VICARIOUS LIABILITY FOR PUNITIVE DAMAGES: THE EFFORT TO CONSTITUTIONALIZE "TORT REFORM"

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I. INTRODUCTION

Recently, the United States Supreme Court again addressed the question whether the United States Constitution limits punitive damage awards in civil suits.[1] In a long-awaited response to due process challenges to large monetary verdicts,[2] the Supreme Court, in *Pacific Mutual Life Insurance Co. v. Haslip*,[3] declined to impose: (1) stringent limits on the amount of punitive damage verdicts, and (2) tough procedural requirements on the manner in which juries make their assessments.[4] This decision has triggered strong reaction from all quarters. Consumer and trial lawyer groups have applauded the Court's refusal to dilute a significant deterrent against corporate misconduct.[5] Concomitantly, business and insurance interests complained bitterly that the Court had "sentenced" them to a future of large punitive damage awards.[6]

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[1] Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991). Constitutional challenges to punitive damages have been raised in a variety of contexts, but the Court has always decided those cases on other grounds. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (eighth amendment excessive fines clause held to be inapplicable to private civil suits; the Court also noted that the defendant had not adequately raised the due process argument below); Bankers Life & Casualty Ins. Co. v. Crenshaw, 486 U.S. 71 (1988) (defendant failed to preserve the asserted constitutional grounds for reversal); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) (disposed of on nonconstitutional grounds).

[2] Although the Supreme Court ultimately sidestepped the due process issues raised in its three ventures into the area of punitive awards prior to *Haslip*, *see supra* note 1, corporate defense counsel for several years had been coordinating their efforts to raise and preserve constitutional challenges to punitive damages, confident that a Court decision on the matter was "an inevitability." Wermiel, *High Court Urged to Rule On Punitive Damages Issue*, Wall St. J., Oct. 21, 1988, at B3, col. 2.

[3] 111 S. Ct. 1032 (1991).

[4] *Id.* at 1043.

[5] *See* Wermiel, *Justices Don't Limit Punitive Damages*, Wall St. J., Mar. 5, 1991, at A2, col. 4 (spokesperson for consumer groups hailed the *Haslip* decision as a "great victory for consumers"); Greenhouse, *Justices Uphold Punitive Damages In Awards By Jury*, N.Y. Times, Mar. 5, 1991, at A1, col. 2 (quoting representatives of the Consumers Union and the Association of Trial Lawyers of America).

[6] *See Our Punitive Supreme Court*, Wall St. J., Mar. 6, 1991, at A8, col. 3 ("[T]he Justices effectively sentenced dozens of corporate defendants to multimillion-dollar judgments."); *Consumers Hail Court Ruling*, USA Today, Mar. 5, 1991, at B7, col. 2 ("Business groups called Monday's Supreme Court decision on punitive damages a serious defeat." A spokesman for the Pharmaceutical Manufacturers Association termed the decision "a setback," while the General Counsel for the U.S. Chamber of Commerce pronounced it "bad news for business."). *See also* Freudmann, *Tort Reform Advocates*

Almost completely overlooked in the controversy over restricting the *amount* of punitive damage verdicts, however, is the fact that *Haslip* confronted a constitutional question of first impression concerning a matter that had sharply divided courts for over a century; namely, to what extent an employer can be held vicariously liable for punitive damages arising from the misconduct of an employee.[7] The *Haslip* Court ultimately held that imposing punitive damages based on the doctrine of respondeat superior does not offend the due process clause of the fourteenth amendment.[8] Part II of this article will review the longstanding policy debate concerning the validity of vicarious liability for punitive damages. Part III will analyze the extraordinary constitutional challenge to this tort doctrine and suggest some explanations for the effort's ultimate failure.

II. VICARIOUS LIABILITY FOR PUNITIVE DAMAGES: THE HUNDRED YEAR DEBATE

Both the remedy of punitive damages—liability for egregious wrongdoing—and the doctrine of vicarious liability—liability for another's actions or non-actions—have been continuously criticized as ill-reasoned,[9] and would ordinarily be viewed as logically incompatible with each other. Yet each has persisted, deemed essential to important public policy goals.[10] Accordingly, courts have long recognized the imposition of vicarious liability for punitive damages as an important deterrent to tortious misconduct.[11] These liability rules thus truly exemplify Justice Holmes' adage: "The life of the law has not been logic: it has been experience."[12] Moreover, the validity and wisdom of these rules has

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Disappointed By Court Ruling on Punitive Damages, J. of Com., Mar. 6, 1991 at 9A, col. 4.

[7] *See* Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1257, 1299-301 (1976) ("The logic and fairness of assessing punitive damages against a corporation for the misconduct of its employees has long been questioned by both courts and theorists."); *see also infra* note 40 (discussing the extensive commentary surrounding punitive damages and vicarious liability).

[8] *Haslip*, 111 S. Ct. at 1041.

[9] *See infra* notes 22 & 34 and accompanying text (discussing critics of punitive damages and vicarious liability, respectively).

[10] *See infra* notes 30 & 37 and accompanying text (discussing the respective policies of punitive damages and vicarious liability).

[11] *See, e.g.*, Goddard v. Grand Trunk Ry., 57 Me. 202 (1869) (holding a carrier liable for his servant's willful misconduct directed at passengers and the resulting injuries).

[12] O.W. HOLMES, THE COMMON LAW 1 (Little, Brown ed. 1963).

occasioned one of the longest running debates among scholars and courts in the history of American tort law.

A. THE CONTROVERSIAL REMEDY OF PUNITIVE DAMAGES

The notion of a private fine paid by the wrongdoer to the injured victim over and above compensation for the damage caused has a long history.[13] The modern remedy of punitive damages, while comparatively young in common law terms, predates our Republic.[14] Indeed, there is some evidence that the drafters of the Bill of Rights had punitive damage suits in mind when they insisted upon the right to trial by jury in the seventh amendment.[15]

The first reported awards of exemplary damages in the United States appeared in 1791—the very year that the Bill of Rights, including the

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[13] Scholars have found precursors to punitive damages in the provisions for multiple damage penalties in the Code of Hammurabi, Mosaic Law, Roman civil law, and other sources. *See* L. SCHLUETER & K. REDDEN, PUNITIVE DAMAGES 3-5 (2d ed. 1989) [hereinafter SCHLUETER & REDDEN]; Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 2-5 (1980); Owen, *supra* note 7, at 1262-64.

[14] The first explicit recognition of punitive damages appears in the companion cases of Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763) and Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763). These decisions upheld awards of exemplary damages to John Wilkes, the publisher of an allegedly seditious pamphlet, and to his printer, arising out of an illegal search and detention. Details of the case are set forth in SCHLUETER & REDDEN, *supra* note 13, at 6-8; J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 1.01 (1985) [hereinafter GHIARDI & KIRCHER] (referring to the case as a "cause celebre" of its time).

[15] *See* Comment, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 157-58 (1991) (One Antifederalist argument in favor of ratification of the seventh amendment was that it would safeguard the remedy of jury awards to punish and deter the violation of constitutional rights: "[I]n such cases a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from committing the same . . . ." (quoting 3 THE COMPLETE ANTI-FEDERALIST 61 (A Democratic Federalist) (H. Storing ed. 1981))). Moreover, the plight of John Wilkes, *see supra* note 14, was closely followed by the American colonists. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 110-12 (1967). For this reason, one commentator asserts that "many Antifederalists had probably heard of or read these cases by the time the civil jury right was being debated." *See* Comment, *supra*, at 157.

fifth amendment guarantee of due process, was ratified.[16] By 1850, well before the drafting of the fourteenth amendment's due process clause, the United States Supreme Court acknowledged that punitive damages were "a well-established principle of the common law."[17] Acceptance in the courts, however, did not shield punitive damages from scholarly criticism. Indeed, such damages were the subject of one of the most famous debates among legal scholars in the nineteenth century.[18] In the late 1800's, the "legal scientists" who then dominated legal philosophy, demanded strict separation of public law (e.g., criminal law) from private law (e.g., contract and tort law).[19] Their spokesman, Harvard Law Professor Simon Greenleaf, denounced the very existence of punitive damages in situations that were neither wholly one nor the other.[20] Championing the more pragmatic view of practitioners, Theodore Sedgwick argued that punitive damages fulfilled important social objectives by punishing those guilty of particularly oppressive conduct and holding them out as examples to the community.[21]

Courts have taken careful note of this controversy. In fact, at the end of a lengthy review of this scholarly debate, Judge Foster of the New Hampshire Supreme Court, in his oft-quoted passage, stated that the idea of punitive damages "is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law."[22] Despite the asymmetry with which the doctrine of punitive damages has "contaminated" the law, experience has triumphed over logic. Recognizing that compensatory damages and criminal penalties could not themselves adequately deter socially unacceptable misconduct,

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[16] *See* Coryell v. Colbaugh, 1 N.J.L. 90 (1791) (breach of promise to marry). *See also* Genay v. Norris, 1 S.C.L. (1 Bay) 3 (1784) (pre-constitutional case awarding punitive damages against defendant who spiked plaintiff's drink with Spanish Fly as a practical joke, causing "extreme and excruciating pain").

[17] Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

[18] The Greenleaf-Sedgwick exchange concerning punitive damages has been termed the "first and foremost debate over the doctrine's validity." Owen, *supra* note 7, at 1263 n.22.

[19] *See generally* Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

[20] 2 S. GREENLEAF, EVIDENCE § 253 & n.2 (14th ed. 1883).

[21] 1 T. SEDGWICK, MEASURE OF DAMAGES ch. 16 (9th ed. 1913).

[22] Fay v. Parker, 53 N.H. 342, 382 (1873). Judge Foster's statement was quoted, for example, in *Haslip*. *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1038 n.8 (1991).

courts have adopted the view that punitive damages further public policy.[23]

Presently, forty-five states permit the recovery of punitive damages.[24] The purpose of punitive damages, in the modern view, is to "punish" and "deter" particularly egregious violations of standards set forth in the substantive law of torts.[25] Of these, the deterrent function is now generally viewed as the most important rationale for punitive damages.[26]

It is a fundamental aim of tort law not only to compensate the victims of tortious conduct, but also to deter such misconduct. In fact, deterrence is the very premise of the fault principle that permeates tort

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[23] *See, e.g.*, Bass v. Chicago & N.W. Ry, 42 Wis. 654, 672 (1877). In *Bass*, Chief Justice Ryan opined that "[i]n the controversy between Professor Greenleaf and Mr. Sedgwick, I cannot but think that the former was right in principle, though the weight of authority may be with the latter." *Id.* Wisconsin adopted a compensatory damages rule as early as 1854. *Id.* Compensatory damages are designed in part to induce railroad companies to dismiss employees engaging in tortious conduct. *Id.* at 679. *See also* T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY: A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW 479, 481 (1906) (Greenleaf's view, "which treats compensation as the exclusive object of the law of civil injury presupposes a theoretical unity . . . in the law of damages which does not exist. It is a generalization pushed too far. . . . [T]he great weight of authority in this country, as in England, is to the effect that exemplary damages may be awarded . . . as stated by Mr. Sedgwick . . . .").

[24] Summaries of the law in each state are set forth in SCHLUETER & REDDEN, *supra* note 13, § 18.1. The jurisdictions which do not permit the awarding of punitive damages, unless explicitly authorized by statute, are: Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington. *Id.*

[25] *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981) (The purpose of punitive damages is to punish the tortfeasor. A municipal defendant in a § 1983 cause of action may not be subjected to punitive damages because only the taxpayers would be punished and no deterrence would result.); Deal v. Byford, 127 Ill. 2d 192, 199-200, 537 N.E.2d 267, 272 (1989) ("Punitive damages are intended to *punish* the wrongdoer and to *deter* that party, and others, from committing similar acts in the future.") (emphasis added); W. PROSSER, THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (Punitive damages are awarded "for the purpose of *punishing* the defendant, of teaching the defendant not to do it again, and of *deterring* others from following the defendant's example." (emphasis added)); RESTATEMENT (SECOND) OF TORTS § 908(1) & comment a (1978) (similar).

[26] *See, e.g.*, GHIARDI & KIRCHER, *supra* note 14, § 2.06 ("It would be highly unlikely for a jurisdiction to sanction the use of punitive damages for vengeance or revenge . . . when punishment to that end in criminal law would not be tolerated."); Owen, *supra* note 7, at 1283 (deterrence is "perhaps the predominant purpose of . . . punitive damages").

law.[27] Yet the prospect of paying compensatory damages may not offer sufficient disincentive to some wrongdoers; even the detractors of punitive damages concede that punitive liability acts as an efficient deterrent in a number of situations.[28] This is the case, for example, with fraud or insurance bad faith, where wrongdoers would obviously not be deterred by the prospect of merely returning the ill-gotten gains to the plaintiff, especially where the probability of liability is low.[29] This is also true where a defendant can expect to profit by his misconduct

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[27] ABA Comm. on Tort Liability System, Formal Op. 4-3 (1984) (Towards a Jurisprudence of Injury) (Deterrence is a "strong thread running through tort law."). *See also* Morris, *Punitive Damages in Tort Cases*, 46 HARV. L. REV. 1173, 1177 (1931) (Tort law itself has "admonitory" function; punitive damages merely increase it.); Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 137 (1982) ("[T]here is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior on the part of accident causers."); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973) (Products liability, for example, seeks not only to compensate victims, but to keep unreasonably dangerous products off the market in the first place.).

