (D. Conn. 1986).

463. Peisner v. Detroit Free Press, 364 N.W.2d 600, 608 (Mich. 1984); Jackovich v. Gen. Adjustment Bureau, Inc. 326 N.W.2d 458, 464 (Mich. Ct. App. 1982) (holding that punitive damages are to compensate the plaintiff for humiliation and indignity suffered as a result of defendant's tort).

find it difficult, if not impossible, to apply the Court's reprehensibility framework, which is entirely incompatible with these states' quasi-compensatory remedies of punitive damages. *Campbell II* also poses problems in jurisdictions where punitive damages serve as "mock compensatory damages" or have compensatory subgoals.[464]

In augmented-compensation jurisdictions, moreover, retributory punishment plays no role. Augmented-compensation jurisdictions de-emphasize punitive damages for punishment and deterrence and instead reserve this remedy for intangible injuries, the expense of litigation, or as something extra awarded for the inconvenience of litigation.[465] Augmented compensation is frequently justified on the grounds that the contingency fee system ensures that plaintiffs will be systematically undercompensated[466] because they must pay substantial legal fees. Compensation can therefore be thought of as a "residual" function of punitive damages.[467] Even states not formally recognizing punitive damages will sometimes permit extracompensatory damages to be awarded as the equivalent of civil punishment.[468]

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464. Several jurisdictions recognize augmented compensation as a subgoal of punitive damages. Idaho, for example, permits courts to assess punitive damages for attorney's fees, but does not necessarily preclude an award of punitive damages that also has a punitive and deterrent element. *See, e.g.*, Erhardt v. Leonard, 657 P.2d 494, 499 (Idaho Ct. App. 1983) (holding that punitive damages are appropriate to reimburse the plaintiff's attorney fees and other related expenses where the defendant was found to have acted in a malicious and wanton manner). Compensation may also be considered as a subgoal of punitive damages in Virginia and West Virginia. *See, e.g.*, Sperry Rand v. A-T-O, Inc., 459 F.2d 19, 21 (4th Cir. 1972) (noting that Virginia law does not prohibit the assessment of punitive damages simply because they serve in part to compensate some of the plaintiff's loss); Perry v. Melton, 299 S.E.2d 8, 12-13 (W. Va. 1982) (holding that punitive damages can be recovered even if no compensatory damages are awarded and noting that punitives may provide the plaintiff additional compensation).

465. *See* Rustad & Koenig, *Historical Continuity*, *supra* note 45, at 1321-22.

466. *Id.* at 1321. Conversely, it is sometimes argued that where punitive damages exceed litigation costs, the plaintiff receives a windfall. Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1905 (1992).

467. David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1295-96 (1976) [hereinafter *Punitive Damages in Products Liability*] (noting that the compensatory role is "usually residual"); Note, *supra* note 466, at 1402 (describing this function as "secondary").

468. Massachusetts, for example, does not recognize punitive damages absent a statute, but permits compensatory damages to be increased to punish. In *Smith v. Holcomb*, 99 Mass. 552 (1868), the plaintiff produced evidence that the defendant struck him. The trial judge instructed the jury that the plaintiff could recover for all the direct injurious results of the assault, as well as for insult and indignity. *Id.* at 554. The Massachusetts Supreme Judicial Court affirmed, stating:

> The insult and indignity inflicted upon a person by giving him a blow with anger, rudeness or insolence, occasion mental suffering. In many cases they constitute the principal element of damage. They ought to be regarded as an aggravation of the tort, on the same ground that insult and indignity, offered by the plaintiff to

C. *Latent Functions of Punitive Damages*

The concept of latent function extends the analysis of punitive damages beyond the question of whether or not the sanction attains its avowed purpose of punishment and deterrence. Punitive damages not only perform the manifest function of punishing and deterring the defendant and others, but also fulfill less acknowledged latent functions. The Wisconsin Supreme Court described punitive damages as a critically important legal institution:

> [It] is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices cognizable in, or not sufficiently punished, by the criminal law.[469]

As the Sections that follow demonstrate, however, the U.S. Supreme Court's constitutionalization of punitive damages has had the unanticipated consequence of undermining each multiple and latent function of punitive damages.

1. Encouragement of Private Attorneys General.—Judge Jerome Frank used the term "private attorney general" to refer to "any person, official or not," who brought a proceeding "even if the sole purpose is to vindicate the public interest."[470] Expanding on this concept, another court noted that "the plaintiff acts as a private attorney general to punish the culpable wrongdoer, thereby encouraging adherence to safety standards that benefit [society] generally. . . . [I]t is not the plaintiff's individual right, but society's as a whole, that is being defended."[471] Courts, however, rarely mention the role of punitive damages in serving as private enforcement for a public purpose. If plaintiffs "are entrusted with the role of private attorneys general, [the

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the defendant, which provoked the assault, may be given in evidence in mitigation of the damage.

469. *Id.* at 554-55.

Luther v. Shaw, 147 N.W. 17, 20 (Wis. 1914).

470. Assoc. Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943).

471. Thiry v. Armstrong World Indus., 661 P.2d 515, 518 (Okla. 1983); *see also* Kink v. Combs, 135 N.W.2d 789, 798 (Wis. 1965) (noting how punitive damages serve the public because the private individual acts as a prosecutor to punish harmful conduct).

punitive damages] must be great enough to encourage the filing and prosecution of an action."[472]

Punitive damages encourage the prosecution of claims by those who otherwise might not have the incentive to incur the expense of "scorched earth" litigation against a large corporation.[473] By encouraging plaintiffs to serve as private attorneys general, punitive damages fulfill their most critical latent function as they vindicate the larger societal interest by bridging the enforcement gap and increase both punishment and deterrence.[474] Punitive damages have consistently provided important protection for average citizens against entities too powerful to be constrained by lesser remedies. Punitive damages meld the two opposed sides of the law, the private and the public. The term "crimtort" captures the expanding middle ground between criminal and tort law, which is increasingly the subject of punitive damages litigation.[475]

The private attorney general can also serve as a "powerful engine of public policy"[476] because of its responsiveness to social problems. Private attorneys general use private enforcement to advance the public interest in an efficient manner that is responsive to market forces.[477] Meanwhile, public law enforcement resources may not be

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472. Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 73 (1990).

473. *See* Wangen v. Ford Motor Co., 294 N.W.2d 437, 454 (Wis. 1980).

474. Owen, *Punitive Damages in Products Liability*, *supra* note 467, at 1287-88 (arguing that "the prospect of punitive damages recoveries induces injured plaintiffs to act as 'private attorneys general' and thereby helps to increase the number of wrongdoers who are properly 'brought to justice'") (footnotes omitted)).

475. Grant Gilmore described "contorts" as cases that lie on the borderline between contract and tort law. GRANT GILMORE, THE DEATH OF CONTRACT 98 (Ronald K.L. Collins ed., 1995). This inspires the term "crimtort," to identify the expanding common ground between criminal and tort law:

> Crimtorts are not a new body of law per se or even a new cause of action. Rather, crimtorts are an explicit recognition that the criminal law principles of punishment and deterrence have been assimilated into tort remedies. Crimtorts have a unique capacity simultaneously to fulfill a private function of compensating injured claimants and a public law purpose of controlling socially harmful behavior. The trend towards the absorption of criminal law elements into torts can be seen in many recent high profile cases.

Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 294 (1998).

476. Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 179 (1998).

477. Some prominent law and economics scholars have endorsed punitive damages for their ability to encourage people not to use formal enforcement measures. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 160-61 (1987). The private attorney general institution can function without a large government bureau-

flexible enough to prosecute particular wrongs.[478] For example, it was private attorneys general, not regulators, who uncovered smoking gun documents of an industry-wide conspiracy to conceal the risks of asbestos exposure.[479] In that complex litigation, punitive damages "awards act[ed] almost as a form of criminal penalty administered in a civil court at the request of a plaintiff who serves somewhat as a private attorney general."[480] The proceeds of the asbestos litigation in turn provided the funds needed to underwrite the costs of taking on big tobacco. It was also private attorneys general, rather than public regulators, who uncovered internal documents that exposed tobacco industry lies about addiction and nicotine manipulation and brought the industry to the settlement table.[481]

Punitive damages are particularly needed "where there are gaps in the criminal law."[482] Private attorneys general provide a backup[483] in situations in which government enforcement agencies fail to protect the public adequately.[484] Government regulatory agencies have played a relatively minor role in uncovering the smoking guns utilized to obtain punitive damages verdicts in products liability.[485] Nations without private attorneys general tend to have a huge government bu-

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cracy because plaintiffs receive the full amount of punitive damages as an incentive for bringing cases.