Moreover, even those who oppose punitive damages concede the importance of deterrence in tort law generally. *See* Parlee, *Vicarious Liability for Punitive Damages: Suggested Changes in the Law Through Policy Analysis*, 68 MARQ. L. REV. 27, 34 (1984) ("Compensatory damages do have a deterrent effect."); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 310 (1983) ("As commentators have long recognized, compensatory damages do not merely shift the cost of injuries. They tend to deter individuals from engaging in undesirable conduct by making them internalize the costs of that conduct.") (footnote omitted).

[28] *See, e.g.*, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 67-68 (1982) ("[E]fficient levels of deterrence will be promoted by imposing punitive damages . . . where the injury is purposefully done or where the expected compensatory damages liability is less than the expected loss caused by the activity."). *See also* Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1389 (1987) (suggesting that punitive damages operate as an efficient deterrent to misconduct).

[29] *See, e.g.*, Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 276 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988) (In protecting the public against outrageous misconduct by insurance companies, liability for "punitive damages . . . is an appropriate, and perhaps the only remedy."). *See also* Comment, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 TUL. L. REV. 395, 400 (1990) (If an insurer can deny a legitimate claim with no fear that the claimant's maximum recovery could exceed the amount originally owed, the company will have incentive to resist all payments.). *See generally* Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F. L. REV. 613, 621-27 (1979) (citing instances in which insurers were motivated by punitive damage actions to change policies or practices that were oppressive to consumers).

even after paying anticipated compensatory damage claims to injured victims. The classic situation of this type is the product liability action where the defendant has knowingly marketed a dangerous product.[30] Further, punitive damages provide deterrence to the invasion of a valuable right where compensatory damages may be slight. This would be the case, for example, in many civil rights actions.[31] Nevertheless, the debate over whether punitive damages should even exist has continued unabated.[32]

B. THE VICARIOUS LIABILITY PROBLEM

Vicarious liability, a concept somewhat foreign to the common law mind, is "the imposition of liability upon one party for a wrong

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[30] As the New Jersey Supreme Court explained:

> Compensatory damages are often foreseeable as to amount. . . . Anticipation of these damages will allow potential defendants, aware of dangers of a product, to factor those anticipated damages into a cost-benefit analysis and to decide whether to market a particular product. The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition.

Fischer v. Johns-Manville Corp., 103 N.J. 643, 664, 512 A.2d 466, 477 (1986). *See also* Palmer v. A.H. Robins Co., 684 P.2d 187, 218 (Colo. 1984) ("If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs . . . ."). *See generally* Owen, *supra* note 7, at 1259-60 (Punitive damages in strict liability actions will not only expose and punish manufacturers who blatantly disregard consumer safety, but deter similar misbehavior as well.).

For this reason, as the California Court of Appeals emphasized in the famous Pinto case, "[p]unitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 810, 174 Cal. Rptr. 348, 383 (1981).

[31] Recognizing this potential situation, the United States Supreme Court has stated that "punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are violated but the victim cannot prove compensable injury." Carlson v. Green, 446 U.S. 14, 22 n.9 (1980). *See also* Newport v. Fact Concerts, Inc., 453 U.S. 247, 269 (1981) ("[A]llowing juries and courts to assess punitive damages in appropriate circumstances against the offending official . . . [under 42 U.S.C. § 1983] directly advances the public's interest in preventing repeated constitutional deprivations.").

[32] *Compare* Ghiardi, *Should Punitive Damages Be Abolished?—A Statement for the Affirmative*, A.B.A. INS. NEGL. & COMPENSATION LAW § 282 (1965) *with* Corboy, *Should Punitive Damages Be Abolished?—A Statement for the Negative*, A.B.A. INS. NEGL. & COMPENSATION LAW § 292 (1965).

committed by another party."[33] However, "common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility."[34] Moreover, to the legal scientists of the nineteenth century, the idea of vicarious liability was an anathema. In fact, during this period, legal science had isolated torts as an identifiable field of law, attempting to supply it with a set of predictable and logical rules by creating the foundational principles of negligence and fault;[35] they were hostile to any imposition of liability without fault and were especially opposed to vicarious liability.[36]

The rise of the corporate form as the dominant business entity, more than any other factor, swept away these objections. To supporters and critics of vicarious liability, it quickly became obvious that if the acts of agents could not bind the corporation, economic life would abruptly

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[33] Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988).

[34] Holmes, *Agency*, 5 HARV. L. REV. 1, 14 (1891). Justice Holmes viewed the notion of a master's liability for the torts of an agent as a holdover from Roman law under which slaveowners were responsible for the acts of their slaves. With some consternation he wrote:

> All servants are now as free and as liable to a suit as their masters. Yet the principle introduced on special grounds in a special case, when servants were slaves, is now the general law of this country and England, and under it men daily have to pay large sums for other people's acts in which they had no part and for which they are in no sense to blame.

O.W. HOLMES, THE COMMON LAW 17 (Little, Brown ed. 1963).

[35] For a brief, but excellent exposition of the impact of legal science on tort law, see G. WHITE, TORT LAW IN AMERICA ch. 2 (1979).

[36] *See, e.g.*, Dillon, *American Law Concerning Employer's Liability*, 24 AM. U.L. REV. 175 (1890). Indeed, it was the legal scientists' attempts to eliminate the "unsound" doctrine of vicarious liability which gave rise to the notorious corporate defenses of the "fellow servant rule" and "assumption of risk." Chicago, Milwaukee & St. Paul Ry. Co. v. Ross, 112 U.S. 377, 389-92 (1884). Judicial dissatisfaction with the harsh results of these defenses, however, lead to the invention of the "vice principal" rule. *See id.* at 394-95. Under this rule, a railroad conductor, for example, having responsibility for the general management of the train as well as "control over the persons employed upon it," was, for that reason, not a fellow servant of an injured member of the crew. *Id.* at 394. Instead, he stood in the shoes of the railroad company. *Id.*

The "vice principal" rule was shortlived. *See* G. White, *supra* note 35, at 50-55. Notwithstanding its brief existence, however, the rule served as a precursor of the "managerial capacity" rule that would be incorporated into the Restatement of Tort's version of vicarious liability. *See infra* note 80.

grind to a halt.[37] As a "fictitious person," a corporation's liability thus became necessarily vicarious. Accordingly, courts began to uphold the imposition of vicarious liability for the torts of agents acting within the scope of their agency.[38] Moreover, it is currently universally accepted that employers are vicariously liable for the *compensatory* damages caused by their agents acting within the scope of their employment.[39]

The same result, however, does not automatically transpire with respect to punitive damages. Indeed, the issue of whether an employer should be vicariously liable for punitive damages is, in Prosser's view, "perhaps chief among the various controversies which have surrounded punitive damages."[40] Moreover, the scope of the debate over vicarious

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[37] As one commentator pointed out:

> The rule of vicarious liability "is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him though the instrumentality of agents. . . . In every case, the principal holds out his agent as competent, and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency.

T. STORY, AGENCY § 452 (1968). *See also* Owen, *supra* note 7, at 1303 n.225 ("[T]he general compensatory damage rule of vicarious liability of employers for the misconduct of their employees arose at an early date because of the confidence consumers necessarily repose in their suppliers." (citing O. W. HOLMES, THE COMMON LAW 16 (Little, Brown ed. 1963))).

For this reason, although the proponents of legal science regarded vicarious liability as unsound, "none proposed, even at the height of the influence of universalistic negligence theory, that vicarious liability itself be abandoned." WHITE, *supra* note 35, at 55.

[38] *See* Philadelphia & Reading R.R. v. Derby, 55 U.S. (14 How.) 468, 486 (1852) (An employer's liability is not dependent upon any contractual relationship with the agent, but is a form of absolute liability which arises whenever the agent's negligent acts are done in the course of his employment.).

[39] By limiting an employer's compensatory damage liability to the scope of employment, the law shifts to the employer those consequences of an employee's tortious conduct which "should be considered as one of the normal risks to be borne by the business." RESTATEMENT (SECOND) OF AGENCY § 229 comment a (1957).

[40] W. PROSSER, THE LAW OF TORTS § 2, at 12 (4th ed. 1971). *See also* Corboy, *supra* note 32, at 296 (Vicarious liability "is probably one of the larger areas of contention encountered in any discussion of punitive damages.").

Contributions to this ongoing debate include: Parlee, *supra* note 27, at 27; Stern & Loughhead, *Vicarious Liability for Punitive Damages: The Worst Side of a Questionable Doctrine*, 1987 DEF. COUNS. J. 29; Comment, *Corporate Vicarious Liability for Punitive Damages*, 1985 B.Y.U. L. REV. 317; Note, *A Corporate Employer is Liable for Exemplary Damages for the Act of an Employee if the Corporate Employer or a Managerial Agent*

liability for punitive damages is narrower than that of punitive damages in general. Assuming that punitive damages are permissible, few critics would seriously argue that an employer should *never* be liable for punitive damages based on the actions of his employees.[41] Nevertheless, critics of the imposition of vicarious liability for punitive damages frequently base their arguments on the simplistic and anthropomorphic rationale that a corporation is "innocent" despite the guilt of its agents.[42] From a public policy perspective, however, blanket immunity from punitive damages serves no social good.[43] Furthermore, economic models demonstrate that vicarious liability tends to be more efficient as a deterrent of misconduct than the alternative of imposing liability on the individual employee.[44] On the other hand, there is no

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Authorized or Ratified the Doing and the Manner of the Act or was Reckless in Employing or Retaining an Unfit Employee, or if the Employee was Employed in a Managerial Capacity and was Acting in the Scope of Employment, 34 DRAKE L. REV. 221 (1984); Note, *Liability of Employers for Punitive Damages Resulting From Acts of Employees*, 54 CHI.-KENT L. REV. 829 (1978); Comment, *supra* note 29, at 395; Comment, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296 (1961) [hereinafter Comment, *Assessment of Punitive Damages*].

[41] *See, e.g.*, Parlee, *supra* note 27, at 50 (advocating personal liability only for those who carried out or authorized the misconduct); Comment, *Assessment of Punitive Damages*, *supra* note 40, at 1309 (same); *see also* Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1309-13 (1979) (corporate entities should be liable for torts of their agents).

[42] Opponents of holding corporations vicariously liable for punitive damages as a result of their agents often quote the Biblical text:

> The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin.

See Parlee, *supra* note 27, at 31 n.26 (quoting *Deuteronomy* 24:16 (King James)). *See also supra* note 34 (discussing Holmes' criticism of vicarious liability as a holdover from Roman Law).

[43] *See supra* note 30.

[44] Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1380 (1982) (economic model suggests that in the private sector, enterprise liability produces greater levels of care than agent liability); Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 569 (1988) [hereinafter Sykes, *Boundaries of Vicarious Liability*] ("Vicarious liability reduces or eliminates *some* of the inefficiencies that can arise under personal liability." Those inefficiencies include: (1) employees with limited resources may feel little incentive to avoid harm or, in the case of a highly risk-averse employee, pursue an inefficiently high level of care; (2) the profitability of an enterprise which is not forced to internalize all costs will be inflated, leading to inefficient expansion of production; (3) though the

benefit to be gained by holding the employer liable for misconduct which is purely personal to the employee.[45]

The issue, therefore, is not whether an employer may be liable for punitive damages based on the misconduct of an employee.[46] Instead, courts have been engaged in the search for a liability rule which best tailors the scope of the employer's responsibility for employee misconduct—the primary reason for assessing punitive damages at all; namely, the effective deterrence of violations of substantive tort law.[47]

1. The Doctrine of Respondeat Superior

Under the classic majority rule, punitive damages were imposed upon a principal for the willful and wanton misconduct of his agent acting within the scope of his employment.[48] Moreover, pursuant to this time-honored standard, the plaintiff was not required to prove that the agent's misconduct had been authorized by the corporation.[49] Therefore, under the classic majority approach, liability for punitive damages followed the same agency rules which govern liability for compensatory damages.[50]

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employer is generally the more efficient risk bearer, the incentive will be simply to seek out insolvent employees to bear the risk of dangerous activities.) (emphasis in original); Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1246 (1984) ("[W]hen vicarious liability forces the enterprise to 'internalize' the full cost of its actions, the result is a socially efficient level of loss-avoidance investment by the agent."); Note, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 YALE L.J. 168, 188-89 (1981) (Vicarious liability promotes social efficiency by deterring the formation of enterprises where social costs exceed social benefits and by forcing enterprises to take account of the social costs of torts when choosing the level of precautionary behavior.).

[45] *See* Sykes, *Boundaries of Vicarious Liability*, *supra* note 44, at 572.

[46] Every state which allows punitive damages also permits the imposition of punitive damages on an employer for the tortious conduct of an employee under appropriate circumstances. GHIARDI & KIRCHER, *supra* note 14, Table 5.1.