478. *See* TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 425 (S.D.N.Y. 2003).

479. *See* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 403 (5th Cir. 1986) (holding that in the asbestos litigation "punitive damages reward individuals who serve as 'private attorneys general' in bringing wrongdoers to account").

480. *In re* Sch. Asbestos Litig., 789 F.2d 996, 1003 (3d Cir. 1986).

481. Henry Weinstein & Myron Levin, *Tobacco Companies Flood Internet with Documents; Litigation: 27 Million Pages Are Posted to Deflect Critics, Charges They're Hiding Damaging Information*, L.A. TIMES, Feb. 28, 1998, at A1. Tobacco litigation, brought by both private lawyers and State Attorneys General, is credited with revealing over the last decade many secret, and damaging, industry documents. *Id.*

482. Leslie E. John, Note, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2051 (1986).

483. One area in which the government relies heavily upon "private attorneys general" is the enforcement of environmental statutes. Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 340 (1988). The private attorney general role is also explicitly recognized in federal antitrust actions, where a private party is permitted a treble damage remedy. 15 U.S.C. § 15(a) (2000).

484. *See, e.g.*, Blomquist, *supra* note 483, at 366 (describing the advent of the citizen-suit provision of the Clean Air Act as a means to ensure enforcement, when Republican administrations of the 1970s would be unlikely to do so).

485. *See, e.g.*, Thiry v. Armstrong World Indus., 661 P.2d 515, 518 (Okla. 1983) (noting how individual, private plaintiffs, in seeking punitive damages for products liability torts, ultimately benefit society by encouraging adherence to safety standards); *see also* Kink v. Combs, 135 N.W.2d 789, 798 (Wis. 1965) (recognizing that without the promise of punitive damages some unlawful conduct will go unpunished).

reaucracy to serve as advocates for victim's rights.[486] Punitive damages deter even the most powerful corporations because the level of the award is often based upon a company's net worth or earnings. In the vast majority of states, the wealth of the defendant is admissible to determine the amount of punitive damages necessary to deter the wrongdoer.[487] The next Subsection examines the chilling effect of *Campbell II* on the role of private attorneys general in bad faith insurance cases and other corporate wrongdoing cases based upon "pattern and practice" evidence.

a. Extraterritorial Limitations on the Private Attorney General.— The *Campbell II* Court has not only articulated substantive and procedural standards for limiting punitive damage awards, but even rules of evidence. This conflicts with the practice where "the States, and not [the] Court, retain 'the traditional authority' to determine what particular evidence . . . is relevant."[488] The private attorney general function of punitive damages has been undermined by the U.S. Supreme

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486. Ironically then, a robust punitive damages regime is consistent with the self-interest of the business community. In the long run, the American emphasis on safety in products liability will produce top quality products needed to compete in the international marketplace. It is a delusion that limiting punitive damages will improve U.S. competitiveness. Punitive damages keep the ethical corporation from being at a competitive disadvantage with its unethical domestic and foreign competitors. There are a large number of examples of foreign companies who were assessed punitive damages for the grossly inadequate testing and design of products. *See, e.g.*, Dorsey v. Honda Motor Co., Ltd., 655 F.2d 650 (5th Cir. 1981) (applying Florida law and upholding punitive damages against Honda for its poor design of the passenger compartment of a subcompact car). A good example is the case of the Japanese firm of Fuji Jukogyo Kabushiki Gaisha, which was assessed punitive damages for the defective design of the Subaru Brat. The Brat had been designed so that the seats were located in the bed, qualifying it as a passenger vehicle subject to only a 3% tariff rather than the 25% import duty applied to trucks. *See* Cunningham v. Subaru of Am., 684 F. Supp. 1567 (D. Kan. 1988); *see also* Michael L. Rustad & Thomas Koenig, *Punitive Damages—Plaintiff's View*, *in* 2 PRODUCTS LIABILITY PRACTICE GUIDE § 18.07[1], at 18-69 (John F. Vargo ed., 2003) (citing and discussing the Subaru Brat case). The "competitive disadvantage" argument is misleading because the legal climate of our major trading partners is converging with that of the United States. The European Community's adoption of the Products Liability Directive is an example of this convergence. *See* William Dawkins, *Brussels Draws Up Basic Safety Rules for Consumer Goods*, FIN. TIMES, Feb. 19, 1987, at I3 (describing the development of new minimum safety standards for all consumer products by the European Commission). While it is true that only the Anglo-American legal system permits the awarding of punitive damages, there are functional equivalents such as augmented civil fines in some countries. The European Union recently imposed a roughly $600 million fine against Microsoft for antitrust violations in its marketing of the Windows operating system in Europe. Jonathan Krim, *Microsoft Lobbies Hard to Reverse EU Antitrust Penalties*, GLOBAL NEWS WIRE, Mar. 31, 2004.