[47] *See supra* note 27 (discussing the significant role of deterrence in tort law).

[48] *See* cases cited *infra* note 50.

[49] *Id.*

[50] *See* Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (it is not inconsistent to use the same standard for determining punitive damages and compensatory damages); Standard Oil Co. v. Gunn, 234 Ala. 598, 176 So. 332 (1937) (similar); Alaskan Village, Inc. v. Smalley, 720 P.2d 945 (Alaska 1986) (similar); Western Coach Corp. v. Vaughn, 9 Ariz. App. 336, 452 P.2d 117 (1969) (similar); Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 479 S.W.2d 518 (1972) (similar); Ford v. Charles Warner Co., 15 Del. (1 Marv.) 88, 37 A. 39 (1893) (similar); Piedmont Cotton Mills, Inc. v. General Warehouse No. 2, 222 Ga. 164, 149 S.E.2d 72 (1966) (similar); Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977) (similar); Kiser v. Neumann Co.

From the earliest expositions of the "scope-of-employment rule," courts have consistently based their rationale on the need to deter tortious conduct.[51] One of the earliest of these decisions is also one of the more eloquent:

> A corporation is an imaginary thing. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes or mischief, as well as its schemes of public enterprise are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts therefore to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation is sheer nonsense. . . . And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. . . . When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.[52]

Contractors, Inc., 426 S.W.2d 935 (Ky. 1967) (similar); Goddard v. Grand Trunk Ry., 57 Me. 202 (1869) (similar); Embrey v. Holly, 293 Md. 128, 442 A.2d 966 (1982) (similar); Lucas v. Michigan Cent. R.R. Co., 98 Mich. 1, 56 N.W. 1039 (1893) (similar); Sandifer Oil Co. v. Dew, 220 Miss. 609, 71 So. 2d 752 (1954) (similar); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App. 1978) (similar); Rickman v. Safeway Stores, 124 Mont. 451, 227 P.2d 607 (1951) (similar); Clemmons v. Life Ins. Co., 274 N.C. 416, 163 S.E.2d 761 (1968) (similar); Kurn v. Radencic, 193 Okla. 126, 141 P.2d 580 (1943) (similar); Stroud v. Denny's Restaurant, Inc., 271 Ore. 430, 532 P.2d 790 (1975) (similar); Beauchamp v. Winnsboro Granite Corp., 113 S.C. 522, 101 S.E. 856 (1920) (similar); Odom v. Gray, 508 S.W.2d 526 (Tenn. 1974) (similar).

[51] *See* PROSSER, THE LAW OF TORTS § 2, at 13 (5th ed. 1984) (Courts espousing the majority rule "have been concerned primarily with the deterrent effect of the award of exemplary damages, and have said that if such damages will encourage employers to exercise closer control over their servants for the prevention of outrageous torts, that is sufficient ground for awarding them.").

[52] Goddard v. Grand Trunk Ry., 57 Me. 202, 223-24 (1869). *See also* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1202 (1931) (Because the servant is often financially irresponsible, "it is impossible to do anything to him in a [court of law] which will discourage such wrongs. But masters are in a particularly good position to

Modern advocates of the vicarious liability rule, however, emphasize the institutional impact of punitive damages. As Professor David Owen points out, the effect on corporate responsibility makes vicarious punitive damages an effective deterrent against the marketing of unsafe products:

> Since manufacturers would then be responsible for the reckless activities of employees at all levels, the deterrent effect of potential punitive damages awards would be considerably increased. Upper-level management of well-counselled enterprises could then be expected to respond by participating in major product safety decisions at all stages of the manufacturing and marketing process. As ultimate responsibility for important safety decisions is thereby shifted to upper management, many manufacturers would probably adopt improved procedures for gathering, transmitting, and using product safety information. Eventually, safety would become routinely considered in decisions concerning profit maximization and thus become institutionalized within the manufacturing enterprise.[53]

This is "deterrence" in the very broad sense. In other words, the imposition of vicarious liability does not seek to dissuade the employer from engaging in a particular action. Rather, it provides an incentive for the company to take affirmative steps to prevent its employee from engaging in such activity.[54] Furthermore, it is an incentive which is well-suited to large corporate entities; it has been long recognized that the practical result of a punitive award against a sizeable corporation is that

> intra-company bulletins, notices and interoffice memos will be sent flying to all corners of the enterprise. Nothing is more institutionalized in the large business organization than preoccupation of its employees with job security, advancement, and the desire to maintain a clean job record. Thus, where a

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punish their servants. They may discharge them, refuse them letters of recommendation, deny them advancement, and so on. So the doctrine of *respondeat superior* may be a means of discouraging the wrongs of servants, whom the law can not reach directly, through punishment by their masters.").

[53] Owen, *supra* note 7, at 1307. It should be understood that this modern rationale completely divorces deterrence from "fault," and instead focuses on the employer's control over the risks. *See* 5 F. HARPER, F. JAMES, O. GRAY, THE LAW OF TORTS § 26.3 (2d ed. 1986) [hereinafter HARPER & JAMES].

[54] HARPER & JAMES, *supra* note 53, § 26.3.

> punitive award is assessed against a corporate employer and made painful to it, the notoriety it is sure to receive within the organization is precisely that type of deterrent which is the primary purpose of punitive damages.[55]

A second argument in support of imposing vicarious liability is the escalated difficulty in proving direct guilt on the part of the employer through authorization or ratification.[56] As a respected commentator pointedly stated:

> There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service. Yet who could prove such a measure of complicity.[57]

Moreover, the difficulty associated with uncovering evidence of the principal's wrongdoing is not an irrational basis for imposing liability upon the employer for the offenses of his agent in the furtherance of important public policy goals.[58] This notion is especially true when

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[55] Corboy, *supra* note 32, at 298.

[56] Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1204-05 (1931). Moreover,

> [i]t is true that it is not necessary to *prove* that masters have been guilty of any wrong; but masters may be guilty in a large number of cases. The doctrine of *respondeat superior* may be used as an administrative device to remove the difficulty of proof of the master's fault. . . . It is hard to prove the fault of masters and easy for them to present a case which indicates that they are blameless when they actually are not.

Id. (emphasis in original). *See also* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 80, at 285 (1935) ("[I]f prevention be the purpose of exemplary damages against corporations, the threat and hence the prevention would seem to be lessened substantially by a rule which imposes upon the plaintiff the difficult task of showing wrongdoing by those 'higher up.'").

[57] J. SALMOND, JURISPRUDENCE § 152, at 402 (12th ed. 1966).

[58] *See* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69 (1910) (It is within the competency of the legislature to award double and treble damages to further a policy goal even where it is difficult to detect the offenders, "or, if detected, the character of their acts, whether wilful, accidental, or involuntary."). *See also* United States v. Balint,

evidence of authorization or ratification which may exist is likely to be in the defendant's control.[59] Any expectation that plaintiffs can simply obtain this evidence through discovery appears extraordinarily naive.[60]

A third rationale for the rule is the fact that punitive damages provide an incentive for the civil plaintiff to act as a "private attorney general,"[61] ferreting out misconduct for the benefit of the public as well as himself.[62] To the extent that this remains a socially valued function of punitive damages, vicarious liability ensures its effectiveness, since the

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258 U.S. 250, 254 (1922).

[59] This evidentiary imbalance, which one commentator terms "evidence asymmetries," was a primary reason for the adoption of strict products liability. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1403 (1987). It was often difficult or impossible for plaintiffs to prove negligence since evidence of the manufacturer's knowledge and design decisions was generally within the possession or control of the defendant. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973).

[60] Placing the burden on the plaintiff to establish the defendant's authorization or ratification of a course of conduct simply adds to the incentive on the part of defendants to resist discovery, sometimes illegally hiding or destroying documents. Mason & Hare, *The Use of F.R.C.P. 26(c)(7) to Prevent or Limit the Dissemination of "Internal Documents"*, 7 J. PROD. LIAB. 1, 10-11 (1984). *See, e.g.*, North American Watch Co. v. Princess Ermine Jewels, 786 F.2d 1447, 1451 (9th Cir. 1986) (defendant falsely represented to the court that relevant documents did not exist); Rozier v. Ford Motor Co., 573 F.2d 1332, 1341 (5th Cir. 1978) (Ford's concealment of relevant documents); Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 506 (4th Cir. 1977) (defendant willfully failed to provide list of prior cases); Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 485 (S.D. Fla. 1984) (defendant destroyed relevant documents as a routine practice); Buehler v. Whalen, 70 Ill. 2d 51, 55, 374 N.E.2d 460, 464 (1977) (Ford withheld important crash test information); Haumersen v. Ford Motor Co., 257 N.W.2d 7, 14 (Iowa 1977) (defendant concealed relevant testing information); Taylor v. Cessna Aircraft Co., 163 Wash. App. 412, 416, 696 P.2d 28, 32-33 (Wash. Ct. App. 1985) (defendant concealed testing information, resulting in new trial). *But see* Briner v. Hyslop, 337 N.W.2d 858, 866 (Iowa 1983) (The difficulty of proving authorization and ratification "is a legitimate concern." However, "modern discovery rules are available to aid litigants in this respect.").

[61] Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 846-47 (1989) (Where either the plaintiff or his attorney would not be financially capable of pursuing an action even though it may be socially significant, "[t]he punitive damage award becomes a kind of 'private attorney general' attorney fee award.").

[62] The United States Supreme Court has noted that both the Clayton Act and the RICO Statute employ "the carrot of treble damages" to induce private suits as an enforcement mechanism. *See* Agency Holding Co. v. Malley-Duff & Assocs., 483 U.S. 143 (1987); Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (treble damage remedy under antitrust statutes as incentive for private suits represents a significant supplement to the limited resources of the Justice Department).

individual wrongdoer may likely be judgment-proof.[63]

It is important to recognize that the policy reasons advanced in support of the imposition of vicarious liability are grounded in the deterrent function of punitive damages.[64] The punishment role of punitive damages as well as the potential unfairness of condemning an innocent employer are largely viewed as irrelevant, trumped by the overriding necessity of maximizing incentives for safety; as stated by one authority:

> There is little doubt that employers of labor are among those strategically placed to promote accident prevention in connection with their operations. . . . Pressure of legal liability on the employer therefore is pressure put in the right place to avoid accidents. This reasoning has nothing to do with fault. It is true of course that liability based on a finding of the master's fault will put pressure on the employer to be careful. But the imposition of strict liability on an employer will exert even greater pressure to prevent accidents and perhaps will often encourage the use of devices or techniques that would not have occurred to the reasonably prudent person who had not been bidden to use Yankee ingenuity to 'achieve the impossible.' This consideration would tend to justify vicarious liability within the area on the general right of control of even that master who had done all that reasonable care required in the exercise of it.[65]

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[63] Professor Dan B. Dobbs is a primary exponent of recognizing the idea that punitive damages serve as a device to finance litigation for the benefit of the public. D. DOBBS, REMEDIES 215, 221 (1973). Professor Dobbs explains that the claim that a plaintiff is made whole by an award of compensatory damages is entirely fictitious since he must pay attorney fees. *Id.* at 24. The professor further points out that punitive damages are often viewed by courts, at least tacitly, as a means of compensating this expense. *Id.* In this fashion, Professor Dobbs opines, punitive damages may be viewed as a "covert response to the legal system's overt refusal to provide financing for litigation." *Id. See also supra* notes 61-62 and accompanying text (discussing the concept of punitive damages as a "'private attorney general' attorney fee award").

[64] *See supra* notes 53-55 and accompanying text (discussing the power of employers to control the actions of employees).

[65] HARPER & JAMES, *supra* note 53, § 26.3. Strong support for this position is found in the fact that the years following the adoption of workers' compensation, with its absolute liability for workplace injuries, witnessed a spectacular decline in the industrial accident rate. *See* James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 561 (1948).

2. Opposition to Respondeat Superior

Opponents of the broad scope-of-employment rule have raised two strenuous objections; namely, that it is the innocent shareholders who wrongly suffer, and that employers cannot be deterred from conduct in which they themselves do not engage. Both of these contentions, however, are based on an unduly narrow view of the deterrent function of punitive damages and undervalue the role that this remedy plays in promoting safety. Furthermore, the complicity rule, which represents the alternative to the theory of respondeat superior, does not address these objections.

The first, and by far the weaker argument, is that the punishment meted out in the form of punitive damages will not ultimately fall on the wrongdoer, or even on the supervisors or officers of the corporation; it will be borne by the corporation's innocent shareholders.[66] Opponents to the doctrine of respondeat superior contend that this result is simply unfair.[67] The innocent shareholder argument, however, is something of a red herring. As one leading commentator suggests, "this concept of shareholder innocence needs to be examined."[68] In many instances, though admittedly not all, the shareholders stand to gain financially from the egregious misconduct of corporate employees.[69] It is also worth considering whether the stockholders, particularly those with significant interests in the corporation who do not demand that the company conduct its business safely and legally as well as profitably, can truly claim innocence. Perhaps the definitive response to this objection is simply that concern for shareholders is necessarily of secondary concern. The impact upon shareholders from a punitive damage verdict against their corporation is strictly financial—not a matter of moral blame.[70] Moreover, the stockholders of a corporation will not bear the brunt of the economic singe alone; the corporation's customers, creditors,

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[66] *See* Briner v. Hyslop, 337 N.W.2d 858, 867 (Iowa 1983) (expressing concern over punishing innocent parties); Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 1002, 666 P.2d 711, 714 (1983) (same). *See also* Parlee, *supra* note 27, at 33 (discussing the possibility of punishing innocent parties for the acts of others).