487. Theodore Emens Cowen, Comment, *Zen and the Art of Exemplary Damages Assessment*, 72 KY. L.J. 897, 910 (1984); *see supra* notes 34, 244 and accompanying text (citing examples).

488. Skipper v. South Carolina, 476 U.S. 1, 11 (1986) (Powell, J., concurring).

Court's new rules for the use of "dissimilar and out-of-state conduct evidence" to "expose, and punish, the perceived deficiencies" of national corporations such as insurers.[489] The Court in *Campbell II* observed that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."[490] In a bad faith insurance case, however, the plaintiff will not typically be in a position to prove that the insurer was a recidivist unless out-of-state prior misconduct is admissible.

Corporate policies are set at the national level, and it would be unlikely that a firm targets consumers in a specific state for unfair or deceptive settlement practices.[491] The amicus brief of the state attorneys general in *Campbell II* contended that the private attorney general function of punitive damages would be crippled if a factfinder was prevented from considering anything other than what the defendant did to the specific plaintiffs in the particular case before the court.[492] The states have traditionally been free to use punitive damages to encourage plaintiffs to serve as private attorneys general and thereby to perform important functions in promoting public health, safety, and welfare.[493] If punitive damages are limited, however, the states will be unable to encourage this type of civil enforcement. Moreover, the Court's limitation on the admissibility of other bad acts conflicts with other traditional aspects of state law, such as the practice of informing juries of other punitive damages awarded for the same course of conduct.[494]

In some bad faith insurance cases, the amount of money chiseled from any one policyholder may be too small to warrant the time and energy to sue a Fortune 500 firm. In such situations, where a corpo-

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489. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 420 (2003).

490. *Id.* at 422.

491. The Utah trial court permitted the plaintiff in the *Campbell* case to introduce evidence of "a national scheme [by State Farm] to meet corporate fiscal goals by capping payouts on claims company wide." Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1143 (Utah 2001). The Supreme Court marginalized the use of extraterritorial bad acts evidence. *See Campbell II*, 538 U.S. at 422 (noting that each state makes its own rules about what type of conduct is permitted within its borders and determines independently the punishment for violating those rules).

492. Brief of Amici Curiae of the Attorneys General of the States of Minnesota, Delaware, Florida, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, Oklahoma, Oregon, and Rhode Island at 7-8, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (No. 01-1289).

493. *Id.* at 3-4, 7-8.

494. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. e.

rate defendant has acted and continues to act in violation of the rights of a large group of people solely for the calculated purpose of making more money, punitive damages awards by state courts may be the only effective remedy. Private attorneys general have traditionally obtained punitive damages in cases where insurance companies misappropriate small amounts from their policyholders.[495] After *Campbell II*, though, counsel now must be careful about the use of "sending a message" arguments because of the Court's restrictions upon the probative value of "dissimilar and out-of-state conduct."[496] The Court's restrictions on the use of extraterritorial bad acts will thus have a chilling impact on the typical bad faith insurance case in which settlement policies are set at the national headquarters.[497] In future cases, the evidence must be framed to make it appear that a national corporation has set policies directed at individual policyholders,[498] for "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."[499]

In the end, the *Campbell II* Court did leave some limited use for evidence of extraterritorial conduct. This evidence may be used to show recidivism. If other-bad-act evidence is used to demonstrate that the insurer is a recidivist, however, there must be a showing that the other acts were substantially similar to the harm suffered by the plaintiff.[500] Therefore, in evaluating the reprehensibility of a defendant's conduct, a court may not consider extraterritorial conduct that has no nexus to the harm suffered by the plaintiffs.[501]

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495. Punitive damages have often been assessed against insurance companies that have shortchanged policyholders—conduct which is dishonest, malicious, and outrageous. *See, e.g.*, Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1078 (Ariz. 1987) (upholding punitive damages against a company that taught adjusters to cheat by "chiseling" small amounts on claims because policyholders would probably not object to these small deductions); Moore v. Am. United Life Ins. Co., 197 Cal. Rptr. 878, 895 (Ct. App. 1984) (upholding punitive damages where disability insurance benefits were denied by use of misleading and deceptive settlement practices that were "firmly grounded in an established company policy" and "that had the potential of defrauding countless policyholders other than plaintiff").

496. *Campbell II*, 538 U.S. at 420.

497. *Id.* at 421 (noting that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred" and indicating the lack of public policy reasons for doing so).

498. *Id.* at 422-23.

499. *Id.* at 423.

500. *Id.*

501. *Id.* at 422.

b. Corporate Pattern and Practice Evidence.—Another troubling aspect of *Campbell II* is that the Court's extraterritorial rules are at odds with rules about the admissibility of other acts found in the Federal Rules of Evidence. Under the Federal Rules of Evidence, prior bad acts are not admissible unless they are relevant to a material, noncharacter issue.[502] In products liability actions, for example, prior consumer complaints regarding a particular product can be offered to prove a manufacturer's knowledge of a defect in that product, and thus support plaintiffs' punitive damages claims, as they demonstrate reprehensible conduct.[503] Limitations on the use of extraterritorial bad acts will therefore encumber private attorneys general in products liability cases.[504] This is particularly damaging in these cases because in a typical products liability case marketing is directed to a wide array of consumers throughout the country over a lengthy period.[505]

At common law, plaintiffs had the right to introduce any evidence that either directly or indirectly demonstrated that a company was acting in reckless disregard of the rights of consumers in most jurisdictions.[506] The Court's restrictions on extraterritorial evidence also conflict with the well-established "substantial similarity test" that evolved under the common law. The states already have rules that screen evidence relevant to corporate patterns and practice. In *General Motors Corp. v. Moseley*,[507] the Georgia Court of Appeals reversed a judgment that included $101 million in punitive damages in the famous GMC pickup case, where a vehicle caught fire due to the placement of the gas tank and led to the plaintiff's death.[508] The *Moseley* court found it improper for the trial court to introduce evidence of prior fuel-fed fires involving GMC pickups without first making a

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502. Huddleston v. United States, 485 U.S. 681, 687-88 (1988) (citing and interpreting FED. R. EVID. 404(b)).

503. *See* Elaine K. Zipp, Annotation, *Admissibility of Evidence of Other Crimes, Wrongs, or Acts Under Rule 404(b) of Federal Rules of Evidence, in Civil Cases*, 64 A.L.R. FED. 648, 666 (1983) (citing cases).

504. Assuming, of course, that this evidence is admissible under Rule 404(b) for noncharacter purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).

505. *See, e.g.*, Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 220 (Colo. 1984) ("Robins' marketing program occurred over a long period of time, was directed to a vast array of unwary consumers, and was accompanied by false claims of safety and a conscious disregard of life threatening hazards known by it to be associated with its product.").

506. *Id.* at 204 (noting that evidence of other acts by the defendant is admissible to show the defendant's disposition, intention, or motive for committing the alleged injuries to the plaintiff).

507. 447 S.E.2d 302 (Ga. Ct. App. 1994).

508. *Id.* at 305.

showing of substantial similarity to the incident in question.[509] The court held that in products liability actions, evidence of other incidents involving the product is admissible and relevant to the issues of notice of a defect and punitive damages, so long as there is a showing of substantial similarity.[510]

In *Worsham v. A.H. Robins Co.*,[511] the Eleventh Circuit ruled that the trial court properly admitted evidence of prior consumer injuries caused by the Dalkon Shield, an intrauterine contraceptive device (IUD) manufactured by the defendant.[512] The manufacturer had received complaints from users who developed serious infections caused by their product.[513] The court held that evidence of these other complaints was admissible because they involved similar infections to that suffered by the plaintiff and could show that the manufacturer was aware of the product's defect.[514]