[67] Comment, *Assessment of Punitive Damages*, *supra* note 40, at 1307 (shareholder punitive liability without personal misconduct "would violate deeply rooted traditions in our legal system").

[68] Owen, *supra* note 7, at 1304.

[69] *Id.* *See also* DOBBS, *supra* note 63, at 214 (citing the example of the shareholders of Richardson-Merrell who reaped millions in profits as a result of the misrepresentations of company scientists regarding the safety of MER/29).

[70] Owen, *supra* note 7, at 1304.

suppliers, and many others in a widening circle will also feel an effect.[71] Further, this may be fairly viewed as one of the risks of investing in a business and "a price that must be paid in the pursuit of optimal product safety," or other valuable public good.[72]

The second argument against the scope-of-employment rule focuses on the deterrent function of punitive damages.[73] Opponents using this argument contend:

> It is obvious . . . that there can be no effective deterrence unless there is some conduct which can be deterred. Thus, if an employer is only vicariously liable and could have done nothing to prevent the misconduct of its employee, it seems of little value to award punitive damages against the employer. Since the corporation is itself innocent of misconduct, there is no deterrent effect.[74]

The fallacy of this argument is that it limits the deterrent function of punitive damages to the narrow scope of direct deterrence of a corporation's misconduct; this much is achieved by the corporation's own direct liability. The public policy rationale of vicarious punitive damages, however, is based on the broad interpretation of deterrence—perhaps more accurately described as positive incentive. As previously demonstrated, the effectiveness of vicarious punitive liability lies in motivating the employer to take steps to deter employee misconduct, steps which an employer might not otherwise undertake, even under the reasonable person standard.[75]

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[71] *Id.* at 1306-07.

[72] *Id.* at 1308.

[73] *See infra* note 75 (citing proponents of the deterrent-based objections to the scope-of-employment rule).

[74] Briner v. Hyslop, 337 N.W.2d 858, 865 (Iowa 1983). For similar renditions of this reasoning, see GHIARDI & KIRCHER, *supra* note 14, § 24.07; Parlee, *supra* note 27, at 33-35; Comment, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 TUL. L. REV. 395, 407-09 (1990).

[75] *See supra* note 65 and accompanying text (discussing the decline in industrial accidents subsequent to the adoption of a workmen's compensation scheme). Some opponents of the doctrine of respondeat superior see little deterrent effect in vicarious liability because they doubt that employers can actually control their employees. *See, e.g.*, Tolle v. Interstate Sys. Truck Lines, Inc., 42 Ill. App. 3d 771, 773, 356 N.E.2d 625, 627 (Ill. 1976) ("The ability to better control the actions of employees through greater supervision is often illusory."). *See also* Comment, *Corporate Vicarious Liability for*

3. The Restatement Rule of Vicarious Liability

Every state which permits the recovery of punitive damages authorizes juries to assess them against employers based on the acts of their employees under appropriate circumstances.[76] States which do not espouse the respondeat superior doctrine, under which an employer may be liable for both compensatory and punitive damages for conduct of an employee within the scope of employment, utilize a narrower standard, frequently termed the "complicity rule."[77] As enunciated by the United States Supreme Court in a pre-*Erie* exposition of general common law, the complicity rule required that the employer be guilty of some participation in the wrongdoing beyond the mere status as the employer.[78]

Punitive Damages, 1985 B.Y.U. L. REV. 317, 323 ("[A] corporation 'will ordinarily spend on prevention only that amount which when added to remaining risk cost will produce a lower total cost than any other combination of prevention and risk costs.'") (quoting Ellis, *supra* note 28, at 71 ("efficient levels of deterrence are unlikely to be promoted by vicarious punitive damages liability"); Comment, *Assessment of Punitive Damages*, *supra* note 40, at 1302)).

One scholar, specifically citing Sykes, responds:

> There are reasons for skepticism about these claims. As Sykes has shown, in a significant range of situations, . . . vicarious liability will often possess attractive incentive policies. . . . Sykes's analysis shows that in a wide range of cases, from a deterrence perspective, the [respondeat superior] rule is likely to be the efficient rule.

Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 819-21 (1989) (referring to studies by Sykes, *supra* note 44).

[76] *See* GHIARDI & KIRCHER, *supra* note 14, Table 5.1.

[77] This name was minted by Professor Clarence Morris, a Professor of Law at the University of Pennsylvania. *See* Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 221 (1960).

[78] Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893). The Supreme Court stated:

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

Id. (emphasis added).

Today, a slight majority of states have adopted some version of the complicity rule.[79] The most commonly cited formulation of the rule is set forth in the Second Restatement of Torts:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
>
> (a) the principal or a managerial agent authorized the doing of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
>
> (c) the agent was employed in a managerial capacity and was acting within the scope of employment, or
>
> (d) the principal or a managing agent of the principal ratified or approved the act.[80]

The most obvious feature of the Restatement rule is that it does not provide for true vicarious liability at all. Rather, an award of punitive damages under this rule is premised on the *employer's* misconduct.[81] The Restatement's chief departure from the doctrine of respondeat

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[79] *See, e.g.,* Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979); Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979); Maisenbacker v. Society Concordia, 71 Conn. 369, 42 A. 67 (1899); Dart Drug, Inc. v. Linthicum, 300 A.2d 442 (D.C. 1973); Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981); Lauer v. YMCA, 57 Haw. 390, 557 P.2d 1334 (1976); Openshaw v. Oregon Auto Ins. Co., 94 Idaho 335, 487 P.2d 929 (1971); Deal v. Byford, 127 Ill. 2d 192, 537 N.E.2d 267 (1989); Briner v. Hyslop, 337 N.W.2d 858 (Iowa 1983); Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 666 P.2d 711 (1983); Cerminara v. California Hotel & Casino, 760 P.2d 108 (Nev. 1988); Security Aluminum Window Mfg. Corp. v. Lehman Assoc. Inc., 108 N.J. Super. 137, 260 A.2d 248 (App. Div. 1970); Samedan Oil Corp. v. Neeld, 91 N.M. 599, 577 P.2d 1245 (1978); Craven v. Bloomingdale, 171 N.Y. 439, 64 N.E. 169 (1902); John Deere Co. v. Nygard Equip., Inc., 225 N.W.2d 80 (N.D. 1974); Gray v. Allison Div. of General Motors Corp., 52 Ohio App. 2d 348, 370 N.E.2d 747 (1977); Conti v. Winters, 86 R.I. 456, 136 A.2d 622 (1957); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967); Johnson v. Rogers, 763 P.2d 771 (Utah 1988); Shortle v. Central Vt. Pub. Serv. Corp., 137 Vt. 32, 399 A.2d 517 (1979); Freeman v. Sproles, 204 Va. 353, 131 S.E.2d 410 (1963); Addair v. Huffman, 156 W. Va. 592, 195 S.E.2d 739 (1973); Garcia v. Samson's, Inc., 10 Wis. 2d 515, 103 N.W.2d 565 (1960); Campen v. Stone, 635 P.2d 1121 (Wyo. 1981); *see also* MINN. STAT. ANN. § 549.20(2) (West 1986).

[80] RESTATEMENT (SECOND) OF TORTS § 909 (1979). *See also* RESTATEMENT (SECOND) OF AGENCY § 217(C) (1957) (similar).

[81] *Johnson*, 763 P.2d at 777 (The Restatement rule "is not 'true' vicarious liability because it is predicated on acts of the principal."); *see also* Parlee, *supra* note 27, at 38 ("The *Restatement* rule is partly one of vicarious liability and partly one of direct liability.") (emphasis in original).

superior is found in part (c); specifically, the misconduct of an employee who is not employed in a "managerial capacity" is not attributable to the employer for purposes of punitive damages.[82] The Restatement rule, therefore, shifts the emphasis from effective deterrence to fair punishment.

Unfortunately, the complicity rule does very little to overcome the objections levied against the broader rule of respondeat superior.[83] Indeed, punitive damage awards rendered under this rule will continue to fall upon the shoulders of the "innocent shareholders." Moreover, there appears to be no principled reason for imputing to the corporation those acts performed by employees in a "managerial capacity," but not those with more menial status. An early decision on the matter explained this flawed distinction as follows:

> The president of a railway corporation is no more or less its agent than a brakeman on one of its trains. His agency is broader, but it is not boundless, and a matter which lies beyond its limits is as thoroughly beyond his powers as any matter beyond the much smaller circle of a brakeman's duties; and *e converso* a brakeman is as fully authorized to act for the company, within the range of his employment, as the president is within the limits of his office. It can no more be said that the corporation has impliedly authorized or sanctioned the wilful wrong of its president, in the accomplishment of some end within his authority, than that a similar wrong by a brakeman, to an authorized end, is the wrong of the corporate entity. . . . That punishment may be imposed on corporations for the wilful or wanton misconduct, within the general scope of their duties, of their chief executive officers, is well established, and not questioned in this case. We feel that we stand upon the same principles, and are moved by the same considerations to the same conclusion, in respect of the wilfulness, wantonness, and the like of brakemen and flagmen, while acting within the scope of their employment, and to the accomplishment of the legitimate ends thereof.[84]

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[82] *Compare* RESTATEMENT (SECOND) OF TORTS § 909(c) (1979) *with supra* notes 48-50 and accompanying text (discussing the nature of respondeat superior).

[83] *See supra* notes 48-50 and accompanying text (discussing the broad scope of respondeat superior).

[84] Mobile & Oil R.R. v. Seals, 100 Ala. 368, 370, 13 So. 917, 919-20 (1893).

Modern courts and commentators have likewise castigated the distinction between managerial and menial workers.[85]

On the other hand, limiting punitive liability to the acts of managerial agents can undermine the good of deterrence. Instead of providing incentives for safety, the rule encourages employers to delegate risky tasks to lower-level employees and remain as ignorant as possible with regard to matters of safety.[86] The rule also tends to favor large corporations, whose multi-tiered management makes top-level ignorance of problems easy, and express authorization of wrongdoing unlikely.[87] Furthermore, the Restatement rule imposes upon plaintiffs the burden of proving such ill-defined elements as "managerial capacity,"[88]

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[85] *See* Stroud v. Denny's Restaurant, Inc., 271 Ore. 430, 532 P.2d 790, 793 (1975) (quoting language in *Mobile*, 100 Ala. at 370, 13 So. at 919-20); *see also* Comment, *Corporate Vicarious Liability for Punitive Damages*, 1985 B.Y.U. L. REV. 317, 321 ("A menial employee is as fully authorized to act for the corporation in performing his entrusted duties as is a managerial employee."); Note, *Exemplary Damages Against Corporations*, 30 GEO. L.J. 294, 299 (1941) (quoting language in *Mobile*, 100 Ala. at 370, 13 So. at 919-20).

It has also been pointed out that, "[n]o matter who the actor may be, it does not alter the character of the act itself." Campen v. Stone, 635 P.2d 1121, 1134 (Wyo. 1981) (Rose, C.J., dissenting).

[86] Note, *Liability of Employers for Punitive Damages Resulting From Acts of Employees*, 54 CHI.-KENT L. REV. 829, 842 (1978).

[87] *See* General Motors Acceptance Corp. v. Froelich, 273 F.2d 92, 94 (D.C. Cir. 1959) ("express authorization by the top executives of tortious acts of its working-level agents [is] highly unlikely" in large corporations); *see also* Owen, *supra*, note 7, at 1306 ("If high-level management learns that one sure way to avoid punitive damages is to remain ignorant of product safety problems, the message will clearly go down at many organizations that product safety is to be the exclusive concern of middle management.").

[88] *See* GHIARDI & KIRCHER, *supra* note 14, § 24.05 (Unfortunately, no good definition of what constitutes "managerial capacity" has been found. The Restatements are silent on the subject."). Other commentators concede that the term is "difficult to define." *See* Parlee, *supra* note 27, at 49. Furthermore, courts have not had much success in defining this term. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 822, 174 Cal. Rptr. 348, 385 (1981) ("Whether an employee acts in a 'managerial capacity' does not necessarily depend on his 'level' in the corporate hierarchy."); Egan v. Mutual of Omaha Ins. Co., 63 Cal. App. 3d 659, 674, 133 Cal. Rptr. 899, 913 (1976) (Managerial status depends upon "the nature of the authority conferred.").

Moreover, the case law on the subject tends to be inconsistent. *Compare, e.g.*, Bass v. Chicago & N.W. Ry, 42 Wis. 654 (1877) (because a conductor is in charge of the train, his acts are those of the corporation) *with* Lake Shore & Mich S. Ry. v. Prentice, 147 U.S. 101 (1893) (the train conductor does not act for the corporation); *compare also* Purvis v. Prattco, Inc., 595 S.W.2d 103, 105 (Tex. 1980) (night manager of motel was acting in managerial capacity when he turned guests out of their room) *with* Pier 66 Co.

"authorization,"[89] and "ratification."[90] The inconsistent and unpredictable positions that courts have taken on these questions undermine any deterrent value they might have.[91] Furthermore, the evidence required to establish the factual elements of these issues is generally within the possession or control of the defendant; thus, artificially barring even meritorious cases.[92]

To this point, the debate over vicarious liability for punitive damages

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v. Poulos, 542 So. 2d 377, 381 (Fla. Dist. Ct. App. 1989) (hotel manager is not a managerial agent). *See also* Stroud v. Denny's Restaurant, Inc., 271 Ore. 430, 437 n.3, 532 P.2d 788, 793 n.3 (1975) (jury could properly find that the cook in a restaurant was a managerial agent); Ramos v. Frito-Lay, Inc., 784 S.W.2d 667, 669 (Tex. 1990) (sales manager filling in for salesman was a managerial agent, even though he was performing a nonmanagerial task at the time of the tortious act).

[89] Authorization is a question of fact for the jury; thus, in certain instances, the employer may be held to have authorized misconduct, even where the employee's action violated the employer's express policies. *See, e.g.,* Briner v. Hyslop, 337 N.W.2d 858, 868 (Iowa 1983) (lack of supervision and training of truck drivers constituted sufficient evidence of "authorization" by an employer of driver's grossly negligent driving); Johnson v. Rogers, 763 P.2d 771, 778 (Utah 1988) (drunk driving by truck driver deemed authorized by employer based on evidence that the employer did not enforce its nondrinking policy).

[90] *See* GHIARDI & KIRCHER, *supra* note 14, § 24.06 (The confusion concerning what constitutes ratification is "a real problem, as yet not satisfactorily answered."); Note, *Liability of Employers for Punitive Damages Resulting From Acts of Employees*, 54 CHI.-KENT L. REV. 829, 838-39 (1978).

[91] *See supra* note 30 (discussing the importance of predictability in preserving the deterrent effect of damage awards).

[92] Owen, *supra* note 7, at 1305-06. Professor Owen noted:

> Moreover, the application of the complicity rule in products liability cases would largely impede the objectives of punitive damages. Only the most extreme forms of manufacturer misconduct would ever be punished under the complicity rule, and then only when the manufacturer was imprudent enough to create, preserve and relinquish evidence of participation by its upper-level management in some improper conduct. Documentary evidence of flagrant misconduct by managerial employees rarely exists and, when it does, it may never be located by even the most diligent discovery and investigative procedures. Thus while upper-level management is probably frequently aware, if sometimes only intuitively, of serious improper safety decisions made lower down the corporate ladder, the complicity rule as a practical matter will often shield even the most culpable manufacturers from liability for punitive damages. Most product safety decisions are made by middle- and lower-middle management.

Id. See also supra notes 56-60 and accompanying text (discussing the difficulty in proving these elements).

has focused exclusively on public policy grounds.[93] It is with respect to these policy questions that courts have remained sharply divided for over a century. During the course of this lengthy debate, neither jurists nor scholars appear to have suggested any serious constitutional impediments to the vicarious liability rule. In the mid-1980's, however, a coalition of tort reform groups undertook a constitutional challenge to punitive damages, succeeding at least in winning the United States Supreme Court's consideration of the merits of their contentions.[94]

III. THE TORT REFORM COALITION'S CONSTITUTIONAL CHALLENGE

A. THE NEW TORT REFORM LOBBY COMES TO COURT

Understanding the recent series of constitutional challenges to punitive damages requires recognition of the crucial role played by a group of "tort reform" organizations. Their success in obtaining the United States Supreme Court's consideration of the merits of virtually untested constitutional theories in a field generally left to the states was the result of a bold and energetic strategy.[95] The ultimate failure of these interest groups in changing tort law,[96] however, also illustrates the limits of overt political lobbying directed at the Court.

In contrast to the legal scientists of the last century, and the liberal activists of this one, the dominant members of the new "tort reform" movement did not spring from the ranks of jurists and scholars interested in improving the law.[97] Instead, "[t]he attack on punitive damages [was] part of a wide-ranging, well-organized attack on the current tort law system"[98] on the part of those who were frequent

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[93] As one court stated, the question "is not of constitutional dignity." Douglas v. Hustler Magazine, Inc., 769 F.2d 1128, 1145 (7th Cir. 1985).

[94] *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991).

[95] *See infra* notes 120-28.

[96] *See infra* notes 112-16 (discussing the lukewarm reception of lobbying efforts by legislatures).

[97] Professor Joseph Page, a Professor of Law at Georgetown University Law Center, astutely distinguished the historic tort reform efforts pressed by liberal scholars from the current special interest lobbying effort which has appropriated for itself the tort reform title. Page, *Deforming Tort Reform* (Book Review), 78 GEO. L.J. 649, 652-56 (1990).

[98] Prentice, *Reforming Punitive Damages: The Judicial Bargaining Concept*, 7 REV. OF LIT. 113, 123 (1988). Professor John Wade, reporter for the Restatement of Torts, accused the tort reformers of mounting "an intensive, lavishly-financed campaign" against joint and several liability. Wade, *Should Joint and Several Liability of Multiple*

defendants in lawsuits (or their insurers) who had strong economic motives in changing the rules of the game.[99] This is the realm of special-interest pressure group politics.

A characteristic feature of this tort reform movement has been the prominence of "coalitions" consisting of the liability insurance industry, manufacturing and business interests, professional organizations, and other such associations. Borrowing the strategy that liberal activists had practiced with sometimes striking success,[100] the insurance industry fostered the development of national and local coalitions to disseminate information to the public and coordinate lobbying efforts.[101] Among the "reforms" sought by these groups were: (1) caps on recoverable damages; (2) abolition of some specific tort doctrines such as joint and several liability and the collateral source rule; and (3) severe limits on punitive damages.[102] The leadership role in these efforts, particularly

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Tortfeasors Be Abolished?, 10 AM. J. TRIAL ADVOC. 193, 207 (1986).

[99] These efforts were by no means kept secret. The Insurance Information Institute ("IIT")—the public relations arm of the industry—announced a massive "effort to market the idea that there is something wrong with the civil justice system in the United States." National Underwriter, Dec. 21, 1984, at 1. That effort included a $6.5 million national advertising campaign that IIT claimed would "change the widely held perception of an insurance crisis to a perception of a lawsuit crisis." J. of Com., Mar. 19, 1986, at 1, 20. *See also Those Who Pay Most Lobby to Change Way Suits Are Tried, Damages Awarded*, Wall St. J., Jan. 21, 1986, at 2, col. 1.

[100] A recent example of the effective use of coalition politics was the organized opposition to the United States Supreme Court nomination of the Honorable Robert Bork. For an assortment of views concerning the propriety of coalition pressure groups in that context, see R. BORK, THE TEMPTING OF AMERICA 271-344 (1990); E. BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989).

[101] *See* Casey, *Tort Reform Coalitions Flourish in Midwest*, National Underwriter, July 18, 1986, at 14; *see also Civil Justice Coalitions: A National Awakening*, 62 J. AM. INS. 4 (1986); *When You Need a Coalition: How-to-Do-it Examples from Tort Reform*, 62 J. AM. INS. 1 (1986). For a discussion of the extraordinary effectiveness of the tort reform coalitions in dominating the public agenda through vigorous public relations campaigns, see Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 LAW & CONTEMP. PROB. 269, 282 (1989).

[102] The insurance industry's interest in punitive damages is not merely that of the third party payor of others' judgments, as is the case with other tort reform proposals. After all, punitive damages are insurable in only half the states, and in those states, insurers often do not provide such coverage. *See generally* GHIARDI & KIRCHER, *supra* note 14, ch. 7. Rather, the industry's concern stems from its own direct liability under the relatively recent recognition of "bad faith" actions against abusive insurance companies. *See* Kornblum & Thornton, *The Seismic Impact Punitive Damages In Actions Against Insurers*, 77 BEST'S REV. 36, 44 (1976) ("[R]ecent punitive damage awards against insurance companies . . . have resulted in a shock wave throughout the industry which is not measurable on the Richter Scale."); *see also* Levine, *supra* note 29, at 621

in the area of changing the law of punitive damages, was assumed by the American Tort Reform Association ("ATRA")—an umbrella group of some 400 associations, businesses, and other interested parties.[103] Concurrently, numerous state-wide coalitions also flourished,[104] along with more specialized national coalitions.[105]

Much of the coalition's public relations campaign was devoted to portraying punitive damage verdicts as explosive and "skyrocketing" in both their size and frequency.[106] In actuality, however, large punitive

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(discussing cases which "alerted the insurance companies that the law of bad faith would have a national impact on first party insurance claims").

Additionally, punitive damage awards have assumed a mythical role as a symbol of what the tort reformers despise most about the civil justice system. *See* Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 3, 9-14 (1990).

[103] *See Punitive Awards Are Alive and Well*, J. of Com. (Nov. 13, 1989) (identifying ATRA as "the group leading the efforts to limit punitive damage awards"). ATRA set forth its agenda in "The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis From Affected Organizations" (May 1986)—included in ATRA's Legislative Resource Book on Tort Reform. *Id.* ATRA kept its members up to date on these efforts through its newsletter, "The Reformer." *Id.* ATRA's efforts included an energetic lobbying program in state legislatures. For a discussion of ATRA's accomplishments, see *infra* notes 111, 119 (discussing ATRA's presentation of *amicus curiae* briefs in cases challenging punitive damages and a particularly sophisticated public relations campaign).

[104] Daniels, *supra* note 101, at 283 n.73. One well-publicized example of the power of tort reform coalitions in state legislatures was the aggressive, and successful, campaign by the Tort Reform Coalition to persuade Washington state legislators to enact one of the country's most severe rollbacks of plaintiffs' common law rights. *See Tort Reform Legislation: Did State Get Suckered?*, Seattle Times, July 1, 1986, at A1, col. 2. The Texas campaign is documented in Sanders & Joyce, *"Off To the Races": The 1980's Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

[105] *See* L. LIPSEN, THE EVOLUTION OF PRODUCTS LIABILITY AS A FEDERAL ISSUE IN TORT LAW AND THE PUBLIC INTEREST 250 (1991) (listing various groups lobbying for federal product liability legislation with an estimated combined annual budget of $1.5 million).

[106] This campaign managed to persuade at least one member of the United States Supreme Court. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part). The opening line of Justice O'Connor's separate opinion in *Browning-Ferris* announced: "Awards of punitive damages are skyrocketing." *Id.* Citing as her sole authority the Brief for Pharmaceutical Manufacturers Association, *et al.* as *Amici Curiae*, the Justice continued, "manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market." *Id.* (citation omitted). The Pharmaceutical Manufacturers Association's ("PMA") reliance on the plight of the makers of childhood vaccines, however, was somewhat misleading. In fact, the only punitive damages verdict ever rendered against a childhood vaccine manufacturer was reversed on appeal. *See* Johnson v. American Cyanamid Co., 239 Kan. 279, 279, 718

damage awards are relatively infrequent and their amounts, while occasionally spectacular, have increased only moderately overall.[107]

P.2d 1318, 1318 (1986).

Even more surprising is the fact that only a few months after *Browning-Ferris*, PMA placed a series of full-page advertisements in the national media trumpeting the fact that American pharmaceutical makers were vigorously investing in research and placing new drugs on the market. The advertisements would appear to be highly embarrassing to Justice O'Connor. Although PMA repeated the same arguments in its amicus brief, Justice O'Connor made no allusion to them in her dissenting opinion. *See Browning-Ferris*, 492 U.S. at 282-301 (O'Connor, J., dissenting).

[107] Empirical studies have demonstrated that the notion of "skyrocketing" punitive damages is little more than a myth. The first such study was conducted by the Institute of Civil Justice at the Rand Corporation, funded primarily by business and insurance interests. M. Peterson, S. Sarma, M. Shanley, Punitive Damages: Empirical Findings 65 (RAND Institute for Civil Justice 1987). Analysis of some 17,000 civil jury trials in Cook County and San Francisco County during 1960 to 1984 led researchers to conclude that "[p]unitive damages were rarely awarded in personal injury cases and there is little evidence that frequency has increased significantly." *Id.* The study also found that most punitive damage awards remained fairly modest. *Id.* A subsequent study conducted by the American Bar Association deduced:

> [C]ontrary to the common perception, punitive damages awards are neither routine nor routinely large, especially in personal injury cases including product liability and malpractice litigation. . . . The punitive damages picture in personal injury cases has changed very little in 25 years. Moreover, while the size of punitive damages awards has increased, most awards are moderate in amount and the ratio of punitive to compensatory damages is generally not excessive.