Similarly, in *Hilliard v. A.H. Robins Co.*,[515] the plaintiff was permitted to introduce evidence that the IUD that she used had caused serious pelvic inflammatory disease and spontaneous abortions in other users.[516] The *Hilliard* court concluded that such evidence was relevant, as it had "a tendency . . . to prove that [A.H. Robins] was aware of the probable dangerous consequences" of its conduct and took no remedial steps to protect the public.[517] The corporate concealment that occurred in the Dalkon Shield IUD cases was at the national headquarters level, and was not directed at any one plaintiff: "The A.H. Robins Company marketed [the] Dalkon Shield IUD knowing it was dangerous to women and presumably hoping that profits would exceed liability."[518] These landmark products liability cases might

509. *Id.* at 307.
510. *Id.*
511. 734 F.2d 676 (11th Cir. 1984).
512. *Id.* at 689.
513. *Id.* at 686.
514. *Id.* at 686-87.
515. 196 Cal. Rptr. 117 (Ct. App. 1983).
516. *Id.* at 132-33.
517. *Id.* at 133.
518. DOBBS, *supra* note 433, § 381, at 1065. In the modern products liability case, advertisements are not directed at any one plaintiff, but to market segments. In *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568 (Ohio 1981), AMC dared America's youth in the following television advertisement: "[Y]ou guys aren't yellow, are you? Is it a steep hill? Yeah, little lady, you could say it is a steep hill. Let's try it. The King of the Hill, is about to discover the new Jeep CJ-7." *Id.* at 579. It turned out that AMC cared more about the Jeep's rugged good looks than safety. *Id.* at 580. It failed to test either the roll-bar design or ways to prevent "pitch over" when the vehicle was driven the way the television ad depicted. *Id.* The national advertisement was the smoking gun that led to a $1.1 million punitive damages award. *Id.* at 579-80.

never have been brought if evidence of national corporate policies were not deemed to be admissible evidence.

Policies set at corporate headquarters were also an important factor underlying punitive damages in the toxic shock syndrome (TSS) cases of the 1980s. In *Kehm v. Proctor & Gamble Manufacturing Co.*,[519] the representatives of the estate of a woman who died from TSS filed a punitive damages claim against the manufacturer of the Rely tampon.[520] The key pieces of evidence leading to punitive damages were seven documents and the testimony of one witness all relating to prior complaints Proctor & Gamble had received.[521] The Eighth Circuit permitted out-of-state complaint letters as well as an internal memorandum by corporate counsel summarizing various prior complaints.[522] The *Kehm* court reasoned that these prior complaints were material evidence:

> In this case, consumer complaints need not match the exact scientific description of TSS in order to show substantial similarity between other consumers' illnesses and Mrs. Kehm's illness. Proctor & Gamble had ample opportunity, of which it availed itself, to rebut the force of the other complaints by pointing out dissimilarities between the complainers' symptoms and the symptoms of TSS. It was up to the jury to decide what weight to give the complaints from other consumers.[523]

Despite these state standards on evidence, the federal courts after *Campbell II* are already placing more restrictions on the use of any out-of-state bad acts. The Ninth Circuit recently reversed a punitive damages award against Ford Motor Company because the introduction by the plaintiffs of "extensive evidence of extraterritorial conduct" and argument by the plaintiffs' counsel urging the jury to punish the defendant for nationwide conduct constituted a violation of Ford's due process rights.[524] The Ninth Circuit interpreted the U.S. Supreme Court's extraterritorial limitations expansively; it ruled that the plaintiff could not introduce any evidence of the out-of-state sales of Ford pick-up trucks, even if the trucks qualified as defective under the products liability laws of every other relevant jurisdiction.[525] The

519. 724 F.2d 613 (8th Cir. 1983) (applying federal and Iowa law).
520. *Id.* at 616.
521. *Id.* at 625.
522. *Id.*
523. *Id.* at 625-26.
524. White v. Ford Motor Co., 312 F.3d 998, 1016 n.69, 1020 (9th Cir. 2002).
525. *Id.* at 1014, 1018.

court stated that it was improper for the plaintiff's counsel to go "the extra and substantial step" in urging punishment and deterrence of Ford's conduct in other states.[526]

2. *Reparative Rights for Victims.*—The subgoals of accident law are to reduce the number and severity of accidents, the social costs resulting from accidents (risk spreading), and reductions in the costs of administering the system of accident law.[527] Punitive damages also serve a latent function of restorative justice, or upholding victims' rights.[528] As Thomas Lambert has noted, punitive damages "serve as a vehicle to vent or express the community's sense of outrage at intolerable and reprehensible social misconduct."[529] Numerous cases address the latent function of punitive damages as a mechanism for expressing "the community's sense of moral outrage at reprehensible business practices."[530]