Report of the Special Committee on Punitive Damages, Punitive Damages: A Constructive Examination 2-1 (ABA 1986). The data showed that from 1960 through 1984, "the relative frequency of punitive awards, in proportion to the number of trials and number of plaintiff's verdicts, remained almost unchanged over the entire 25-year period." *Id.* at 2-2.

The most extensive analysis of punitive damage verdicts, covering 47 counties in 11 states, was completed by Stephen Daniels and Joanne Martin for the American Bar Foundation in 1990. Daniels & Martin, *supra* note 102, at 43. Daniels and Martin found that

> Juries awarded punitive damages infrequently, and when they were awarded the amount was generally modest. . . . Furthermore, juries were least likely to award plaintiffs punitive damages in physical harm cases, even if that case involved medical malpractice or products liability.
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> The punitive damage rates for physical harm cases, including the high visibility areas of medical malpractice and product liability, were extremely low throughout the 19 years [1970-1988]. Furthermore, the typical punitive damage award remained modest.

Moreover, in products liability actions—the field of particular interest to many tort reformers—the award of punitive damages is exceedingly rare.[108] Nevertheless, punitive damage awards have come to symbolize everything that tort reformers find wrong with the civil justice system.

Tort reformers have aggressively pressed state legislatures to adopt their proposals.[109] Serious scholars, however, have bitterly accused the proponents of tort reform of misrepresentation of facts, cynical appeals to prejudice, and manipulation of the political process.[110] Nevertheless, from 1986 to 1989, forty-one states adopted some type of tort reform, including twenty-seven states which enacted various statutes affecting

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Id. at 43, 61-62.

[108] An empirical study of product liability cases indicates that punitive damages are so infrequent as to be of "relative insignificance." W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 304-06 (1988). Moreover, the United States General Accounting Office found that "[l]arge punitive damage awards that were disproportionate to compensatory damages occurred in only a few cases," and were likely to be reduced by judicial review. GAO, Product Liability: Verdicts and Case Resolution in Five States 31 & 47 (Sept. 1989).

[109] Talmadge & Petersen, *In Search of a Proper Balance*, 22 GONZ. L. REV. 259 (1986/87) (1,400 tort reform bills were introduced in state legislatures in 1986 alone). *See also* Sanders & Joyce, *supra* note 104, at 212-20 (giving a national overview of the tort reform campaign in state legislatures during 1985-1989).

[110] The tort reform lobbying efforts have been sharply criticized by scholars as an exercise in "raw interest group politics" and employing "smokescreens and false alarms." Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1148, 1164 (1988). *See also* Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 HOUS. L. REV. 81, 96 (1987) (criticizing reformist's half-truths as tantamount to "intentional misrepresentation."). *See also* Page, *supra* note 97, at 654-55 (characterizing modern tort reform as "fueled by economic self-interest of those who perceive themselves as adversely affected by the tort system").

Moreover, researchers for the American Bar Foundation have complained that "the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear," rather than a matter of rational discourse. Daniels & Martin, *supra* note 102, at 13. Consumer groups have also cried foul. *See* Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 GONZ. L. REV. 15, 18 (1986/87) ("[T]he 'insurance crisis' has little to do with lawsuits. It is a self-inflicted phenomenon which . . . invariably provokes frenetic talk of a litigation explosion, with calls for legislative limits on victim's rights.") (footnote omitted). *See also* Consumers Union, *The Manufactured Crisis: Liability Insurance Companies Have Created a Crisis and Dumped It on You*, Consumer Reports, Aug. 1986, at 544. One scholar suggests that intense lobbying by powerful vested interests against the rights of powerless groups (ie. future plaintiffs) should operate to deprive tort reform statutes of deference to the legislature and the presumption of constitutionality customarily accorded by courts. Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 189 (1981).

punitive damage awards.[111] Many of these reforms, however, were mild—such as raising the standard of proof from "preponderance of the evidence" to "clear and convincing evidence."[112] In what can only be viewed as a major setback for the coalitions, only nine states imposed limits on the amounts of punitive awards,[113] only one state established a precise dollar amount,[114] and only one state abolished vicarious liability for punitive damages.[115]

As a result of this setback in the legislature, the coalition turned to the courts. Convinced that the United States Supreme Court would agree to force upon the states the reforms that their legislatures had so "unwisely rejected,"[116] the coalition embarked upon a course of "planned litigation."[117] One task undertaken by the coalition was to educate defense counsel in punitive damage cases to raise and preserve constitutional objections with the aim of presenting a stream of potential cases to the Supreme Court.[118] The coalition also conducted an extensive public relations campaign against punitive damages.[119] This activity would focus an extraordinary amount of attention on the Court over six years and four decisions.

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[111] *See supra* notes 103-05 (discussing ATRA's "Tort Reform" accomplishments).

[112] *See* Sanders & Joyce, *supra* note 104, at 220-22.

[113] Olson & Boutrous, *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPPERDINE L. REV. 907, 924 (1990). The nine states that did impose limits on the amounts of punitive awards were: Alabama, Colorado, Connecticut, Florida, Georgia, Kansas, Nevada, Texas, and Virginia. *See id.*

[114] Virginia is the sole state that limited punitive damages to $350,000. *See* VA. CODE ANN. § 8.01-38.1 (Supp. 1989).

[115] Minnesota was the sole state to abolish vicarious liability for punitive damages. *See* MINN. STAT. ANN. § 549.20(2) (West 1986).

[116] The relief demanded in *Haslip*, as one *amicus* bluntly stated, is for the Supreme Court "to require state legislatures to specify when punitive damages are permissible and in what amounts." Brief of *Amicus Curiae* Defense Research Institute at 13, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279).

[117] *See generally* Wasby, *How Planned Is "Planned Litigation?"*, 1984 AM. B. FOUND. RES. J. 83.

[118] *High Court Urged to Rule On Punitive Damages Issue*, Wall St. J., Oct. 21, 1988, at B3, col. 4; *see also supra* note 2 (discussing efforts to preserve constitutional challenges).

[119] Through a Washington, D.C. public relations firm, ATRA provided a newsletter, *Punitive Damages Update* ("PDU"), to the media and others who might influence policymakers. Daniels & Martin, *supra* note 102, at 15. PDU was essentially a "press kit" which presented the tort reformers' view of the punitive damages debate under the guise of objective reports that could be placed in legitimate national publications. *Id.* at 15-18.

B. PUNITIVE DAMAGES AND THE CONSTITUTION

To obtain limits on punitive damages by means of judicial fiat rather than legislation, the coalition needed to clothe the policy arguments made to state lawmakers in constitutional garb. Consequently, the due process clause of the fourteenth amendment emerged as the constitutional ground of choice.[120] The United States Supreme Court, however, had a 130 year history of upholding punitive damage verdicts.[121] Although the Court had previously stepped in to head off a collision between punitive damages and first amendment values,[122] it had unswervingly adhered to the principle that "the Constitution presents no general bar to the assessment of punitive damages in a civil case."[123]

The fallibility of the Court, while not disputed, is not viewed as an argument of first resort. Instead, the coalition advanced a rather outlandish argument that punitive damages violate the eighth amendment excessive fines clause.[124] Although scant explication of this

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[120] Indeed, Professor Malcolm Wheeler outlined a persuasive argument that defendants facing punitive damage claims should be entitled to heightened procedural protections as a matter of due process. *See* Wheeler, *supra* note 27.

[121] As early as 1851, the Supreme Court recognized that punitive damages were a "well-established principle of the common law." Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851). *See also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984) (In upholding a $10 million punitive damage verdict, the Court noted that punitive damages "have long been a part of traditional state tort law."); Barry v. Edmunds, 116 U.S. 550, 565 (1886) (the jury's function in assessing punitive damages was widely accepted in the states).

[122] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment"). *See also* International Bhd. Elec. Workers v. Foust, 442 U.S. 42, 48 (1979) (recognizing that "the threat of large punitive sanctions would likely affect unions' willingness to pursue individual complaints").

[123] Curtis Publishing Co. v. Butts, 388 U.S. 130, 159 (1967). *See also* Missouri Pac. Ry. v. Humes, 115 U.S. 512 (1885) (In upholding a statute imposing damages of twice plaintiff's actual damages for failure to erect a fence at a railroad crossing, the Court found no due process violation in providing additional monetary recovery to a plaintiff who had already been fully compensated.).

[124] The eighth amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

This imaginative argument can be traced to Professor John Calvin Jeffries. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986). Professor Jeffries acknowledged that this article was based on work performed for a law firm "and was, therefore, in origin not disinterested." *Id.* at 139 n.*. Professor Jeffries

clause during 200 years of American jurisprudence indicated that it applied solely to fines imposed in criminal cases,[125] the reformers contended that punitive damages are clearly "fines" as well.[126] Punitive damages, the argument ran, were the modern analog to "amercements," which were within the scope of the eighth amendment by virtue of its roots in the Magna Carta.[127] One might venture a general observation that if one must reach back across 700 years to find a precedent, it may be profitable to reexamine one's argument. Nevertheless, the coalition adhered to this theory, subjecting the Supreme Court to a succession of cases in which modern corporations sifted through legal parlance that was antique at the time of Blackstone and demanded that modern American tort rules be made to conform to "the particulars of 13th Century English practice."[128]

In the first of these constitutional challenges,[129] the Supreme Court managed to sidestep both the excessive fines clause and the due process

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also collaborated with Professor Wheeler in authoring briefs on behalf of various tort reform *amici* in *Haslip*.

Subsequent authors delved into the history of the excessive fines clause to even greater depths, tracing its origins back to as early as 1066. *See* Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988); Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233 (1987); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987) (crediting Professor Jeffries with "opening the debate").

[125] *See* Ingraham v. Wright, 430 U.S. 651, 664-68 (1977) (By linking bail, fines and punishment, "the text of the [Eighth] Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government."). *See also* Ex Parte Watkins, 32 U.S. (7 Pet.) 568, 573-74 (1833).

[126] *See, e.g.*, Jefferies, *supra* note 124, at 148 ("That punitive damages are functionally fines . . . seems clear.").

[127] For a sustained analysis of the similarity between "amercements and the excessive fines clause of the eighth amendment," see Boston, *supra* note 124, at 728-32. Simply stated, amercements under the Magna Carta ensured "that the punishment . . . fit the crime." *Id.* at 712. For an effective rebuttal of these arguments, see Ennis, *Punitive Damages and the U.S. Constitution*, TORT & INS. L.J. 587 (1989). In fact, Author Bruce Ennis would later appear as counsel for Respondent in Pacific Mutual Life Insurance Co. v. Haslip, 111 S. Ct. 1032 (1991). *See id.*

[128] *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989) (stating that while "the argument is somewhat intriguing, . . . we hesitate to place great emphasis on the particulars of 13th-century English practice"). *See also* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).

[129] *Lavoie*, 475 U.S. 813 (1986).

clause issues and disposed of the case on nonconstitutional grounds,[130] but not before inviting the coalition to continue its efforts, stating that the constitutional arguments "raise important issues which, in an appropriate setting, must be resolved . . . ."[131] In *Bankers Life & Casualty Co. v. Crenshaw*,[132] the Court again avoided these constitutional issues, stating that they had not been adequately raised and passed upon by the state court.[133] However, Justice O'Connor, joined by Justice Scalia, bluntly instructed the tort reformers to concentrate their efforts on the issue of whether punitive damage verdicts "may violate the Due Process Clause."[134] In *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[135] the Court finally and firmly shut the door on the coalition's eighth amendment theory, squarely holding that the excessive fines clause simply does not apply to private civil suits.[136] On this occasion, however, the entire Court saw fit to overtly set out the welcome mat to a future constitutional challenge on due process grounds.[137]

The reaction of the tort reform coalition to the Court's due process overtures in *Kelco* was jubilant, reading into the opinions a virtual binding promise by the Supreme Court to wield the ax against punitive damages in a properly presented case, and accordingly, launched a steady stream of certiorari petitions to the Court.[138] The case which the Court selected, like three of the previous four challenges, involved

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[130] *Id.* at 828 (decision was vacated and remanded on the basis of recusal for bias issue).

[131] *Id.* at 828-29.

[132] 486 U.S. 71 (1988).

[133] *Id.* at 76-80.

[134] *Id.* at 87 (O'Connor, J., concurring).

[135] 492 U.S. 257 (1989).

[136] *Id.* at 260.

[137] Writing for the majority, Justice Blackmun ventured that "whether due process acts as a check on undue jury discretion to award punitive damages . . . must await another day." *Id.* at 277. Justices Brennan and Marshall stated, approvingly, that the majority "leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages . . . ." *Id.* at 280 (Brennan, J. concurring). Justice O'Connor, joined by Justice Stevens, also agreed. *Id.* at 282 (O'Connor, J., concurring in part).