In the field of products liability, this remedy has expressed the moral indignation of the community, for example, in asbestos litigation.[531] The imposition of punitive damages vindicates victims' rights by essentially forcing manufacturers to fortify product warnings, redesign products to eliminate excessive preventable dangers, or scrap dangerously defective products in the research labs of America. To the extent that the remedy causes corporate executives to think twice before threatening the public safety, it performs its historic function as an effective social control device.[532] Thus, there is overlap between the reparative justice function and the "prophylactic purpose" of punitive damages in tort law.[533]

3. *Socially Compensatory Damages.*—Tort law's capacity to efficiently punish and deter conduct through socially compensatory dam-

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526. *Id.* at 1014.

527. *See* THE COSTS OF ACCIDENTS, *supra* note 20, at 24-33.

528. *See generally* Calabresi, 21st Century Judging and Tort Law, *supra* note 417 (discussing reparative or victims' rights function of punitive damages).

529. THOMAS F. LAMBERT, JR., THE CASE FOR PUNITIVE DAMAGES: A NEW AUDIT 9 (ATLA Monograph Series, Arnett J. Holloway ed., 1988).

530. *Id.* at 10-11 (citing supporting case law).

531. *Id.* at 9-11 (citing asbestos litigation as an example of the community expressing moral outrage and a way to vindicate victims' rights).

532. *Id.* There is some evidence that punitive damages in products liability resulted in unsafe products being redesigned, modified, or withdrawn from the marketplace. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 79-82 (1992) (listing results of a study that found various manufacturers had removed or modified unsafe products or fortified warnings in punitive damages litigation).

533. Thomas F. Lambert, Jr., *Suing for Safety*, TRIAL, November 1983, at 48.

ages is central to Calabresi's theory of punitive damages.[534] In fact, the economic analysis of punitive damages was rooted in *The Costs of Accidents*.[535] Judge Calabresi argues that in many cases, "compensatory damages are . . . an inaccurate measure of the true harm caused by an activity."[536] Thus, the purpose of punitive damages is primarily deterrence, but also compensation to society for uncompensated external costs.[537] Punitive damages are particularly well suited to serving as a means of social control in cases involving the pattern and practice of fraud, where the probability of detection is low.[538] Punitive damages, according to Judge Calabresi, may be viewed as "socially compensatory damages," because they are "designed to make society whole" as opposed to compensatory damages, which are "assessed to make an individual victim whole."[539] Actors are continually engaging in cost-benefit analyses to determine whether a given activity is worth the price. Punitive damages serve as a mechanism for ensuring that the wrongdoer "bears all the costs of its actions, and is thus appropriately deterred from causing harm, in those categories of cases in which compensatory damages alone result in systematic underassessment of costs, and hence in systematic underdeterrence."[540] The social cost of underdeterrence is that "actor[s] will have an incentive to undertake activities whose social costs exceed their social benefits."[541]

Professor Catherine Sharkey further elaborates on Calabresi's work with her innovative concept of "compensatory societal dam-

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534. *See generally* Ciraolo v. City of New York, 216 F.3d 236, 242 (2d Cir. 2000) (Calabresi, J., concurring).

535. The late Gary Schwartz notes that the entire field of the economics of tort law gained prominence after *The Costs of Accidents* was published in 1970. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 377 (1994).

536. *Ciraolo*, 216 F.3d at 244 (Calabresi, J., concurring).

537. *See In re* Simon II Litig., No. OO-CV-5332, 2002 U.S. Dist. LEXIS 25632, at *7-8 (E.D.N.Y. Oct. 22, 2002) (noting each of these aims of punitive damages).

538. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 217-18 (6th ed. 2003); *see also* Lutfy v. R.D. Roper & Sons Motor Co., 115 P.2d 161, 165 (Ariz. 1941) (holding that punitive damages can only be sustained upon a showing of recklessness or malice in a fraud case originating in a vehicle sale); Jones v. W. Side Buick Auto Co., 93 S.W.2d 1083 (Mo. 1936) (applying punitive damages in a case involving a fraudulent used vehicle sale); Huffman v. Moore, 115 S.E. 634 (S.C. 1923) (affirming punitive damages awarded in a case involving a fraudulent vehicle sale).

539. *Ciraolo*, 216 F.3d at 245 (Calabresi, J., concurring).

540. *Id.* at 243 (Calabresi, J., concurring); *see also* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 219-92, 319-31 (2002) (arguing that proportional sanctions on the criminal side of the law, based solely on the factor of the gravity of the offense, will result in underdeterrence and will increase social costs).

541. *Ciraolo*, 216 F.3d at 243 (Calabresi, J., concurring).

ages."[542] Professor Sharkey notes that the concept of socially compensatory damages addresses "diffuse harms" against society in general.[543] She argues that the remedy of punitive damages should be extended to perform a societal compensation goal: it should redress harms caused by defendants that injure persons beyond the named plaintiff in an individual case.[544] She categorizes punitive damages into specific harms to identifiable individuals and societal damages whose emblem is diffuse harms affecting larger groups or the society.[545] Her theory of societal compensation addresses the problem of extraterritorial, multiple punishment through the use of punitive damages in the context of class actions.[546]

As punitive damages expanded to control the misdeeds of corporate America, there were new dimensions such as the multijurisdictional reach of their wrongdoing. The focus of this Part has been the extent to which the Supreme Court's punitive damages jurisprudence is interfering with multiple social functions of this valuable remedy. The Court's focus has been on the role of punitive damages in one-on-one injuries. However, it is an empirical reality that punitive damages are increasingly based upon a reckless indifference to the public safety rather than the "intentional malicious act of an individual offender."[547]

The Court's individuation of punitive justice has undermined the latent functions of punitive damages—including the punishment of conduct endangering the society as a whole.[548] In the past quarter-century, punitive damages have risen in the field of products liability to punish and deter objectionable corporate policies where public regulators have failed to protect the public.[549] Punitive damages in the twenty-first century have expanded even further to accommodate new kinds of cases against websites, software companies, and the stake-

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542. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 352 (2003); *see also Ciraolo*, 216 F.3d at 245 (Calabresi, J., concurring) (using this concept to describe the punitive damages goal of imposing costs of the accident on the tortfeasor).

543. Sharkey, *supra* note 542, at 391-92.

544. *Id.* at 389-92.

545. *Id.* at 392.

546. *Id.* at 350-52 (acknowledging the class action as the multistate "paradigm" punitive damages now claim).

547. TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 421 (S.D.N.Y. 2003).

548. *See* Sharkey, *supra* note 542, at 391-92 (noting that one goal of punitive damages should be to compensate harms to society in general).

549. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 382-83 (Ct. App. 1981) (noting how punitive damages serve as the most effective remedy in protecting consumers when government safety regulations have failed to do so).

holders in the information society.[550] The use of punitive damages to protect society is not a recent innovation of the common law, it is the common law.

CONCLUSION

The late Justice Byron White once commented that

> it is normally "within the power of the State to regulate procedures under which its laws are carried out" . . . and its decision in this regard is not subject to proscription under the Due Process Clause "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[551]

The history of punitive damages confirms the wisdom of the federalist model of permitting the states to have relative autonomy when it comes to the common law. By the early part of the twentieth century, the remedy of punitive damages evolved to punish corporate defendants in commercial transactions; over the course of the century it continued to evolve to punish and deter sharp practices such as turning back the odometer or misrepresenting the quality of automobiles.

The hubris of the philosopher-king is a piece of boundless and inexcusable intellectual arrogance, as if men were gods, able to regulate everything. Like the *Lochner* period, the Court is investing the Due Process Clause with new meaning that benefits corporate America. The Court's federalization of punitive damages permits corporations to argue that punitive damages deprive them of constitutional due process. This pro-corporate interpretation of due process unduly interferes with goals and subgoals of punitive damages developed in the states to deter corporate misconduct. The Court's punitive damages jurisprudence is taking a wrecking ball to elaborate state common-law developments of punitive damages procedure. The Court's federalization of punitive damages threatens the well-established functions of punitive damages developed over two centuries of Anglo-American jurisprudence.

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550. For a discussion of modern issues in tort law and those likely to remain in the near future, see Chapter 6 of THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 206-35 (2001).

551. Patterson v. New York, 432 U.S. 197, 201-02 (1977). Chief Justice Burger quoted this language and applied it in the context of punitive damages in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986).