[138] *See Punitive Awards Are Alive and Well*, J. of Com., Nov. 13, 1989 ("'As you would expect, given the invitation the [C]ourt gave in *Browning-Ferris*, they have been flooded with punitive damages cases,' said Martin F. Connor, president of the American Tort Reform Association, the group leading the efforts to limit punitive damage awards.").

misconduct by an insurer.[139] Like its predecessors, the case raised due process challenges to the amount of punitive damages and to the procedures under which the verdict was rendered.[140] Notwithstanding these challenges, the new case presented an issue that was not present in any of the prior challenges; namely, the constitutionality of vicarious liability for punitive damages.[141]

C. THE CONSTITUTIONAL CHALLENGE TO VICARIOUS PUNITIVE DAMAGES

Haslip is the story of a small time con man and his prey. Pacific Mutual insurance agent Lemmie Ruffin sold a package of group life and health insurance to a small Alabama town to provide coverage for municipal workers.[142] Ruffin, who arranged to have the town send the premiums to him rather than to the company, decided to pocket the money.[143] The fraud was discovered when the town's librarian, Cleopatra Haslip, herself hospitalized and facing mounting medical bills, discovered that she was uninsured.[144] Haslip then filed suit against Pacific Mutual in the Jefferson County, Alabama Circuit Court.[145] After a jury trial on the claim of fraud, Haslip was awarded damages in the amount of $1,040,000.[146] The Alabama Supreme Court upheld the verdict against Pacific Mutual, which included over $800,000 in punitive damages, finding that Pacific Mutual was liable for both the actual and punitive damages resulting from the willful fraud carried out by Ruffin while acting within the scope of his employment.[147] Pacific Mutual's petition for certiorari presented two issues for review; specifically, whether the amount of the punitive award and Alabama's procedures violated the due process clause of the fourteenth amendment,[148] and

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[139] *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991).

[140] *Id.* at 1037-38.

[141] *Id.* at 1036-37.

[142] *Id.* at 1036.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 1036-37.

[146] *Id.* at 1037.

[147] *Id.* at 1035. Additional factual background is set forth in Brief for Respondent at 1-8, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279).

[148] *Petition for cert.* at 13, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279).

"[w]hether Alabama Law violated Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing punitive damages to be awarded against it under a respondeat superior theory."[149]

The United States Supreme Court's slate is not blank with respect to the subject of vicarious liability for punitive damages. Although the Court had espoused the "complicity rule" in 1893,[150] the *Prentice* decision was clearly not constitutionally compelled.[151] Moreover, thirty-four years later, the Supreme Court squarely upheld the constitutionality of the doctrine of respondeat superior in *Louis Pizitz Dry Goods Co. v. Yeldell*.[152] In *Yeldell*, the victim was killed in an elevator accident caused by a department store employee.[153] At the conclusion of a jury trial, the plaintiff was awarded $9,500 in punitive damages against the store under Alabama's wrongful death statute.[154] The defendant appealed, claiming that the statute, which authorized the assessment of punitive damages against an employer who is without fault based on the negligence of an employee, was "unreasonably oppressive, arbitrary, unjust, violative of the fundamental conceptions of fair play, and, therefore, repugnant to the Fourteenth Amendment."[155] Rejecting the petitioner's argument, the Supreme Court stated:

> The principle of respondeat superior itself and the rule of liability of corporations for the willful torts of their employees, extended in some jurisdictions, without legislative sanction, to liability for punitive damages, are recognitions by the common law that the imposition of liability without fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law. . . .
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> . . . We cannot say that it is beyond the power of a Legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly

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[149] *Id.* at 16.

[150] *See* Lake Shore & Mich. S. Ry. v. Prentice, 147 U.S. 101 (1893).

[151] *See id.*

[152] 274 U.S. 112 (1927).

[153] *Id.* at 113.

[154] *Id.* (citation omitted).

[155] *Id.* at 114.

> culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented.[156]

Although some distinction may be drawn on the basis that *Yeldell* addressed punitive damages under Alabama's wrongful death act,[157] the Court's reasoning is not restrictive. In fact, the *Yeldell* Court recognized the broad view of the deterrent function of punitive damages, which encompasses the threat of liability as an incentive for safety—not based on defendant's fault, but on its control over the risks.[158] Moreover, the Supreme Court recognized that even at the height of close scrutiny of economic regulation,[159] this was a legitimate state interest.[160]

More than a half a century later, in *American Society of Mechanical Engineers v. Hydrolevel Corp.*,[161] the United States Supreme Court held that a principal could be liable for treble damages under the Sherman Act for antitrust violations by an agent acting under apparent authority.[162] The principal in this case, a trade association, argued that treble damages are akin to punitive damages and should not be imposed upon a principal merely by virtue of an agency relationship.[163] The Court disagreed.[164] Writing for the majority, Justice Blackmun noted that a majority of courts have held corporations liable for punitive damages even in the absence of approval or ratification.[165] The Justice further opined that the *Prentice* Court, in espousing the complicity rule, "may have departed from the trend of late nineteenth century

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[156] *Id.* at 115-16 (citations omitted).

[157] The Alabama statute is unique in that it permits the award of punitive, but not compensatory damages. *See* SCHLUETER & REDDEN, *supra* note 13, § 18.1(A)(1).

[158] *See* Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927).

[159] The corporation relied heavily upon Lochner v. New York, 198 U.S. 45 (1905), and Adkins v. Children's Hospital, 261 U.S. 525 (1923), to support the proposition that "punishing vicariously the innocent master" was repugnant to the fourteenth amendment. *See* Brief for Plaintiff in Error at 20-21, 24, Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927) (No. 171) (citations omitted).

[160] *Yeldell*, 274 U.S. at 116.

[161] 456 U.S. 556 (1982).

[162] *Id.* at 575-76.

[163] *Id.* at 574-75.

[164] *Id.* at 575-76.

[165] *Id.* at 575 n.14.

decisions."[166] Indeed, the Court, again focussing on the deterrent aspect of damages, stated:

> Since treble damages serve as a means of deterring antitrust violations and of compensating victims [for the "difficulty of maintaining a private suit"], it is in accord with both the purposes of the antitrust laws and principles of agency law to hold ASME liable for the acts of agents committed with apparent authority.[167]

Although the matter was not entirely free from doubt, it would appear that the coalition had very little precedent from which to draw support for a due process challenge to vicarious liability for punitive damages. In fact, the sole favorable decision had been limited to a nonconstitutional exposition of general common law—and an erroneous one at that. Furthermore, no support was to be found in the legal literature.[168]

D. THE ARGUMENTS IN *HASLIP*

1. Crime and Punishment

Having won the ear of the United States Supreme Court, the coalition found it necessary to devise a constitutional argument against vicarious liability. Although a large number of tort reformers filed *amicus curiae* briefs in *Haslip*, presenting the Supreme Court with arguments from a variety of perspectives in addition to those raised by the parties,[169] the opponents of vicarious liability for punitive damages raised only one significant constitutional argument.[170] Their assertion—

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[166] *Id.* Significantly, the Court here cited with approval Goddard v. Grand Trunk Railway Co., 57 Me. 202, 223-24 (1869); *see supra* text accompanying note 46 (quoting passage in full).

[167] American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 575-76 (1982).

[168] Even those commentators, generally defense practitioners, who were the most vehemently opposed to vicarious punitive damages on policy grounds, did not raise serious constitutional arguments against the doctrine. *See, e.g.*, Parlee, *supra* note 27, at 27; Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1138-45 (1984); Stern & Loughhead, *Vicarious Liability for Punitive Damages: The Worst Side of a Questionable Doctrine*, 1987 DEF. COUNS. J. 29.

[169] *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1038 n.4. (1991).

[170] *Id.* at 1038.

that vicarious punitive liability deprived defendant employers of due process under the fourteenth amendment—was based predominantly on the proposition that punitive damages are constitutionally equivalent to criminal punishment and, therefore, could not be imposed upon the innocent.[171]

A major obstacle to excising vicarious liability for punitive damages from the law is the plain fact that, at this stage of history, vicarious liability for compensatory damages is indispensable; no corporate entity of appreciable size could operate in an environment where they could not legally bind nor be bound by the acts and representations of their agents. Thus, what the coalition chiefly needed was a constitutional distinction between the imposition of vicarious liability for compensatory damages and for punitive damages.

The argument that the tort reformers devised depended upon the distinction between criminal (or quasi-criminal) punishment and compensation.[172] Conceding that the public policy in favor of assuring compensation to the injured victims of tortious misconduct justifies the allocation of compensatory damages to an employer on the basis of the doctrine of respondeat superior,[173] the reformers contended that punitive damages constitute punishment inflicted by the state.[174] As such, the petitioners maintained that the imposition of punitive damages, like the infliction of criminal punishment, raises issues of a constitutional dimension.[175]

If one accepts the constitutional equivalence of punitive damages and criminal punishment, it becomes a powerful argument against the prevailing tort rules governing punitive damages. Indeed, commentators have argued on this basis that defendants facing claims for punitive damages should be afforded many of the constitutional safeguards enjoyed by the criminally accused, including the requirements of proof beyond a reasonable doubt and protection against double jeopardy.[176] Furthermore, the acceptance of this premise formed the basis for the reformers' arguments that punitive damage verdicts, like criminal

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[171] *See infra* notes 179-87 and accompanying text (discussing the *amici's* arguments that punitive damages constitute criminal punishment).

[172] *See Haslip*, 111 S. Ct. at 1047 (Scalia, J., concurring in the judgment).

[173] *See supra* notes 37-39 and accompanying text.

[174] *See e.g.*, Brief for Arthur Anderson & Co., Coopers & Lybrand, Deliotte & Touche, Ernst & Young, KPMG Peat Marwick, and Price Waterhouse as *Amici Curiae* at 12, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279).

[175] *Id.* at 11-12.

[176] *See, e.g.*, Wheeler, *supra* note 25, at 351; Jeffries, *supra* note 107, at 158.

sentences, should be explicitly limited.[177] Moreover, there were indications that at least two crucial Justices were sympathetic to this theory.[178]

Of the briefs presented to the Court in *Haslip*, one filed by a group of accounting firms addressed the issue at greatest length.[179] The accountants' contention was:

> [T]he touchstone of due process is protection of the individual against arbitrary action of government, and punishment for blameless conduct is surely an example of arbitrary governmental action. Thus the principle that there can be no punishment without guilt has come to be recognized as one grounded in the Due Process Clauses.[180]

The *amici* asserted that punitive damages constitute punishment, despite the fact that they are awarded in a civil action.[181] The *amici* further averred that unlike tort liability for compensatory damages, "due process requires *some* level of culpability before *punishment* can be imposed."[182] Just as the due process clause would preclude imprisonment or monetary sanction of one who was merely the "next-door neighbor or the brother of a person shown to be culpable," the *amici* maintained, neither may punishment be visited upon the wrongdoer's employer,[183] or, more precisely, upon the innocent shareholders.[184] A group of liability insurance underwriters advanced

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[177] *See* Brief for Petitioner at 22-27, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279) (including the argument that awards may contravene the prohibition against *ex post facto* punishment).

[178] *See* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., joined by Scalia, J., concurring in part) ("In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.").

[179] *See* Brief for Arthur Anderson, et al., *supra* note 174.

[180] *Id.* at 9 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring)) (footnote omitted).

[181] *Id.* at 12 (footnote omitted).

[182] *Id.* at 11 (emphasis in original).

[183] *Id.* at 11-12.

[184] *Id.* at 18-19.

a similar line of reasoning,[185] as did the brief of another group of insurers.[186] It is worth noting that none of the other *amici* appearing in support of Pacific Mutual addressed the vicarious liability issue. Thus, it may be assumed that this was a strategic decision on the part of the coalition to coordinate the efforts of *amici*.[187]

Pacific Mutual itself added an additional wrinkle to the argument. After characterizing punitive damages as a "punishment sanction,"[188] the insurer called the Court's attention to *New York Central & Hudson River Railroad Co. v. United States*,[189] "which established the basic principles of corporate criminal liability . . . ."[190] In Pacific Mutual's view, *New York Central* explained that liability is imposed on corporations "because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment . . . ."[191] The insurers concluded, therefore, that "the punitive damages award here violated Due Process by imputing acts of Mr. Ruffin to Pacific Mutual which were not performed to benefit, or with any intent of benefiting, Pacific Mutual, and therefore are beyond the point of fundamental fairness."[192]

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[185] *See* Brief for *Amici Curiae* Liability Insurance Underwriters at 6, Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279) ("Indeed, punishment (as opposed to compensatory loss allocation) by reason of mere association is contrary to 'the basic values that underlie our society.' Accordingly, due process must prevent a State from awarding punitive damages that are based solely on a party's relation to a wrongdoer.") (citation omitted).

[186] *See* Brief for the National Ass'n of Mut. Ins. Cos. as *Amicus Curiae* at 6, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279) ("Punitive damages implicates the defendant's right to fair punishment rather than plaintiff's interest in fair compensation. . . . A meaningful nexus must be required between the defendant principal and the actual tortfeasor before the latter's misconduct may serve as the predicate for punishment, even under a liberal rule of respondeat superior.") (footnote omitted).

[187] *See* Brief for Petitioner at 30, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279).

[188] *Id.* at 27.

[189] 212 U.S. 481 (1909).

[190] Brief for Petitioner at 30, Pacific Mut. Life Ins. Co v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279).

[191] *Id.* (quoting *New York Central*, 212 U.S. at 493).

[192] *Id.* at 29.

2. A Flawed Argument?

The coalition's argument against punitive damages suffered from several fatal flaws. Its primary defect lay at its very foundation—"the predicate . . . necessary to see that due process forbids their imposition on those whose guilt has not been shown"[193]—the equivalence, for constitutional purposes, between punitive damages and criminal punishment. Admittedly, those facing criminal prosecution are afforded greater constitutional protections than civil defendants.[194] But the distinction is not based on the difference between punishment and compensation. What distinguishes criminal sanctions for due process purposes is the fact that the accused is facing the superior resources of the government and risks possible loss of liberty.[195] "[T]he typical case involving a monetary dispute between private parties,"[196] where all that is at stake is "mere loss of money,"[197] lies at the other end of the spectrum.[198] Thus, while defendants in private civil suits are entitled to due process,[199] the demands of the due process clause are minimal.[200] Moreover, the Supreme Court's modern view of its role in reviewing economic regulation under the due process clause is highly deferential to the states and places the burden "on one complaining of a due process violation to establish that the legislature has acted in an

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[193] Brief for Arthur Anderson, et al., *supra* note 174, at 13.

[194] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (civil litigants are not entitled "to a hearing on the merits in every case").

[195] Santosky v. Kramer, 455 U.S. 745, 756, 760 (1982) (A proceeding in which the government "marshalls an array of public resources to prove its case" may require heightened due process safeguards.).

[196] Addington v. Texas, 441 U.S. 418, 423 (1979).

[197] *Id.* at 424.

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> Pacific Mutual and amici expend considerable effort arguing that punitive damages, like criminal penalties, are intended to punish and deter misconduct. However, as noted earlier, even compensatory damages in tort actions have a punishment and deterrence function. More to the point, as Mathews [v. Eldridge, 424 U.S. 319 (1976),] and subsequent cases make clear, it is the importance of the private interest and direct opposition by the government, not the purpose of the deprivation, which determines what process is due.

Brief for Association of Trial Lawyers of America as *Amicus Curiae* at 22, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (No. 89-1279).

[199] Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

[200] *Id.*

arbitrary and irrational way."[201] The fact that a substantial number of states have long adhered to the doctrine of respondeat superior as a means of deterring misconduct should itself demonstrate that the rule has a rational basis.[202]

A second problem with the petitioner's argument is that even if punitive damages are deemed equivalent to criminal sanctions, criminal law recognizes vicarious liability for criminal violations by agents under the doctrine of respondeat superior.[203] Furthermore, the constitutionality of strict criminal liability for statutory or public health and safety violations, which is closely analogous to punitive liability, is also well-settled.[204]

Pacific Mutual's unusual argument that an employer may be held vicariously liable for punitive damages only for conduct that was intended to benefit the company also suffers from a dearth of supporting precedent. Indeed, the Court squarely rejected precisely this argument in upholding the vicarious liability of a trade association (ASME) for antitrust treble damages based on acts of its agents, noting:

> Whether they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them. And, whether they act in part to benefit ASME or solely to benefit themselves or their employers, ASME's agents can have the same anticompetitive effects on the marketplace. The anticompetitive practices of ASME's agents are repugnant to the antitrust laws even if the agents act without any intent to aid ASME, and ASME should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use

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[201] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); *see also* Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).

[202] *See supra* note 39 and accompanying text (discussing state adherence to the doctrine of respondeat superior).

[203] *See* New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 491-92 (1909) ("[T]he act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person."). *See also* Note, *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 GEO. L.J. 547 (1962).

[204] *See* Owen, *supra* note 7, at 1303 (suggesting the analogy between vicarious punitive damages and strict criminal liability).

their positions in ASME solely for their own benefit . . . .[205]

The third flaw in the tort reformers' strategy was their utter failure to address the deterrence rationale of vicarious punitive damages. While the purposes of punitive damages are nearly always identified as both punishment and deterrence,[206] the latter plainly predominates in the modern view.[207] In the context of vicarious liability, punishment is seldom proffered as a rationale; instead, deterrence is usually the sole justification offered.[208] The unfairness of the "punishment" of punitive damages, nearly irrelevant to the concerns that have generally mattered to courts in the past, was, therefore, merely a convenient straw man for the coalition. Neither Pacific Mutual nor any of the coalition *amici* challenged vicarious punitive damages on the proponents' own terms—as a tort remedy intended to deter wrongs rather than as a quasi-criminal anomaly.[209]

This is not to suggest that the opponents of punitive damages would have prevailed. In fact, the argument that vicarious deterrence is irrational embraces, almost by definition, the discredited narrow view of deterrence.[210] Plaintiff's brief, however, addressed this issue squarely, propounding the accepted notion that deterrence can be divorced from fault to operate as an incentive:

> If corporations were liable for exemplary damages only upon proof that they were independently at fault, they would have strong incentive to *minimize* oversight of their agents; the less they knew about their agents' conduct, the less likely they would be found at fault for failing to prevent a fraud. . . .
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> . . . .

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[205] American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 573-74 (1982).

[206] *See supra* note 25 and accompanying text.

[207] *See supra* notes 26 & 47 and accompanying text.

[208] "[P]roponents of vicarious punitive damage liability have difficulty arguing that employers deserve to be punished for the wrongful acts of their employees. Rarely does one see a positive assertion to that effect." Ellis, *supra* note 28, at 66-67. Moreover "vicarious punitive damage liability cannot be justified as deserved punishment. . . . Deterrence alone is thus relied upon to justify it." *Id.* at 71.

[209] The tort reformers could have invoked substantive due process. Moreover, an argument could be made that vicarious liability is not rationally related to the objective of deterring wrongful conduct because the defendant is not charged with any wrongful act which it or others might avoid in the future.

[210] *See supra* note 65.

> Requiring fault, the Court held [in *Hydrolevel*,] would permit the principal to "avoid liability by ensuring that it remained ignorant of its agents' conduct, and . . . would therefore encourage [it] to do as little as possible to oversee its agents."[211]

Consumers Union, in an *amicus* brief supporting the plaintiff, also portrayed the deterrence function broadly:

> If the punitive damage award is upheld[,] Pacific Mutual will be forced to pay out a large sum of money it had hoped greatly to use for other purposes. It will communicate with its agents nationwide. It will upgrade its review of field agents using the Pacific Mutual name. In short, Pacific Mutual will take every possible step to prevent this type of misconduct in the future. Other insurance companies will learn quickly of Pacific Mutual's behavior; like trade associations after *Hydrolevel*, they will take steps to prevent misconduct by agents acting with apparent authority.[212]

E. THE COURT RESPONDS

It is plain from the briefs that the coalition's constitutional challenge depended heavily upon the Supreme Court's agreement that vicarious punitive damages, viewed as a quasi-criminal punishment rather than a purely civil remedy, are fundamentally unfair to defendants. If the Court had adhered to the more settled view that punitive damages are imposed chiefly as a deterrent to misconduct, and that states are entitled to view deterrence broadly as an incentive, the tort reformers would have conceded the issue by default.

On October 3, 1990, counsel for both parties presented their oral arguments before the United States Supreme Court.[213] The Justices'

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[211] Brief for Respondent at 12-13, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (No. 89-1279) (quoting American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp,. 456 U.S. 556, 573 (1982) (emphasis in original)).

[212] Brief for Consumers Union as *Amicus Curiae* at 63-64, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279).

[213] Transcript of Oral Argument at 7, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279) (Oct. 3, 1990), *reprinted in* 5 Mealey's Insurance Antitrust & Tort Reform Rept. (Oct. 26, 1990) at Appendix A [hereinafter Transcript].

questions plainly foreshadowed the Court's ultimate disposition.[214] One valuable clue was the fact that immediately after Pacific Mutual's counsel announced that he would address the issue of vicarious liability third, after addressing standardless juries and judicial review, the Justices interrogated him concerning vicarious liability. Moreover, while Justice Scalia dominated the line of questioning, Chief Justice Rehnquist, as well as Justices Stevens and O'Connor also took part.[215] Thus, it would appear that vicarious liability was of greater concern to the Court than was reflected by the relatively scant attention paid to it by Pacific Mutual and the coalition. Responding to a query from the Chief Justice, counsel asserted that a different constitutional standard applied to the "punishment" of punitive damages than to compensatory damage awards.[216] Under that standard, counsel explained, vicarious liability for conduct of an agent which did not benefit the company—which was actually a theft from the company—violated due process.[217] Justice O'Connor termed this a "rather curious position."[218] It was Justice Scalia, however, who effectively rang the death knell for the coalition's constitutional challenge.

Justice Scalia began by positing a hypothetical situation where a corporate officer secretly favors polluting the environment[219]—at some expense to the company and not in its best interests, the officer intentionally causes the corporation to pollute the environment.[220] The Justice then asked whether it was Pacific Mutual's position that a penalty could not be imposed upon the corporation.[221] The insurer's counsel responded that that was indeed Pacific Mutual's position, reasoning that it would not further the goals of retribution and deterrence to punish the company because of the self-serving actions taken by one employee.[222] Justice Scalia responded: "It would deter the company from putting such a nut in such a position, wouldn't it?"[223]

The significance of Justice Scalia's hypothetical, and Justice Steven's

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[214] *See id.*

[215] *See id.*

[216] *Id.* at 7-8.

[217] *Id.* at 9-10.

[218] *Id.* at 10.

[219] *Id.*

[220] *Id.*

[221] *Id.* at 10-11.

[222] *Id.* at 11.

[223] *Id.* at 11-12.

question which prompted it, was not to be found in counsel's response.[224] Rather, it lay in the fact that the Justices refused to adopt the "punishment" rationale offered by the insurer, repeatedly returning to the question of deterrence. Because these were asked by Justices who, presumably, were most sympathetic to the company's due process challenge,[225] the tenor of oral argument did not bode well for the abolitionists.[226]

The decision which the Court announced on March 4, 1991 effectively closed off the coalition's due process challenges to vicarious liability. With respect to Alabama's adherence to the scope-of-employment rule, the Court concluded: "We cannot say that this does not rationally advance the State's interest in minimizing fraud."[227] Writing for a seven-to-one majority, Justice Blackmun continued:

> Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented." If an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents. Imposing liability without independent fault *deters* fraud more than a less stringent rule. It therefore rationally advances the State's goal. We cannot say that this is a violation of Fourteenth Amendment due process.[228]

The notion of conferring heightened protections upon defendants in civil suits based on the constitutional equivalence of punitive damages to criminal punishment was left as the road not taken by the Court.

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[224] *Id.* at 12. Instead, counsel pointed out, quite correctly, that the company could still be held liable for its own failure to control or monitor the renegade employee. *Id.*

[225] *See supra* notes 134-78 and accompanying text.

[226] It is also noteworthy that when counsel for Ms. Haslip argued in support of vicarious punitive damages by citing *Pizitz* and *Hydrolevel*, both of which enunciate the broad deterrence rationale, no Justice questioned the applicability of the decisions. Transcript, *supra* note 213, at 47 (citations omitted).

[227] Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1041 (1991).

[228] *Id.* (emphasis added) (citations omitted).

IV. CONCLUSION

The outcome in *Haslip* is perhaps a classic illustration of the adage that one should be careful for what one wishes. By and large, the members of the tort reform coalition are to be found among the ranks of those who have called for a less "activist" Supreme Court, a Court less inclined than the Warren Court to stray from the traditional explication of the constitutional text, less likely to "constitutionalize" rules of law unnecessarily, or to intrude into areas traditionally relegated to the states. Having fashioned a majority which generally subscribes to the precepts of judicial restraint, it is with graceless irony that the tort reformers called upon the Court to cast these principles aside on their behalf.

The failure of the constitutional challenge to the common law remedy of punitive damages, on this round at least, also illustrates a problem in translating a legislative agenda into constitutional litigation. Much of the crisis rhetoric that was successful in placing punitive damages on the public agenda and legislative dockets undermined the constitutional arguments, which look to preserve rather than improve.

Finally, the weight of history and precedent was simply too great for the tort reformers to overcome. To give the tort changers the new rules of law they proposed, the Justices would have had to rewrite vast blocks of constitutional doctrine involving such basic propositions as the distinction between civil and criminal law, the balance of federal and state law in a federal system, and the due process status of corporations. The Court would have had to move mountains to move an inch, and it would not.

In view of the Court's resolution of the latest due process challenge, and especially in view of the deference to history which permeates the majority and concurring opinions,[229] there is an eerie prescience to a musing by Professor Jeffries near the opening of the article which fueled

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[229] *See id.* at 1043 ("In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. 'If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'") (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988) (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922))). *See also id.* at 1053 (Scalia, J., concurring) ("I affirm that no procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law."); *id.* at 1054 (Kennedy, J. concurring) ("Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair.").

so much of the tort reformers' ill-fated efforts:

> At the outset, one might ask whether it is not too late in the day to suggest the unconstitutionality of punitive damages. After all, punitive damages have been around for a long time. Whatever academics may say against them, punitive damages at least have the warrant of past practice, and that in itself suggests constitutional permissibility.[230]

[230] Jeffries, *supra* note 124, at 140.